

New Regulations Implement EESA and ARRA Compensation Restrictions

On June 10, 2009, the Treasury Department issued an interim final rule (referred to herein as the “regulations”) implementing and providing guidance on the executive compensation and corporate governance provisions of the Emergency Economic Stabilization Act of 2008 (“EESA”), as amended by the American Recovery and Reinvestment Act of 2009 (“ARRA”), which apply to entities receiving financial assistance from the federal government under the Troubled Asset Relief Program (“TARP”).¹ The regulations were published in the Federal Register on June 15, 2009.² This memorandum summarizes certain highlights of the regulations.

I. Executive Summary of Requirements and Effective Dates

The regulations set forth the following requirements:

- Evaluation of employee compensation plans and potential to encourage excessive risk or manipulation of earnings (§30.4 (Q-4));
- Compensation committee discussion, evaluation and review of senior executive officer (“SEO”) compensation plans and other employee compensation plans to ensure that they do not encourage unnecessary and excessive risk (§30.5 (Q-5));
- Compensation committee discussion, evaluation and review of employee compensation plans to ensure that they do not encourage manipulation of reported earnings (§30.6 (Q-6));

¹ Certain provisions also apply to entities that hold a commitment to receive financial assistance but have never had an obligation to repay a debt obligation to Treasury or redeem or repurchase equity securities purchased by Treasury. This memorandum generally does not address how the requirements apply to such entities, or to private companies.

² 74 FR 28393.

- Compensation committee certification and disclosure requirements regarding evaluation of employee compensation plans (§30.7 (Q-7));
- “Clawback” of bonuses based on materially inaccurate financial statements or performance metrics (§30.8 (Q-8));
- Prohibition on golden parachute payments (§30.9 (Q-9));
- Limitation on bonus payments, retention awards and incentive compensation (§30.10 (Q-10));
- Disclosure regarding perquisites and compensation consultants; prohibition on gross-ups (§30.11 (Q-11));
- Luxury or excessive expenditures policy (§30.12 (Q-12));
- Shareholder advisory resolution on executive compensation (§30.13 (Q-13));
- Annual compliance certification by principal executive officer (“PEO”) and principal financial officer (“PFO”) (§30.15 (Q-15)); and
- Establishment of the Office of the Special Master for TARP Executive Compensation with authority to review certain payments and compensation structures (§30.16 (Q-16)).

Notably, in general neither the provisions of EESA as amended by ARRA nor the regulations apply retroactively prior to June 15, 2009 (consistent with the view that the regulations implement the statutory provisions directing the Secretary of the Treasury to establish the relevant standards and requirements).³ The preamble to the regulations confirms that the bonus payment limitation does not apply to amounts accrued or paid prior to June 15, 2009, and the golden parachute prohibition applies only to payments due to departures on or after June 15, 2009.⁴ Many of the requirements apply only during the period during which an obligation arising from financial assistance under the TARP remains

³ Section 111(e) of EESA, which requires public companies to permit a shareholder advisory vote on executive compensation, did take effect before the issuance of the regulations and applied with respect to preliminary or definitive proxy statements filed with the SEC after February 17, 2009, with limited exceptions.

⁴ The regulations deem amounts paid on or after June 15, 2009 due to a departure that occurred prior to that date to have been made at the time of termination of employment. See §30.9 (Q-9)(a) and (b), example 2. Presumably the same rule applies by analogy to payments triggered by a change in control, although the regulations state only that a golden parachute payment “is treated as paid at the time of departure” (emphasis added) and do not expressly address timing rules for change of control payments, whether or not the employee has departed.

outstanding, disregarding unexercised warrants (the “TARP period”) but, for companies that have already received financial assistance (“existing TARP recipients”), no earlier than June 15, 2009. For companies that become TARP recipients following June 15, 2009, the requirements and restrictions generally become effective when the company receives TARP funds.

The chart below summarizes when the various requirements and restrictions under EESA and the regulations begin and cease to apply, both for existing TARP recipients and for companies that receive TARP funds in a transaction closing after the publication of the regulations (“future TARP recipients”).

Requirement	Summary	Effective date for existing TARP recipients	Effective date for future TARP recipients	Ceases to apply
Excessive risk and manipulation of earnings; committee review and discussion; certification and disclosure ⁵	TARP recipient must establish and maintain an independent compensation committee, ⁶ which must discuss, evaluate and review at least every six months potential issues regarding risk and compensation plans with TARP recipient’s senior risk officers. Committee must certify that it has performed required review and, at least once per year, provide narrative description regarding risk issues (regulations do not specify whether certification and disclosure must be provided to shareholders, Treasury and/or TARP recipient’s primary regulator).	Committee must be formed not later than September 14, 2009 (90 days after publication). For required biannual meetings and annual disclosure, it appears that time periods start to run beginning June 15, 2009.	Committee must be formed not later than 90 days after closing date of agreement between TARP recipient and Treasury.	End of TARP period. ⁷

⁵ §30.4 (Q-4), §30.5 (Q-5), §30.6 (Q-6) and §30.7 (Q-7).

⁶ The regulations require a committee of independent directors whose independence is determined pursuant to Item 407(a) of Regulation S-K under the Securities Exchange Act of 1934 (the “Exchange Act”). Public companies should generally already meet this requirement.

⁷ A public company would be required to continue to maintain an independent compensation committee under other applicable law, as noted above.

Requirement	Summary	Effective date for existing TARP recipients	Effective date for future TARP recipients	Ceases to apply
Clawback ⁸	Any bonus payment made to a CEO or the next twenty most highly compensated employees during the TARP period is subject to a provision for recovery or “clawback” by the TARP recipient if the bonus payment was based on materially inaccurate financial statements or any other materially inaccurate performance metric criteria. ⁹	June 15, 2009. ¹⁰	Beginning of TARP period.	End of TARP period.
Golden parachutes ¹¹	No payments to CEOs or the next five most highly compensated employees for departure from the company for any reason or due to change in control, except for payments for services performed or benefits accrued. ¹²	Effective for payments triggered by departure (and presumably change in control) on or after June 15. ¹³	Effective for payments triggered by departure (and presumably change in control) after the beginning of the TARP period.	No longer effective for payments triggered by departure (and presumably change in control) after end of TARP period.

⁸ §30.8 (Q-8).

⁹ This requirement applies to permitted restricted stock awards and awards under grandfathered contracts that are exempt from the prohibition on bonus payments, but does not appear to apply to commission compensation, which is excluded from the definition of “bonus.” All other types of bonus payment to the CEOs and next 20 most highly compensated employees are prohibited during the TARP period for TARP recipients receiving more than \$500 million in financial assistance. For TARP recipients receiving a lower level of financial assistance, the bonus prohibition may apply to a smaller subset of these 25 employees, but the clawback requirement would apply to all 25.

¹⁰ For existing TARP recipients, clawback requirements that were previously agreed to under contractual commitments entered into by the TARP recipient with Treasury continue to apply to bonus payments to CEOs and any other applicable employees made prior to June 15, 2009.

¹¹ §30.9 (Q-9).

¹² See Part IV below for details and discussion.

¹³ For existing TARP recipients, restrictions on golden parachute payments to CEOs and other applicable employees that were previously agreed to under contractual commitments entered into by the TARP recipient with Treasury (limiting such payments to less than three times the employee’s “base amount”) continue to apply to payments in respect of departures prior to June 15, 2009.

Requirement	Summary	Effective date for existing TARP recipients	Effective date for future TARP recipients	Ceases to apply
Bonuses, retention awards and incentive compensation ¹⁴	No payment or accrual of bonuses, retention awards or incentive compensation to CEOs and additional most highly compensated employees (up to 20 depending on level of financial assistance received). ¹⁵	June 15, 2009.	Beginning of TARP period.	End of TARP period.
Perquisite disclosure ¹⁶	Annually disclose to Treasury and primary regulator perquisites whose total value exceeds \$25,000 for employees subject to bonus prohibition. Provide narrative description of amount and nature of perquisites provided to employees subject to the bonus prohibition, the recipient of the perquisites, and a justification for offering the perquisites	Within 120 days of the completion of a fiscal year any part of which is a TARP period, starting June 15, 2009 (e.g., for a calendar year company that received TARP assistance in 2008, the first disclosure is due April 30, 2010 and subsequent disclosures are due each April 30).	Within 120 days of the completion of a fiscal year any part of which is a TARP period (e.g., for a calendar year company, the first disclosure is due April 30 of the year following the year in which TARP assistance is received and subsequent disclosures are due each April 30).	Last disclosure required within 120 days of the completion the TARP recipient's last fiscal year any part of which is a TARP period.

¹⁴ §30.10 (Q-10).

¹⁵ See Part III below for details and discussion.

¹⁶ §30.11 (Q-11).

Requirement	Summary	Effective date for existing TARP recipients	Effective date for future TARP recipients	Ceases to apply
Compensation consultant disclosure ¹⁷	Annually disclose to Treasury and primary regulator whether compensation committee has engaged a compensation consultant and all types of services, including non-compensation related services, that the consultant or any of its affiliates has provided to the TARP recipient, the board or the compensation committee during the past three years.	Within 120 days of the completion of a fiscal year any part of which is a TARP period, starting June 15, 2009. (e.g., for a calendar year company that received TARP assistance in 2008, the first disclosure is due April 30, 2010 and subsequent disclosures are due each April 30).	Within 120 days of the completion of a fiscal year any part of which is a TARP period (e.g., for a calendar year company, the first disclosure is due April 30 of the year following the year in which TARP assistance is received and subsequent disclosures are due each April 30).	Last disclosure required within 120 days of the completion the TARP recipient's last fiscal year any part of which is a TARP period.
Gross-up prohibition ¹⁸	No gross-ups to SEOs or next 20 most highly compensated employees. Certain tax equalization agreements are permitted.	June 15, 2009.	Beginning of TARP period.	End of TARP period.
Excessive or luxury expenditures policy ¹⁹	Adopt excessive or luxury expenditures policy, provide policy to Treasury and company's primary regulator, and post policy on company website. Policy must be designed to eliminate excessive or luxury expenditures including on entertainment and events, office and facility renovations, and aviation or other transportation services.	September 14, 2009 (90 days after publication).	90 days after closing date of agreement between TARP recipient and Treasury.	End of TARP period.

¹⁷ §30.11 (Q-11).

¹⁸ §30.11 (Q-11).

¹⁹ §30.12 (Q-12).

Requirement	Summary	Effective date for existing TARP recipients	Effective date for future TARP recipients	Ceases to apply
PEO and PFO certifications ²⁰	PEO and PFO must provide written certification of compliance with requirements.	First certification due within 90 days after completion of the first fiscal year of TARP recipient any portion of which is a TARP period, effective as of June 15, 2009 (e.g., for a calendar year company that received TARP assistance in 2008, the first certification is due March 31, 2010). Subsequent certifications due within ninety days of the completion of each fiscal year.	First certification due within 90 days after completion of the first fiscal year of TARP recipient any portion of which is a TARP period (e.g., for a calendar year company that receives TARP assistance in July 2009, the first certification is due March 31, 2010). Subsequent certifications due within ninety days of the completion of each fiscal year.	End of the TARP period. Last certification required within 90 days after completion of the TARP recipient's last fiscal year any part of which is a TARP period.
Review by Special Master: pre-ARRA payments ²¹	See Part V below.	Applies to payments during TARP period but prior to February 17, 2009.	N/A	Payments on or after February 17, 2009 not subject to this review.
Review by Special Master: ongoing review of payments to certain employees of entities receiving "exceptional financial assistance" ²²	See Part V below	Applies to amounts paid or accrued in period covered by bonus limitation (beginning June 15, 2009). ²³	Applies to amounts paid or accrued in period covered by bonus limitation (starting at beginning of TARP period).	Amounts paid or accrued after end of TARP period not subject to review.

²⁰ §30.15 (Q-15).

²¹ §30.16 (Q-16).

²² §30.16 (Q-16). "Exceptional financial assistance" is defined as any financial assistance provided under the Programs for Systemically Significant Failing Institutions, the Targeted Investment Program, the Automotive Industry Financing Program and any new program designated by the Secretary as providing exceptional financial assistance. Seven companies are currently receiving exceptional financial assistance: American

Existing restrictions. The regulations confirm that contractual commitments previously entered into by TARP recipients with Treasury pursuant to TARP documentation that are not inconsistent with the regulations continue to apply. This would include, for example:

- Agreements to forgo tax deductions by analogy with the statutory limitation under Section 162(m)(5);²⁴
- Clawback policies for bonuses and incentive compensation paid to SEOs (and any other employees specified in the agreement with Treasury) based on materially inaccurate financial statements or other performance metric criteria;
- Limitation on golden parachute payments to SEOs (and any other employees specified in the agreement with Treasury) to less than three times the employee's "base amount"; and
- For entities receiving exceptional financial assistance, applicable limits on the aggregate amount of any annual employee bonus or incentive compensation pool for all employees (e.g., no more than 60% of the bonus pool for 2007).

Application after repayment of TARP funds. See Part VI below for a discussion of when the regulations cease to apply for TARP recipients exiting the TARP program.

International Group, Inc., Citigroup Inc., Bank of America Corporation, Chrysler Group LLC, General Motors Corporation, GMAC LLC and Chrysler Financial.

²³ On a literal reading, it appears that payments made on or after February 17, 2009 but prior to June 15, 2009 by entities receiving exceptional financial assistance may not be subject to review by the Special Master.

²⁴ Pursuant to Section 111(b)(1)(B) of EESA, Section 162(m)(5) of the Internal Revenue Code of 1986 (the "Code"), limiting compensation deductions to \$500,000 annually (with no exception for performance-based compensation) for the CEO, the CFO and the next three most highly compensated executive officers of the TARP recipient based on compensation in the current fiscal year, continues to apply while any obligation arising from financial assistance arising under the TARP remains outstanding, the statutory provision seems by its terms not to apply to TARP recipients that received direct investments. In any event, TARP recipients have been required to agree by contract to forgo tax deductions for these senior executives as if Section 162(m) (5) applied to them, as required under the interim final rule published on October 20, 2008 (73 FR 62205) adding 31 CFR Part 30 under Section 111 of EESA (the "CPP Rules").

II. Identifying the Affected Employees

EESA's executive compensation restrictions apply to the SEOs and certain additional "most highly compensated employees" of the TARP recipient. In this memorandum we refer to this group of employees collectively as the "Affected Employees." The statutory language of EESA and ARRA left a number of questions open about how to determine who the Affected Employees are. While many of those questions are answered by the regulations, unfortunately not all questions are answered and indeed some new ones have been raised.

Definition of TARP Recipient.²⁵ As previously under the CPP Rules, the term "TARP recipient" is defined in the regulations to include an entity that receives financial assistance under TARP and any of its affiliates that would be treated as the same employer as that entity based on the rules in Sections 414(b) and 414(c) of the Code, disregarding the rules for brother-sister controlled groups and combined groups. However, the regulations lower the 80% threshold ownership requirement under those sections to 50%, a change from the CPP Rules. This change has potentially significant implications for identifying both the SEOs and the additional Affected Employees:

- Lowering the ownership threshold to 50% expands the universe of parent companies or shareholders of the entity directly receiving assistance, which can complicate the determination of who the SEOs are. SEOs are by definition senior officers who have policy-making responsibility. If the company directly receiving TARP assistance is a subsidiary of another entity, the SEOs would be officers who have policy-making authority for the entire group. If the entity directly receiving assistance is an 80%-owned subsidiary of a public company, the executive officers of the public parent would typically have policy-making authority for the group, including the entity directly receiving assistance. However, if the entity is, for example, a joint venture that is 50% owned by two unrelated shareholders, it may not be clear that the executives of either parent company are in fact responsible for or have the authority to make policy decisions for the joint venture.
- The lower ownership threshold also widens the net for employees that have to be considered in determining who the additional "most highly compensated employees" are for purposes of the regulations. For example, a highly compensated employee of a subsidiary or a joint venture that is at least 50% owned (by vote or value), directly or indirectly through a chain of 50% owned entities, by the entity

²⁵ §30.1 (Q-1) (definition of "TARP recipient").

directly receiving financial assistance may be an Affected Employee. Under definition of a “TARP recipient” in the CPP Rules, such employees could be ruled out a priori as long as the chain of ownership was under 80%.

The regulations also include an anti-abuse rule under which the “TARP recipient” includes any entity related to the entity receiving assistance to the extent that it was created or used to evade the requirements of EESA or the regulations.

Senior Executive Officers. The regulations define an SEO as a “named executive officer” of the TARP recipient, determined pursuant to the compensation disclosure rules promulgated by the Securities and Exchange Commission (“SEC”) under the Exchange Act,²⁶ “who is an employee of the TARP recipient.”²⁷ Generally, the “named executive officers” include (i) anyone who served as the TARP recipient’s PEO or PFO at any time during the last completed fiscal year (regardless of compensation level or employment status), (ii) the three most highly compensated executive officers of the TARP recipient other than the PEO and the PFO who were serving as executive officers at the end of the last completed fiscal year and (iii) up to two additional individuals who would have been included but for the fact that they were not serving as executive officers at the end of the year. The SEOs are identified by “looking back” at compensation for the prior fiscal year.²⁸

- A person who served as PEO, PFO or as an executive officer during the prior fiscal year and is still employed with the TARP recipient at the time as of which the SEOs are identified, but no longer in such position, could be included among the SEOs – and, therefore, may be an Affected Employee who is restricted from receiving any bonus, incentive, retention or golden parachute payments – regardless of his or her then-current level of compensation.

Additional Affected Employees. The additional “most highly compensated employees”²⁹ are also identified based on their total compensation for the prior fiscal year as described above. However, these employees are not limited to executive officers or

²⁶ Instruction 1 to Item 402(a)(3) of Regulation S-K (17 CFR 229.402(a)).

²⁷ §30.1 (Q-1) (definition of “Senior executive officer or SEO”).

²⁸ By contrast, for purposes of Section 162(m)(5) and the contractual agreement to forgo tax deductions as if Section 162(m)(5) applied, the relevant executives are identified by looking at the current year’s compensation. See Internal Revenue Service Notice 2008-94 (Q/A 4(b)) and Treasury’s Executive Compensation FAQs under the Capital Purchase Program, available at <http://www.financialstability.gov/about/executivecompensation.html>.

²⁹ §30.1 (Q-1) (definition of “Most highly compensated employee”).

members of management. Therefore, highly compensated non-executives such as sales people and investment managers may be among the Affected Employees.³⁰ To be one of the additional most highly compensated employees, an individual must still be employed by the TARP recipient as of the first day of the fiscal year in which the determination is made.

- Unlike the proviso in the SEO definition, which specifies that an SEO is someone “who is an employee” at the time the determination is made, this definition provides that “a former employee who is no longer employed as of the first day of the relevant fiscal year of the TARP recipient is not a most highly compensated employee unless it is reasonably anticipated that such employee will return to employment with the TARP recipient during such fiscal year.”³¹ This definition leaves open questions for companies that become TARP recipients after the beginning of their fiscal year. For example, if a company with a calendar fiscal year received TARP assistance in April 2009, and employee X was employed with the company on January 1, 2009 (the first day of the fiscal year) but left on February 1, 2009, could X be among the most highly compensated? Although a literal reading suggests that result, it seems unlikely that it was intended, since the inclusion of X as one of the Affected Employees would, in effect, “displace” a current highly compensated employee from the group.
- While the use of the SEC’s methodology for determining annual compensation is generally helpful for companies that are accustomed to carrying out similar information-gathering and analysis for compensation disclosure purposes, it will present a daunting task when applied to the far larger pool of potential affected employees (up to 20 employees company-wide on a 50% controlled group basis) as opposed to the far more easily identifiable pool of executive officers.

Employees may cycle in and out of the group of Affected Employees in successive years as the restrictions under EESA and the regulations will limit the compensation that may be paid to them in a year in which they are Affected Employees and therefore make it less likely that they will be among the most highly compensated in the following year. (In the preamble to the regulations, the Treasury takes note of this possibility and invites comment on the extent to which intentional cycling is likely to occur and potential methods for mitigating the issue, including determining highly compensated status based on an average of the preceding two or three years’ annual compensation.)

³⁰ However, as noted below, certain types of sales commissions and investment management fees are exempt from the prohibition on paying bonuses and incentive compensation to Affected Employees.

³¹ §30.1 (Q-1) of the regulations (definition of “Most highly compensated employee”) (emphasis added).

We note that the SEC's method for measuring stock option and stock award compensation for the year for purposes of executive compensation disclosure and determination of "named executive officers" (expense recorded during the year in accordance with the Financial Accounting Standards Board Statement of Financial Accounting Standards No. 123 (revised 2004) ("FAS 123R") as opposed to grant-date fair market value of awards granted during the year or some other method) is the subject of some controversy and may be changed.³² Any change in the SEC rules would presumably carry through to the determination of the Affected Employees under the regulations.

Because Affected Employee status is determined by looking back to the prior year's compensation, a newly hired employee will not be an Affected Employee until (at the earliest) the fiscal year following the year in which he or she is hired. This means that sign-on bonuses that are accrued and paid by the end of the fiscal year of hire are not subject to the bonus limitation.

III. Bonuses, Retention Awards and Incentive Compensation

Section 111(b)(3)(D) of EESA directs the Secretary of the Treasury to establish a prohibition on TARP recipients "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" to SEOs and a number of additional highly compensated employees determined based on the amount of assistance the company received. (For TARP recipients that have received assistance of \$500 million or more, this restriction applies to the SEOs and the next 20 most highly compensated employees.) An exception is provided for awards of restricted stock that meet specific requirements, including that the value of the award must not exceed 1/3 of the total amount of the applicable employee's annual compensation.

[§30.10 \(Q-10\)](#) sets forth the actions necessary for a TARP recipient to comply with the limitation on bonus payments. The limitation is effective for amounts paid or accrued on or after June 15, 2009 or, for a future TARP recipient, after assistance is received.

Definition of "bonus." The regulations provide definitions of "bonus,"³³ "retention award"³⁴ and "incentive compensation."³⁵ The term "bonus" is defined very

³² See our client alert entitled "SEC Reconsiders Equity Compensation Disclosure Methodology for Summary Compensation Table" dated May 3, 2009 (available at http://www.cgsh.com/sec_reconsiders_equity_compensation_disclosure_methodology_for_summary_compensation_table/).

³³ [§30.1 \(Q-1\)](#) (definition of "Bonus" and "Bonus payment").

³⁴ [§30.1 \(Q-1\)](#) (definition of "Retention award").

broadly to include “any payment in addition to any amount payable to an employee for services performed by the employee at a regular hourly, daily, weekly, monthly or similar periodic rate.” Whether a payment is a bonus payment is based on all the facts and circumstances. There are exceptions for

- contributions to qualified retirement plans
- benefits under broad-based benefit plans (defined as “employee welfare benefit plans,” as defined in Section 3(1) of the Employee Retirement Income Security Act of 1974, except for deferred compensation and severance plans)
- bona fide overtime pay
- bona fide and routine expense reimbursements.

This expansive definition of the term “bonus” under the regulations raises a number of questions.

- Are severance payments “bonuses”? The definition picks up any payment in addition to amounts payable at regular periodic rates. There is an exception for broad-based benefit plans, but this exception expressly excludes severance plans (whether or not discriminatory). The term is potentially broad enough to apply to severance, but to read it so broadly appears to run counter to the intention of the statute. Such a reading would mean that an employee who is not an SEO and not one of the next five most highly compensated (so not covered by the golden parachute prohibition), but is in the next twenty most highly compensated (so subject to the bonus restriction) would not be permitted to receive severance payments, even though EESA’s golden parachute restriction would not apply. The regulations provide that whether a payment is a bonus payment is determined based on all the facts and circumstances, and the common-sense view that severance and bonus are different things should govern this determination.
- When are contributions to or accruals under nonqualified pension plans or deferred compensation plans bonuses? The definition of “bonus” specifies that a bonus “may include” such contributions and accruals. This seems to imply that they are not always bonuses. However, as in the case of severance plans, deferred compensation plans are expressly excluded from the exception for “benefit plans.” The regulations provide

³⁵ §30.1 (Q-1) (definitions of “Incentive compensation” and “Incentive plan”).

little guidance on how to determine when a contribution to a nonqualified pension or deferred compensation plan is or is not a bonus, other than to state that the determination is based on the facts and circumstances.

Grandfathered Amounts. Section 111(b)(3)(D)(iii) of EESA provides that the bonus prohibition does not apply to “any bonus payment required to be paid pursuant to a written employment contract executed on or before February 11, 2009.” The regulations specify that this grandfather clause applies to amounts to which an employee had a legally binding right under a valid employment contract as of February 11, 2009.³⁶ Amendment of a contract to materially enhance the benefit available to the employee would cause the grandfather clause to cease to apply.

- A “valid employment contract”³⁷ is not limited to employment contracts in the narrow sense, but is broadly defined by reference to compensatory plans, contracts and arrangements that would be required to be filed as exhibits to periodic disclosures under Item 601(b)(10)(iii) of SEC Regulation S-K (but not limited to those in which executive officers participate) and includes option and other stock award agreements and pension, retirement and deferred compensation plans.
- The regulations borrow the concept of a “legally binding right” from Section 409A of the Code, which is broad and generally includes any right to compensation, whether or not contingent, that cannot be unilaterally reduced or eliminated by the employer.

When Amounts Accrue. Since EESA and the regulations prohibit TARP recipients from paying or accruing any “bonus,” “retention award” or “incentive compensation” to Affected Employees during the TARP period, it is important to determine when an amount “accrues.” [§30.10 \(Q-10\)](#) of the regulations provides some guidance.

- An accrual may include the granting of service credit towards the calculation of the benefit or any vesting requirement, or the crediting of compensation received during the applicable period (or that would have been received absent the EESA restrictions).
- The regulations prohibit “make-up” payments paid after the restriction has ceased to apply but based on services performed or compensation received during the restricted period.³⁸

³⁶ [§30.10\(e\)\(2\) \(Q-10\(e\)\(2\)\)](#).

³⁷ [§30.1 \(Q-1\)](#) (definition of “Valid employment contract”).

³⁸ See [§30.10\(d\) \(Q-10\(d\)\)](#), [examples \(2\) and \(3\)](#).

- If an incentive award accrues over a multi-year period that includes some portion during which the restriction applies to the employee, it can be reduced pro rata to reflect that period; for example, if an employee has a three-year incentive award and is subject to the restriction for one year of the three-year period, it would be permissible to pay the award reduced by 1/3 at a time when the employee is not subject to the restriction.

Commissions and Investment Management Fees.³⁹ Certain sales commissions, brokerage commissions, fees based on a percentage of assets under management and similar forms of compensation are exempt from the prohibition on bonuses, retention awards and incentive compensation. This means that an employee may be among the most highly compensated based in part on his or her commission compensation, but may not be restricted from receiving that compensation during the TARP period, as long as it meets the criteria for the exemption. The commission compensation program must have been in existence as of February 17, 2009, so TARP recipients cannot establish a new program that would benefit from the exemption. The compensation must be reasonable. Compensation based on a specific transaction, such as a deal bonus, is not covered by this exemption. A number of other conditions apply depending on the specific type of compensation.

- The regulations do not specify whether annual or other periodic updates of a program whose basic structure was in place as of February 17, 2009 – for example, to reflect new products or sales targets – would cause the program to fail to qualify. Presumably such updates should be permissible short of a change to the program so significant as to effectively create a new program. Material changes to existing compensation commission programs should be approached with caution, especially if they would enhance the benefits available to employees.
- The exception for commission compensation only applies if a substantial portion of the services provided by the employee receiving the compensation consists of direct sales of products or services. The exception does not appear to apply to bonuses for sales or trading managers who are not themselves primarily engaged in sales, even if the compensation is calculated in a similar manner to a commission based on sales generated by the staff managed by the manager.

Permissible Restricted Stock Awards. The regulations also flesh out the requirements for permissible restricted stock awards that are exempt from the bonus restriction.⁴⁰ Restricted stock units (which are substantially economically identical to true

³⁹ §30.1 (Q-1) (definition of “Commission compensation”).

⁴⁰ §30.10(e)(1) (Q-10(e)(1) and §30.1 (Q-1) (definition of “Long-term restricted stock”).

restricted stock) are also eligible for the exemption; this includes awards settled in cash. The regulations also permit use of units “analogous to common stock” (phantom units) based on the value of a business division or unit. The method for calculating whether the value of the award is limited to no more than 1/3 of the employee’s total annual compensation is based on the SEC method for determining compensation for the current year.

- Annual compensation (the denominator) is measured in the year of the award, not on a look-back basis as it is for determining who the Affected Employees are.
- Equity-based compensation is included in the year of grant at its fair market value on the grant date, instead of the expense recognized for that year as under the SEC rules. No value is included in respect of equity-based compensation granted in fiscal years ending before the publication of the regulations. So, for example, if an employee becomes subject to the restriction in 2009 and received stock option grants in 2008 and 2009, to determine his annual compensation for 2009 the 2009 option award is included at its grant-date fair market value, and the 2008 award is disregarded. To determine the value of the restricted stock award (the numerator) the entire award is measured in the year of grant at its total fair market value on the grant date.
- The regulations do not specify how total fair market value on the grant date is to be measured – whether using the valuation method under FAS 123R or some other method.⁴¹

EESA provides that permissible restricted stock awards must not “fully vest during the period in which any obligation arising from financial assistance provided to [the] TARP recipient” remains outstanding. The regulations clarify what the “fully vest” requirement means in practice. The restricted stock must be subject to a service-based vesting condition (subject to forfeiture on departure, except for death, disability or a change in control) for at least two years following grant. It can become transferable (or payable, in the case of restricted stock units) when the TARP financial assistance is repaid. As each portion of 25% of the total obligation under TARP is repaid, up to 25% of the award can become transferable or be paid. A portion of the award is permitted to be transferable prior

⁴¹ We note that, under FAS 123R, the grant date fair market value of restricted stock units subject to performance-based conditions that may be settled in cash could be significantly lower than the value of the stock subject to the restricted stock units.

to meeting these milestones to the extent necessary to cover taxes incurred on vesting.⁴² More restrictive conditions are permitted.

The preamble also provides that a restricted stock unit may be structured as a short-term deferral under Section 409A of the Code with a payment date no later than either the end of the short-term deferral period or the first date on which payment is permissible under the regulations and the applicable terms of the agreement between the TARP recipient and the Treasury, and will not be subject to Section 409A provided that the payment terms are satisfied.

Permissible Payments in Property. The regulations provide that salary, or other payments that are not prohibited under the regulations, can be paid in the form of property rather than cash, including company stock.⁴³ Such payments cannot be subject to vesting conditions and must be made at the same time that the salary or other payments are due. The provision permits TARP recipients to structure pay arrangements providing Affected Employees with a greater stake in the company's equity than could be provided solely in the form of permitted restricted stock or restricted stock unit awards. Payments in property, like salary payments in cash, cannot be used to make up bonuses or incentive awards that would have been granted to the employee in the previous year except for the application of the regulations.⁴⁴

Section 409A of the Code. Since covered bonuses, retention awards and incentive compensation may not be paid or accrued while the restriction applies, an employee could permissibly accrue an amount while not subject to the limitation, but be prohibited from being paid that amount on the scheduled payment date (if the employee had become subject to the restriction as of the payment date, or if pursuant to an agreement between the TARP recipient and Treasury the payment could only be made upon fulfillment of another condition related to the TARP recipient's financial health). The preamble to the regulations states that such a payment may be delayed until the restriction no longer applies without resulting in a failure to comply with Section 409A of the Code or causing a payment

⁴² This provision is limited under the regulations to "restricted stock for which the employee does not make an election under section 83(b) of the [Code]." However, employment taxes may become due with respect to restricted stock units that become substantially vested for tax purposes prior to the settlement date. Presumably the intention was to provide similar relief to cover taxes due in such circumstances.

⁴³ §30.1 (Q-1) (part 2 of definition of "Incentive plan").

⁴⁴ §30.10(d) (Q-10(d)), examples (2) and (3), deal with increases in salary for an employee who was an Affected Employee in the prior year but not in the year of the increase. By analogy, a compensation increase in the form of permitted stock or other property grants to an Affected Employee that, under the facts and circumstances, replaced a prohibited bonus forgone in the prior year would not be permitted. By contrast, an increase in base salary established at or before the beginning of the first year in which the employee is an Affected Employee, with the increase paid in the form of company stock, would appear to be perfectly permissible.

that would otherwise have been a short-term deferral under Section 409A to be treated as a payment of deferred compensation.⁴⁵ Payment must be made promptly once the restriction ceases to apply. We anticipate that the regulations under Section 409A of the Code will be updated accordingly.

IV. Golden Parachutes⁴⁶

Section 111(b)(C) of EESA directs the Secretary of the Treasury to establish a prohibition on TARP recipients making any “golden parachute payment” to an SEO or any of the next five most highly compensated employees. “Golden parachute payment” is defined in the statute to include any payment for departure from the company for any reason, except for payments for services performed or benefits accrued.

Change in Control Payments Added. The regulations extend the statutory restriction to apply to any payment due to an event that would qualify as a change in control event for purposes of either Section 280G or Section 409A of the Code with respect to either the TARP recipient or any single entity in a group of entities treated as one TARP recipient.

Exclusions. Prohibited golden parachute payments do not include:

- payments made by reason of the employee’s death or disability
- payments under qualified or foreign pension plans
- payments under broad-based severance plans mandated under state or foreign law
- payments “for services performed or benefits accrued,” such as vested deferred compensation and pension
 - Whether a payment meets this exception is based on all the facts and circumstances, but in general a payment is treated as being for services performed or benefits accrued if it would be made regardless of whether the employee departs or the change in control occurs, or if it is due upon departure regardless of whether the departure is voluntary or involuntary. The regulations specify that a reasonable restriction, such as forfeiture of the right to payment due to a termination for cause, may be disregarded. Presumably other reasonable restrictions – for example, forfeiture due to breach

⁴⁵ Preamble.

⁴⁶ §30.9 (Q-9) and §30.1 (Q-1) (definition of “Golden parachute payment”).

of a noncompetition agreement or for detrimental conduct – would also be permitted.

- In the case of payments from benefit plans and deferred compensation plans (“plans”), certain additional conditions must be met, including payment in accordance with the terms of a plan that has been in effect for at least one year prior to the employee’s departure and under which the employee has a vested right to payments or benefits that is not due to his or her departure or to the change in control. It is not clear why there are separate requirements for payments from plans and other types of payments being for services performed or benefits accrued. Since a plan could in principle include an arrangement with a single employee, distinguishing payments under plans from other payments being for services performed or benefits accrued may present difficulties. For example, would settlement of a restricted stock unit that is fully vested because the employee has qualified for a retirement rule and is within the definition of “nonqualified deferred compensation” for purposes of Section 409A of the Code be considered a payment from a deferred compensation plan or not?

Payments Deemed Made at Time of Departure. Golden parachute payments are treated as being made at the time of the employee’s departure, even if actual payments are made later.⁴⁷ This means that severance or other covered payments cannot be taken out of the prohibition by delaying payment until after the TARP period is over. Conversely, installments of severance payments that are due during the TARP period but relate to a departure before the TARP period are not prohibited.

V. Special Master for TARP Executive Compensation

The regulations provide that the Treasury shall establish the Office of the Special Master for TARP Executive Compensation (the “Special Master”).⁴⁸ It has been announced that Kenneth Feinberg, previously Special Master of the U.S. Government's September 11th Victim Compensation Fund, will serve as the Special Master.

The Special Master has broad authority to interpret and apply Section 111 of EESA, the regulations and other applicable guidance. In addition, the Special Master is responsible for reviewing compensation paid to employees of TARP recipients before the

⁴⁷ As noted above, although the regulations do not say so, presumably the same logic applies to payments triggered by a change in control.

⁴⁸ §30.16 (Q-16).

enactment of ARRA (which amended EESA to add stricter executive compensation provisions), and to approve or review compensation paid to certain employees of companies receiving exceptional financial assistance. The Special Master's decisions are not subject to appeal. The powers, duties and responsibilities of the Office of the Special Master are described in [§30.16 \(Q-16\)](#) of the Regulations.

Review of pre-ARRA payments. The Special Master is responsible for reviewing bonuses, retention awards and other compensation paid before February 17, 2009 to employees of each entity receiving TARP assistance before February 17, 2009 to determine whether any such payments were inconsistent with the purposes of Section 111 of EESA or of the TARP, or otherwise contrary to the public interest and, if such a determination is made, for negotiating with the TARP recipient and the applicable employee(s) for appropriate reimbursements to the federal government. The Special Master has the authority to request information from TARP recipients in order to carry out this review, and TARP recipients must submit any requested information within 30 days of the request.

Companies receiving exceptional financial assistance: review and approval of certain payments. The Special Master is responsible for reviewing and approving payments to certain employees of entities receiving exceptional financial assistance, as follows:

- **Top 25.** For the SEOs and the additional Affected Employees of an entity receiving exceptional financial assistance who are subject to the bonus limitation (i.e., the next 20 most highly compensated for TARP recipients receiving \$500 million or more in assistance), the Special Master must review any compensation accrued or paid during the period that the Affected Employees are subject to the bonus limitation to determine whether any such compensation is inconsistent with the purposes of Section 111 of EESA or of the TARP, or otherwise contrary to the public interest.
- **Other employees.** For any other employee of an entity receiving exceptional financial assistance who is either an executive officer or one of the 100 most highly compensated employees (or both), the Special Master is responsible for reviewing compensation structure and determining whether it is inconsistent with the purposes of Section 111 of EESA or of the TARP, or otherwise contrary to the public interest. For these employees, the regulations only require a determination that compensation arrangements are adequately structured, and not approval of specific payments. In addition, a safe harbor is provided. If total annual compensation to an employee is limited to (i) no more than \$500,000 (pro-rated for 2009 and, presumably, for any year only part of which is a TARP period in the

case of future TARP recipients) plus (ii) unlimited additional compensation in the form of permissible restricted stock that complies with the requirements under [§30.10 \(Q-10\)](#) of the regulations, without regard for the 1/3 cap, no approval by the Special Master is required. In measuring whether the \$500,000 limit on compensation other than such restricted stock is reached, awards of equity-based compensation are measured at the grant-date fair value and included in the year of grant. In addition, changes in the actuarial present value of pension benefits and above-market earnings on deferred compensation – which are not included in determining who is a named executive officer under the SEC disclosure rules – are counted. We note that the change in the actuarial present value of pension benefits may, depending on the investment performance of the pension plan and other factors, be a negative number the inclusion of which could cause an employee who would otherwise be picked up not to be among the covered 100.

Procedure. Requests for approval by existing TARP companies receiving exceptional financial assistance must be submitted by August 14, 2009 (60 days after publication) for the top 25 and by October 13 (120 days after publication) for the additional 100+ employees. Presumably, for recipients of exceptional financial assistance these submissions would be due 60 days and 120 days, respectively, following the beginning of the TARP period. Determinations by the Special Master are due 60 days after the submission.

Guiding principles and scope of review. [§30.16\(b\) \(Q-16\(b\)\)](#) of the regulations sets forth the principles to be applied by the Special Master in making these determinations. They are:

- Risk, including avoidance of incentives to take excessive and unnecessary risks;
- Return on the investment of U.S. taxpayer funds, including the need to retain and recruit employees who will contribute to the future success of the TARP recipient;
- Allocating an appropriate proportion of compensation to be performance based;
- Comparable compensation structures and amounts for persons in similar positions at similarly situated entities; and
- The employee's current or prospective contributions to the TARP recipient's value.

The regulations indicate that amounts that are not subject to review because they were paid or accrued prior to June 15, 2009 may nevertheless be taken into account. The regulations also imply that grandfathered amounts, although they are exempt from EESA's bonus limitation, may be included in the scope of the Special Master's review.⁴⁹

VI. Application of the Regulations After End of TARP Period

In general, the substantive requirements under EESA and the regulations cease to apply as of the end of the TARP period (i.e., when all obligations arising from financial assistance under the TARP, disregarding unexercised warrants, have been repaid). The bonus limitation and the prohibition on golden parachutes end when the TARP period ends. Some of the requirements under the regulations have an implementation period following the publication of the regulations. If a TARP recipient repays TARP funds before the end of that period, presumably the requirement will never apply. For example, existing TARP recipients have 90 days from June 15, 2009 to adopt a policy on excessive or luxury expenditures. If the TARP recipient repays TARP funds prior to September 14, 2009, this requirement should not apply. Generally, disclosure and certification requirements apply following the completion of any fiscal year of the TARP recipient any part of which is a TARP period (as summarized in the chart in Part I above).

On a technical reading of the regulations, if the TARP period ends a very short time after June 15, 2009,⁵⁰ the bonus and golden parachute limitations could be interpreted to apply for that short period between publication and repayment and the disclosure and certification requirements could be interpreted to apply in respect of 2009. Similarly, for requirements with an implementation period, such as the excessive or luxury expenditures policy, if the TARP recipient continues to have an obligation for only a very short period following the end of the implementation period – for example, the funds are repaid on October 14, 2009 – the regulations could be interpreted to require that a policy be adopted even though it would only apply, in the example, for a month.

It remains to be seen whether Treasury will interpret the regulations so technically. Any benefit from imposing these requirements in respect of a covered period numbered in days would be far outweighed by the burdens of compliance.

⁴⁹ §30.16(a)(3) (Q-16(a)(3)) states that "In revising compensation structures and compensation payments for any period subject to Special Master review, the Special Master may take into account other compensation structures and other compensation earned, accrued or paid, including such compensation and compensation structures that are not subject to the restrictions of Section 111 of EESA pursuant to section 111(b)(3)(D)(iii) ... (certain legally binding rights under valid contracts)), and amounts that were accrued or paid prior to [June 15, 2009] and are therefore not subject to review by the Special Master." While amounts accrued prior to June 15 are explicitly identified as not being subject to review, grandfathered amounts are not.

⁵⁰ Ten TARP recipients have been granted permission to repay their funds and reportedly plan to do so as early as June 17, 2009. See Treasury press release ("Treasury Announces \$68 Billion in Expected CPP Repayments"), available at http://www.financialstability.gov/latest/tg_06092009.html.

The Special Master's authority to review certain payments to employees of TARP recipients prior to February 17, 2009 has no specified end date. It would appear that all such payments will remain subject to review until the Special Master has made a determination on the payment.

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Please feel free to call any of your regular contacts at the firm or any of the partners and counsel listed under Employee Benefits in the Practices section of our website (www.cgsh.com) if you have any questions.

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Federal Register

**Monday,
June 15, 2009**

Part III

Department of the Treasury

**31 CFR Part 30
TARP Standards for Compensation and
Corporate Governance; Interim Final Rule**

DEPARTMENT OF THE TREASURY**31 CFR Part 30**

RIN 1505-AC09

TARP Standards for Compensation and Corporate Governance**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 of the Emergency Economic Stabilization Act of 2008 (EESA), as amended by the American Recovery and Reinvestment Act of 2009 (ARRA), provides guidance on the executive compensation and corporate governance provisions of EESA that apply to entities that receive financial assistance under the Troubled Asset Relief Program (TARP). Section 111 of EESA requires entities receiving financial assistance (TARP recipients) from the Department of the Treasury (Treasury) to meet appropriate standards for executive compensation and corporate governance. This interim final rule includes standards for TARP recipients that implement the provisions of section 111 of EESA, as well as certain additional standards adopted pursuant to the authority granted the Treasury under section 111(b)(2) to promulgate such additional standards.

DATES: *Effective Date:* These regulations are effective on June 15, 2009. *Comment due date:* August 14, 2009.

ADDRESSES: Treasury invites comments on the topics addressed in this interim final rule. Comments may be submitted to 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, 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. Treasury will also make such comments available for public inspection and copying in Treasury's Library, Room 1428, Department of the Treasury, 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 final rule contact the Office of Domestic Finance, Treasury, at (202) 927-6618.

SUPPLEMENTARY INFORMATION:**Executive Summary**

This Interim Final Rule sets forth the following standards, which generally apply to all TARP recipients in the programs under the TARP, subject to certain exceptions for TARP recipients that do not hold outstanding obligations: (1) Limits on compensation that exclude incentives for senior executive officers (SEOs) to take unnecessary and excessive risks that threaten the value of the TARP recipient; (2) provision for the recovery of any bonus, retention award, or incentive compensation paid to a SEO or the next twenty most highly compensated employees based on materially inaccurate statements of earnings, revenues, gains, or other criteria; (3) prohibition on making any golden parachute payment to a SEO or any of the next five most highly compensated employees; (4) prohibition on the payment or accrual of bonus, retention award, or incentive compensation to SEOs or certain highly compensated employees, subject to certain exceptions for payments made in the form of restricted stock; (5) prohibition on employee compensation plans that would encourage manipulation of earnings reported by the TARP recipient to enhance an employee's compensation; (6) establishment of a compensation committee of independent directors to meet semi-annually to review employee compensation plans and the risks posed by these plans to the TARP recipient; (7) adoption of an excessive or luxury expenditures policy; (8) disclosure of perquisites offered to SEOs and certain highly compensated employees; (9) disclosure related to compensation consultant engagement; (10) prohibition on tax gross-ups to SEOs and certain highly compensated employees; (11) compliance with Federal securities rules and regulations regarding the submission of a non-binding resolution

on SEO compensation to shareholders; and (12) establishment of the Office of the Special Master for TARP Executive Compensation (Special Master) to address the application of these rules to TARP recipients and their employees. Among the duties and responsibilities of the Special Master with respect to TARP recipients of exceptional assistance is to review and approve compensation payments and compensation structures applicable to the SEOs and certain highly compensated employees, and to review and approve compensation structures applicable to certain additional highly compensated employees. TARP recipients that are not receiving exceptional assistance may apply to the Special Master for an advisory opinion with respect to compensation payments and structures. For further discussion of the Special Master's responsibilities, *see* section III.B of this preamble. Finally, this interim final rule also establishes compliance reporting and recordkeeping requirements regarding the rule's executive compensation and corporate governance standards. This interim final rule generally affects TARP recipients, their SEOs, and certain of their highly compensated employees.

I. Background

In October, 2008, the Department of the Treasury (Treasury) established the Troubled Asset Relief Program (TARP) under the Emergency Economic Stabilization Act of 2008, as amended (12 U.S.C. 5021 *et seq.*) (EESA). EESA provided immediate authority and facilities that the Secretary of the Treasury (Secretary) could use to restore liquidity and stability to the financial system. Section 101(a) of EESA authorizes the Secretary to establish the 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."

On February 13, 2009, Congress enacted the American Recovery and Reinvestment Act of 2009 (ARRA), which the President signed into law on February 17, 2009. Title VII of Division B of the ARRA amended in its entirety section 111 of EESA. Section 111 of EESA provides that certain entities that receive financial assistance from Treasury under the TARP (TARP recipients) will be subject to specified executive compensation and corporate governance standards to be established by the Secretary.

II. Previous Rulemaking

A. October 2008 Interim Final Rule

On October 20, 2008, Treasury published in the **Federal Register** an interim final rule (73 FR 62205) adding 31 CFR Part 30 under section 111 of EESA (prior to its later amendment by ARRA) (October 2008 Interim Final Rule). The October 2008 Interim Final Rule established the original executive compensation standards for financial institutions participating in the Capital Purchase Program (CPP), a financial stability program implemented under the TARP in October 2008. These standards generally applied to the senior executive officers (SEOs) of the CPP participant, that is, the principal executive officer (PEO), the principal financial officer (PFO), and the three most highly compensated executive officers in addition to the PEO and the PFO.

Section 111(b)(2)(A) of EESA, prior to the amendment by ARRA, required “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), the October 2008 Interim Final Rule required 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 October 2008 Interim Final Rule required that the compensation committee review (no more than ninety days after the purchase under the CPP and annually thereafter) the SEO incentive compensation arrangements with the financial institution’s senior risk officers to ensure that SEOs were not encouraged to take such risks. The compensation committee was then required to certify that it had completed those reviews.

Section 111(b)(2)(B) of EESA required “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 this section, the October 2008 Interim Final Rule required the SEO bonus and incentive compensation paid while Treasury holds an equity or debt position acquired under the CPP to be

subject to a provision for 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.

Section 111(b)(2)(C) of EESA required “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.” In accordance with this section, the October 2008 Interim Final Rule prohibited a financial institution from making any golden parachute payment to a SEO during the period Treasury holds an equity or debt position acquired under the CPP. The October 2008 Interim Final Rule defined a golden parachute payment as 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 of compensation.

The October 2008 Interim Final Rule also set forth an additional standard for executive compensation and corporate governance under the authority of section 111(b)(1) of EESA. This standard required the financial institution to forgo any deduction for compensation 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 (26 U.S.C. 162(m)(5)) applied to the financial institution.

B. Other Guidance

At the same time of the release of the October 2008 Interim Final Rule, Treasury also published guidance relating to other financial stability programs under TARP. Treasury Notice 2008–PSSFI addressed the provisions under section 111(b) of EESA as applicable to financial institutions participating in programs for systemically significant failing institutions. Treasury Notice 2008–PSSFI included the same standards as the October 2008 Interim Final Rule with one exception: It prohibited the financial institution from making any golden parachute payment (defined more strictly under Treasury Notice 2008–PSSFI as any payment made on account of an applicable severance from employment) to a SEO.

In addition, Treasury issued two notices on executive compensation requirements applicable to auction programs for purchasing troubled assets. First, pursuant to section 111(c) of

EESA, Notice 2008–TAAP prohibited any financial institution selling more than \$300,000,000 in troubled assets through an auction program from entering into a new SEO employment agreement with a golden parachute provision through the length of the program. Second, I.R.S. Notice 2008–94, addressing certain tax provisions in section 302 of EESA applicable to SEO compensation, required financial institutions selling more than \$300,000,000 in troubled assets through an auction program to forgo any deduction for compensation for Federal income tax purposes in excess of \$500,000 for each SEO under newly added section 162(m)(5) of the Internal Revenue Code (26 U.S.C. 162(m)(5)) and any deduction for certain SEO golden parachute payments under newly added section 280G(e) of the Internal Revenue Code (26 U.S.C. 280G(e)). In addition, I.R.S. Notice 2008–94 subjected SEOs to a 20-percent excise tax on these golden parachute payments.

On January 16, 2009, Treasury announced amendments to the October 2008 Interim Final Rule to include reporting and recordkeeping requirements under the executive compensation standards for the CPP. However, these amendments were returned from the **Federal Register** and never published and, thus, will never be effective.

The provisions of the ARRA and this interim final rule (Interim Final Rule) supersede the October 2008 Interim Final Rule, Notice 2008–PSSFI, and Notice 2008–TAAP, for periods for which the ARRA provisions described in this rule are effective. For a more detailed discussion of the effective dates, including the effective date of this Interim Final Rule, see § 30.17 (Q–17) of the Interim Final Rule, and the discussion of § 30.17 (Q–17) in section III.B of this preamble.

In addition, on February 4, 2009, Treasury issued new guidance on the executive compensation restrictions under EESA (February 2009 Treasury Guidance). The February 2009 Treasury Guidance provided financial institutions participating in the TARP with reporting and recordkeeping guidance, including guidance for compensation committees in preparing an explanation of how SEO compensation arrangements do not encourage excessive and unnecessary risk-taking.

For entities participating in an exceptional assistance program under the TARP, the February 2009 Treasury Guidance proposed to (1) limit the annual compensation of senior executives to \$500,000 other than

restricted stock or other similar long-term incentive arrangements; (2) require the vesting schedule of this restricted stock to be based on the financial institution's satisfying repayment obligations, protecting taxpayer interests, and meeting lending and stability standards; (3) require full disclosure of executive compensation structure and strategy and a non-binding shareholder resolution approving or disapproving the structure and strategy; (4) require provisions for clawback of bonuses and incentive compensation awarded to SEOs if based on materially inaccurate financial statements or performance metrics; (5) require provisions for the clawback of bonuses and incentive compensation awarded to the next twenty executive officers if based on materially inaccurate financial statements or performance metrics and the executive officers had knowingly engaged in providing inaccurate information relating to those financial statements or performance metrics; (6) limit the payment of any golden parachute payments to the SEOs and the next five executive officers; (7) prohibit the payment of any golden parachute payments greater than one year's compensation to the next twenty-five executive officers; and (8) provide guidance for boards of directors in adopting a luxury expenditures policy.

For entities participating in a generally available capital access program under the TARP, the February 2009 Treasury Guidance proposed to (1) limit SEO annual compensation to \$500,000 with any additional pay in the form of restricted stock or other similar long-term incentive arrangements carrying the same restrictions as for entities participating in an exceptional assistance program; (2) allow entities to waive this limitation only by disclosure of SEO compensation and, if requested, a non-binding shareholder resolution on that SEO compensation; (3) require provisions for clawback of bonuses and incentive compensation awarded to SEOs if based on materially inaccurate financial statements or performance metrics; (4) require provisions for clawback of bonuses and incentive compensation awarded to the next twenty executive officers if based on materially inaccurate financial statements or performance metrics and if the executive officers knowingly engaged in providing inaccurate information relating to those financial statements or performance metrics; (5) prohibit the payment of any golden parachute payments greater than one year's compensation to the SEOs; and (6) provide guidance for boards of

directors in adopting a luxury expenditures policy.

The February 2009 Treasury Guidance provided that the guidelines would not apply retroactively to existing investments or to previously announced programs. The February 2009 Treasury Guidance also anticipated a public comment period before implementation of the guidelines for generally available capital access programs. Before the full implementation of the February 2009 Treasury Guidance, Congress enacted the ARRA. The ARRA prescribes new executive compensation standards different from the Treasury Guidance (except for the similar provisions with respect to required clawback provisions and excessive or luxury expenditures policies), and requires Treasury to establish these standards by promulgating regulations to implement section 111. This Interim Final Rule complies with this statutory requirement to promulgate standards that implement the ARRA provisions, consolidates all of the executive-compensation-related provisions that are specifically directed at TARP recipients into a single rule (superseding all prior rules and guidance), and utilizes the discretion granted to the Secretary under the ARRA to adopt additional standards, some of which are adapted from principles set forth in the February 2009 Treasury Guidance.

III. The Interim Final Rule

This Interim Final Rule revises in its entirety 31 CFR Part 30, which comprises Treasury's regulations implementing section 111 of EESA.

A. Overview of Statutory Provisions

Generally, section 111 of EESA, as amended by ARRA, imposes corporate governance and executive compensation requirements on TARP recipients and requires Treasury to establish certain corporate governance and executive compensation standards with which TARP recipients must comply. Section 111 outlines several specific standards, and requires Treasury to establish these standards by promulgating regulations. Section 111 also authorizes Treasury to establish additional standards by regulation.

Section 111(b)(1) of EESA provides that a TARP recipient shall be subject to the standards established by the Secretary under that section and the provisions of section 162(m)(5) of the Internal Revenue Code, as applicable. The October 2008 Interim Final Rule required that all TARP recipients forgo any deduction for Federal income tax purposes for compensation that would

not be deductible if section 162(m)(5) of the Internal Revenue Code (26 U.S.C. 162(m)(5)) were to apply to the TARP recipient. Thus, TARP recipients generally agreed in their applicable contracts with Treasury under TARP not to claim a deduction for compensation during a taxable year in excess of \$500,000 for a SEO. This Interim Final Rule does not impose additional tax related restrictions beyond those that already apply under section 162(m)(5). However, because these contractual terms are not inconsistent with any provisions of this Interim Final Rule, the contractual provisions remain in effect, in accordance with their terms, and accordingly, TARP recipients continue to be required to forgo the applicable deduction. *See* § 30.17 (Q-17), and the discussion of § 30.17 (Q-17) in section III.B of this preamble. In addition, Treasury anticipates requiring this condition in any future agreements to provide TARP assistance.

Section 111(b)(3)(A) requires that Treasury promulgate standards limiting SEO compensation to exclude incentives for SEOs to take unnecessary and excessive risks threatening to the TARP recipient's value.

Section 111(b)(3)(B) requires Treasury to establish standards mandating that TARP recipients institute a provision to recover any bonus, retention award, or incentive compensation paid to a SEO and any of the next twenty most highly compensated employees of the TARP recipient if the compensation was based on materially inaccurate statements of earnings, revenues, gains, or other criteria (a provision sometimes referred to as a "clawback").

Section 111(b)(3)(C) requires Treasury to establish standards prohibiting TARP recipients from making golden parachute payments (defined in Section 111(a)(2) as any payment for "departure from a company for any reason, except for payments for services performed or benefits accrued") to a SEO or any of the next five most highly compensated employees.

Section 111(b)(3)(D) requires Treasury to establish standards prohibiting TARP recipients from paying or accruing any bonus, retention award, or incentive compensation to certain highly compensated employees or SEOs. This prohibition has two exceptions: (1) TARP recipients can pay or accrue such amounts if the amounts are payable as long-term restricted stock, provided that the stock does not fully vest until the repayment of TARP assistance, has a value that is no greater than one-third of the total annual compensation, and is subject to such other terms and conditions as the Secretary may

determine to be in the public interest; and (2) TARP recipients can make bonus payments required to be paid under written employment contracts executed on or before February 11, 2009 and determined to be valid by the Secretary. The number of employees to which this prohibition applies depends upon the amount of financial assistance provided to the TARP recipient.

Section 111(b)(3)(E) requires Treasury to establish standards prohibiting any employee compensation plan that would encourage manipulation of the reported earnings of the TARP recipient to enhance the compensation of any of its employees.

Section 111(b)(3)(F) and Section 111(c) require Treasury to mandate that the TARP recipient establish a compensation committee of its board of directors comprised entirely of independent members of the board of directors to meet at least semi-annually to review, discuss, and evaluate employee compensation plans in light of any assessment of any risks these plans pose to the TARP recipients. Section 111(c)(3) provides that the board of directors of a TARP recipient that has no common or preferred stock registered pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (Exchange Act) and has received \$25,000,000 or less in financial assistance is required to carry out the duties of the compensation committee as described above.

Section 111(d) requires a TARP recipient's board of directors to put in place a company-wide policy regarding excessive or luxury expenditures, as identified by the Secretary, and that may include excessive expenditures on entertainment or events, office and facility renovations, aviation or other transportation services, or 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 TARP recipient's business operations.

Section 111(e) requires that any proxy or consent or authorization for an annual or other meeting of the TARP recipient shareholders, as long as any obligation arising from TARP assistance remains outstanding, permit a separate nonbinding shareholder vote to approve the compensation of executives, as disclosed pursuant to the compensation disclosure rules of the Securities and Exchange Commission (SEC). Section 111(e)(3) directs the SEC to issue any final rules and regulations necessary to implement this requirement not later than February 17, 2010.

Section 111(b)(4) requires the chief executive officer and the chief financial officer of the TARP recipient (or equivalents thereof) to provide a written certification of compliance with the requirements of section 111 to the SEC, if the TARP recipient has publicly traded securities, or to the Secretary, if the TARP recipient does not have publicly traded securities.

Section 111(f) requires the Secretary to review bonuses, retention awards, and other compensation paid to CEOs and the next 20 most highly compensated employees of each TARP recipient before the date of enactment of the ARRA to determine whether any such payments were inconsistent with the purposes of section 111 of EESA or TARP or were otherwise contrary to the public interest, and if such a determination is made, to seek to negotiate with the TARP recipient and the subject employee for appropriate reimbursement.

Section 111(h) requires the Secretary to promulgate regulations to implement section 111.

B. Description of the Interim Final Rule

The major provisions of the Interim Final Rule, to be codified at 31 CFR Part 30, are as follows:

Section 111 specifies executive compensation and corporate governance standards applicable to TARP recipients. The standards are written in question and answer format.

Definitions used in the Interim Final Rule are set forth in § 30.1 (Q-1) of the Interim Final Rule. The executive compensation and corporate governance requirements under the Interim Final Rule apply to all TARP recipients, defined in section 111(a)(3) as "any entity that has received or will receive financial assistance under the financial assistance provided under the TARP." These restrictions will also generally apply to any entity of which the TARP recipient owns at least 50%, or which owns at least 50% of the TARP recipient, determined using certain provisions of sections 414(b) and (c) of the Internal Revenue Code, 26 U.S.C. 414(b) and (c), if those provisions were applied using a 50% ownership threshold instead of an 80% ownership threshold. In addition, these restrictions may apply to a related entity if the primary purpose for the creation or utilization of such entity is to avoid or evade some or all of the restrictions under section 111. These requirements generally apply for the period during which any obligation arising from financial assistance under the TARP remains outstanding (TARP period), except any period during which the

Federal government only holds warrants to purchase common stock of the TARP recipient. For TARP recipients that never hold an obligation, however, the more limited requirements generally apply through the last date of the TARP purchase authority.

The Interim Final Rule defines financial assistance to include direct financial transactions between Treasury and private sector participants in programs under the TARP. Although some determinations may be fact specific, entities that do not engage in financial transactions with Treasury as a counterparty generally will not be deemed to be receiving "financial assistance." As illustration, for purposes of the Interim Final Rule, financial institutions that sell preferred stock to Treasury through the Capital Purchase Program are receiving financial assistance and therefore are TARP recipients subject to the provisions of the Interim Final Rule. By contrast, entities that post collateral to and receive loans from the Federal Reserve Term Asset-Backed Securities Loan Facility (TALF) are not receiving "financial assistance provided under the TARP" and, therefore, are not TARP recipients under the Interim Final Rule. In the TALF program, Treasury has posted a subordinated loan to the Federal Reserve Bank of New York special purpose vehicle (SPV), which accepts forfeited collateral from TALF lending. Although the SPV has engaged in a financial transaction with Treasury, Treasury has not interpreted ARRA to require that the Federal Reserve Bank of New York, as a non-profit government instrumentality, be deemed to be receiving financial assistance. Importantly, Federal Reserve banks fulfill their governmental function by returning their annual profits to Treasury, which limits the extent to which a transaction with Treasury could be deemed to be financial assistance.

These requirements apply to CEOs and certain most highly compensated employees, as defined in § 30.1. Section 30.1 (Q-1) of the Interim Final Rule bases the determination of the CEOs on the executive compensation disclosure requirements in Item 402 of Regulation S-K under the Federal securities laws (17 CFR 229.402), which generally applies to the PEO, the PFO, and the three most highly compensated executive officers (other than the PEO and the PFO). Section 30.1 (Q-1) of the Interim Final Rule bases the identification of the three most highly compensated executive officers on annual compensation for the last completed fiscal year and defines annual compensation as it is determined

pursuant to Item 402(a) of Regulation S-K under the Federal securities laws (17 CFR 229.402(a)). To be consistent with the determination of the three most highly compensated executive officers, § 30.1 (Q-1) of the Interim Final Rule also defines the most highly compensated employees according to their annual compensation for the last completed fiscal year, as it is determined pursuant to Item 402(a) of Regulation S-K under the Federal securities laws (17 CFR 229.402(a)). However, a most highly compensated employee may be an employee who is not an executive officer. The Interim Final Rule does not limit application of the requirements to executive officers because the ARRA statutory language refers to most highly compensated employees, rather than most highly compensated executive officers, and therefore does not limit the coverage in this manner. A most highly compensated employee does not include a former employee of the TARP recipient who is not employed by the TARP recipient on the first day of the fiscal year for which the determination is being made (as opposed to the preceding fiscal year), unless such employee is reasonably anticipated to return to employment with the TARP recipient during the fiscal year.

The Interim Final Rule defines annual compensation in this manner for several reasons. Both the ARRA and the original EESA executive compensation provisions require that the senior executive officers be determined according to the compensation disclosure requirements under Federal securities regulations; it would be anomalous to treat the determination of most highly compensated employee compensation in a different manner. In addition, the compensation required to be disclosed under Federal securities regulations more closely reflects the economic reality of the compensation that the employee actually earned during the year by reporting compensation regardless of whether it was includible in income for income tax purposes during that year (for example, including the value of a stock option, deferred salary and bonuses when earned) in contrast to annual compensation reported as Form W-2 compensation, which reflects only compensation that was includible in income for income tax purposes during the calendar year regardless of when that compensation was earned (for example, including income from stock options generally at the time of exercise and including in income deferred salary and bonuses only when those amounts

are actually paid in a future year). Finally, public companies and investors are familiar with this SEC total annual compensation measurement, which was developed through an extensive notice and comment process and has been in effect since 2006 as part of the SEC's final revised executive compensation disclosure rule.

Because the most highly compensated employees are determined based on annual compensation earned in the prior year, the issue has been raised that a TARP recipient might be able to intentionally cycle employees in and out of most highly compensated employee status in alternate years to guarantee periods of complete exclusion for certain employees from the executive compensation limitations applicable to most highly compensated employees. Some methods that might mitigate, though not eliminate, this possibility include identifying the most highly compensated employees based on an averaging of the preceding two or three years' annual compensation, or requiring that some or all of the most highly compensated employees identified for one year remain subject to the limitations for a prescribed number of additional years, regardless of their subsequent level of compensation. The Treasury invites comment on this issue, including on the extent to which intentional cycling of most highly compensated employee status is likely to occur given that there is no overall compensation limitation on most highly compensated employees under the Interim Final Rule, potential methods of addressing the issue (including the methods previously mentioned), how such methods would be effective in deterring, eliminating, or limiting intentional cycling, and the extent of any additional administrative burdens that the application of such methods might create.

Section 30.1 (Q-1) of the Interim Final Rule requires that TARP recipients that are smaller reporting companies, as that term is defined in Item 10 of Regulation S-K under the Federal securities laws (17 CFR 229.10), identify five SEOs, even if only three named executive officers are required to be identified pursuant to Item 402(m) of Regulation S-K under the Federal securities laws (17 CFR 229.402(m)). Analogous rules apply to TARP recipients that do not have securities registered with the SEC pursuant to the Federal securities laws.

Prior to the annual identification of the SEOs, who are typically identified in the TARP recipient's annual report on Form 10-K or annual meeting proxy statement, and the most highly

compensated employees, § 30.3 (Q-3) of the Interim Final Rule requires that the TARP recipient ensure that a potential SEO or most highly compensated employee comply with the relevant executive compensation and corporate governance standards.

Several requirements under the Interim Final Rule relate to the compensation committee of the TARP recipient's board of directors, and its duties. Pursuant to section 111(b)(3)(A), section 111(b)(3)(E), and section 111(b)(3)(F), § 30.4 (Q-4) of the Interim Final Rule requires the TARP recipient to establish a compensation committee composed of independent members of the board of directors before the later of ninety days after the closing date of the agreement between Treasury and the TARP recipient or ninety days after June 15, 2009 to fulfill a number of duties. Many public company TARP recipients already maintain compensation committees of independent directors pursuant to stock exchange listing standards, and § 30.4 (Q-4) of the Interim Final Rule allows for the continued maintenance of already-established compensation committees. Section 30.4 (Q-4) of the Interim Final Rule also, in accordance with section 111(c)(3), provides an exception for certain private company TARP recipients. Thus, § 30.4 (Q-4) of the Interim Final Rule allows TARP recipients that have no securities registered pursuant to the Exchange Act and have received \$25,000,000 or less in financial assistance to either establish a compensation committee of independent directors or to delegate, as appropriate, to the board of directors the duties of the compensation committee as described below.

Each TARP recipient faces different material risks given the unique nature of its business and the markets in which it operates. Thus, § 30.5 (Q-5) of the Interim Final Rule requires the compensation committee to discuss, evaluate, and review at least every six months with senior risk officers SEO compensation plans and employee compensation plans and the risks these plans pose to the TARP recipient; identify and limit the features in the SEO compensation plans that could lead SEOs to take unnecessary and excessive risks that could threaten the value of the TARP recipient; and identify and limit any features in the employee compensation plans that pose risks to the TARP recipient to ensure that the TARP recipient is not unnecessarily exposed to risks, including any features in these SEO compensation plans or the employee compensation plans that would encourage behavior focused on

short-term results rather than long-term value creation. In addition, § 30.6 (Q-6) of the Interim Final Rule requires that the compensation committee discuss, evaluate, and review at least every six months the terms of each employee compensation plan and identify and eliminate the features in the plan that could encourage the manipulation of reported earnings of the TARP recipient to enhance the compensation of an employee.

Sections 30.4 (Q-4) and 30.7 (Q-7) of the Interim Final Rule require the compensation committee to provide annually a narrative description of how it limited the features in (1) SEO compensation plans that could encourage SEOs to take unnecessary and excessive risks that could threaten the value of the TARP recipient, including how these SEO compensation plans do not encourage behavior focused on short-term results rather than long-term value creation, (2) employee compensation plans to ensure that the TARP recipient is not unnecessarily exposed to risks, including how these employee compensation plans do not encourage behavior focused on short-term results rather than long-term value creation, and (3) employee compensation plans that could encourage the manipulation of reported earnings of the TARP recipient to enhance the compensation of an employee.

Sections 30.4 (Q-4) and 30.7 (Q-7) of the Interim Final Rule require that the compensation committee certify annually that it has completed the reviews of the SEO compensation plans and the employee compensation plans as outlined above. Section 30.7 (Q-7) of the Interim Final Rule also provides that TARP recipients with securities registered with the SEC pursuant to the Federal securities laws must provide these disclosures and certifications in the Compensation Committee Report required pursuant to Item 407 of Regulation S-K under the Federal securities laws (17 CFR 229.407) and to Treasury. Section 30.7 (Q-7) of the Interim Final Rule requires that TARP recipients that are smaller reporting companies or do not have securities registered with the SEC pursuant to the Federal securities laws provide the disclosures and certifications to their primary regulatory agency and to Treasury.

Pursuant to section 111(b)(3)(B), § 30.8 (Q-8) of the Interim Final Rule requires a TARP recipient to ensure that any bonus, retention award, or incentive compensation paid or accrued during the TARP period to a SEO or one of the next twenty most highly compensated

employees is subject to a provision for recovery or “clawback” by the TARP recipient if the payments or accruals were based on materially inaccurate financial statements or any other materially inaccurate performance metric criteria. Section 30.8 (Q-8) of the Interim Final Rule deems that bonuses, retention awards, and incentive compensation are paid or accrued to a SEO or any one of the next twenty most highly compensated employees during the TARP period when the SEO or one of the next twenty most highly compensated employees obtains a legally binding right to that payment during the TARP period.

This clawback provision differs from the clawback provision required under 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 or the chief financial officer of any bonus, incentive-based, or equity-based compensation received during the twelve-month period following a materially non-compliant financial report and any profits from sales of the company’s securities during that period. In contrast, the standard established under section 111(b)(3)(B) of EESA applies to the three most highly compensated executive officers and the next twenty most highly compensated employees in addition to the CEO and the CFO; applies to both public and private TARP recipients; applies to retention awards; is not exclusively triggered by a requirement to prepare an accounting restatement due to material noncompliance of the issuer as a result of misconduct; 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 calculate bonus payments.

Pursuant to section 111(b)(3)(C), § 30.9 (Q-9) of the Interim Final Rule prohibits a TARP recipient from making a golden parachute payment to a SEO or the next five most highly compensated employees during the TARP period. Under the Interim Final Rule, a golden parachute payment includes a payment for departure from a TARP recipient for any reason, other than a payment for services performed or benefits accrued. Pursuant to the authority granted the Secretary under section 111(b)(2) and section 111(h), the Interim Final Rule also treats as a golden parachute payment and amount due upon a change in control event of the TARP recipient. Section 30.1 (Q-1) of the Interim Final Rule excludes from the

definition of golden parachute payment qualified retirement plans and similar foreign retirement plans, as well as payments due to an employee’s death or disability and severance payments required by State statute or foreign law. Given the language of the ARRA, there is no longer any exception for any amount of a golden parachute payment, such as was allowed under the October 2008 Interim Final Rule. In addition, a golden parachute payment is treated as paid at the time of the employee’s departure, regardless of when the amounts are actually paid. Therefore, TARP recipients and employees may not avoid the restriction by deferring payment of the golden parachute payment past the end of the TARP period.

Pursuant to section 111(b)(3)(D), § 30.10 (Q-10) of the Interim Final Rule prohibits a TARP recipient from paying or accruing any bonus, retention award, or incentive compensation during the TARP period to certain employees. The TARP recipient’s amount of financial assistance determines the number of employees subject to this prohibition. This prohibition applies to the most highly compensated employee of any TARP recipient that has received less than \$25,000,000 in financial assistance; to at least the five most highly compensated employees of any TARP recipient that has received at least \$25,000,000 but less than \$250,000,000; the CEOs and at least the ten next most highly compensated employees of any TARP recipient that has received at least \$250,000,000 but less than \$500,000,000; and the CEOs and at least the twenty next most highly compensated employees of any TARP recipient that has received \$500,000,000 or more. Section 30.10 (Q-10) of the Interim Final Rule states that TARP recipients will be subject during the TARP period to the bonus limitation requirements based on the total amount of financial assistance outstanding under the TARP. If additional financial assistance would result in additional employees becoming subject to the prohibition, the prohibition on the additional employees will not be effective until the fiscal year following the year during which the additional financial assistance is received.

Section 30.1 (Q-1) of the Interim Final Rule includes definitions of a bonus, incentive compensation or retention award. A bonus means any payment in addition to any amount payable to an employee for services performed by the employee at a regular hourly, daily, weekly, monthly or similar periodic rate. Generally a bonus would not include a contribution to a

qualified plan, benefits under a broad-based benefit plan, bona fide overtime pay, and bona fide and routine expense reimbursements. Section 30.10 (Q-10) contains rules defining when bonuses will be treated as accruing or paid. Notably, section 30.10 (Q-10) contains an anti-abuse rule, intending to address circumstances in which a bonus that was not permitted to accrue during the year an employee was covered by the bonus limitation is paid to the employee in the subsequent year when the employee is not covered by the bonus limitation, but is designated as some other form of payment such as a salary increase or a stock option grant. In such a case, the payment in the subsequent year may be recharacterized as a payment of the bonus that was not permitted to accrue in the previous year.

Section 30.1 (Q-1) of the Interim Final Rule excepts from the definition of a bonus certain commission compensation for sales to, and investment management services for, unrelated parties. Many TARP recipients have broker-dealer, investment advisory, and insurance divisions, where registered representatives, investment advisors, and agents typically receive commissions based on the amount of sales of financial products or the value of assets under management. In this context, commission payments characteristically are viewed as a component of base salary rather than bonus compensation. However, fees earned from sales to entities within the affiliated group, investment banking, or proprietary trading are not considered commission compensation and the Interim Final Rule does not except these fees from the definition of a bonus or incentive compensation.

Section 30.1 (Q-1) of the Interim Final Rule generally defines an incentive compensation plan by reference to the Federal securities regulations. However, for purposes of this Interim Final Rule, an incentive compensation plan also includes a stock option or stock plan, regardless of whether those plans are subject to performance-based vesting. The inclusion of these arrangements is consistent with the statute's classifying the grant of a limited amount of long-term restricted stock as an exception to the bonus, incentive compensation, and retention award restrictions.

This inclusion of a stock plan in the definition of an incentive compensation plan does not restrict the TARP recipient's ability to pay salary or other permissible payments in the form of stock or other property, even if the stock is issued pursuant to a stock plan. In

addition, the payment may be made in stock that is subject to holding periods or transferability restrictions, such as not permitting the stock to be transferred for a specified number of years, until a specified event occurs (such as the employee's retirement, or a specified number of years after an employee's retirement or other termination of employment), or until certain TARP fund repayment hurdles are met. However, the payment must still be payment of salary or another permissible amount. Accordingly, the amount of the future payment must be denominated in dollars, rather than in a number of shares. For example, an employee could be entitled to a salary of \$5,000 per week, half payable in cash and half payable in stock valued at \$2,500 on each salary payment date. In addition, as salary, the stock or other property cannot be subject to a substantial risk of forfeiture or any requirement of future services (and thus the grant of such stock will not be treated as a retention award either), as distinguished from a restriction on transferability. The same analysis would apply to a grant of a stock unit (such as phantom stock or a restricted stock unit) with similar characteristics to the salary payment arrangement described above, in lieu of a grant of the same number of shares. Accordingly, the stock unit could not be subject to a substantial risk of forfeiture or other requirement of continued services, and would be payable at a fixed date in the future (and the arrangement would otherwise need to comply with the requirements of section 409A of the Internal Revenue Code (26 U.S.C. 409A)). However, such a structure generally will not be feasible during 2009 due to the restrictions under section 409A of the Internal Revenue Code (26 U.S.C. 409A).

Section 30.1 (Q-1) generally defines a retention award as any payment to an employee that is not payable periodically to an employee for service performed by the employee at a regular hourly, daily, weekly, monthly, or similar periodic rate, is contingent on the completion of a period of future service with the TARP recipient or the completion of a specific project or other activity of the TARP recipient, and is not based on the performance of the employee (other than a requirement that the employee not be separated from employment for cause) or the business activities or value of the TARP recipient. Exceptions are provided for a contribution to or payment made from a qualified plan, or a payment from a benefit plan, overtime pay or reasonable expense reimbursement. An exception

is also made for amounts accrued under a nonqualified deferred compensation plan, to the extent the amounts are accrued in the normal course of the employee's service at the TARP recipient and are not accrued by reason of a material enhancement of such benefits. An exception is not provided, however, for awards to new hires, including awards as part of a "make-whole" agreement intended to provide a newly hired employee a continuation of benefits accruing at a prior employer. Such awards are not structurally materially different from retention awards granted to current employees, which are intended to be subject to these restrictions.

Pursuant to section 111(b)(3)(D)(i), § 30.10 (Q-10) of the Interim Final Rule provides two exclusions from this prohibition on the payment or accrual of bonus, retention award, or incentive compensation. The TARP recipient is permitted to award long-term restricted stock to the employees subject to this prohibition. Because many TARP recipients, especially smaller, family-owned community banks as well as private financial institutions, would be unwilling or unable to award restricted stock, § 30.1 (Q-1) of the Interim Final Rule defines long-term restricted stock to include both restricted stock and restricted stock units, which can be settled in stock or cash, and which may be designed to track a specific unit or division within a TARP recipient.

Section 30.10 (Q-10) of the Interim Final Rule describes the restrictions imposed upon this stock. Pursuant to section 111(b)(3)(D)(i)(I), § 30.11 (Q-11) of the Interim Final Rule states that the value of the long-term restricted stock can be no greater than $\frac{1}{3}$ of the employee's total annual compensation. For purposes of determining annual compensation under the long-term restricted stock exception, all equity-based compensation granted will be included in the calculation only in the year in which it is granted, and will be included at its total fair market value on the grant date, so all equity-based compensation granted in fiscal years ending prior to June 15, 2009 will not be included in the calculation of annual compensation. In determining the value of the long-term restricted stock grant, the long-term restricted stock will be included in the calculation only in the year in which the restricted stock is granted, and will be included at its total fair market value on the grant date. This calculation of total annual compensation differs from the calculation used to determine the SEOs and most highly compensated employees each year, which is

determined pursuant to Item 402(a) of Regulation S-K under the Federal securities laws (17 CFR 229.402(a)). This is necessary to avoid a failure to comply with the Interim Final Rule, for instance, if other aspects of the employee's annual compensation decrease in a subsequent year, so that if the grant were included in compensation over multiple years, the one-third annual compensation limit could be exceeded merely due to such decrease.

Pursuant to section 111(b)(3)(D)(i)(II), § 30.10 (Q-10) of the Interim Final Rule states that the excepted long-term restricted stock must not fully vest until the repayment of all financial assistance by the TARP recipient. Section 30.10 (Q-10) of the Interim Final Rule requires that the employee provide services to the TARP recipient for at least two years after the date of the grant of the long-term restricted stock to vest in this stock, and prescribes a schedule under which such stock may become transferable (or in the case of a restricted stock unit, payable). Specifically, Section 30.10 (Q-10) of the Interim Final Rule establishes the following schedule, subject to the further requirements outlined below, for the long-term restricted stock: For each 25% of total financial assistance repaid, 25% of the total long-term restricted stock granted may become transferable, until the final repayment, at which time the remaining long-term restricted stock may become transferable. Because, in the case of restricted stock (but not a restricted stock unit), the fair market value of the stock may be subject to inclusion in income for income tax purposes before the stock becomes transferable, an exception to the transferability restriction is provided to the extent necessary to pay the applicable taxes. Nothing in the Interim Final Rule, however, prohibits vesting based on longer service periods or additional performance-based requirements.

Pursuant to section 111(b)(3)(D)(iii), § 30.10 (Q-10) of the Interim Final Rule also excludes from this prohibition any bonus, retention award, or incentive compensation payment required to be paid under a valid written employment contract executed on or before February 11, 2009 if the employee has a legally binding right under the contract to this payment. For purposes of determining whether an employee had a legally binding right to a payment, the Interim Final Rule uses rules specified in 26 CFR 1.409A-1(b)(1). In addition, the payment must be made in accordance with the terms of the contract as of February 11, 2009, such that any

amendment to the contract to increase the amount payable, accelerate any vesting conditions, or otherwise materially enhance the benefit available to the employee under the contract will result in the payment being treated as not made under the employment contract executed on or before February 11, 2009. The waiver by the employee of any benefits available to the employee under the terms of the contract will not result in the payment of other benefits under the contract being treated as made other than under the employment contract executed on or before February 11, 2009.

Whether an employee has accrued bonus, retention award, or incentive compensation is determined based on the facts and circumstances. However, to avoid circumvention of the Interim Final Rule by merely delaying bonus payments until after the employee is no longer subject to the prohibition, or granting retroactive service credits after the employee is no longer subject to the prohibition, if after the employee is no longer a SEO or most highly compensated employee, the employee is paid an amount, or provided a legally binding right to the payment of an amount, based upon services performed or compensation received during the period the employee was a SEO or most highly compensated employee, the employee will be treated as having accrued the amount during the period the employee was a SEO or most highly compensated employee.

Certain bonus, retention award, or incentive compensation may relate to a multi-year service period, during some portion of which the employee is subject to the prohibition and during some portion of which the employee is not subject to the prohibition. In such circumstances, the employee will not be treated as having accrued the bonus, retention award, or incentive compensation during the portion of the service period the employee was subject to the limitation, if the bonus, retention award, or incentive compensation is reduced to reflect at least the portion of the service period that the employee was subject to the prohibition. However, if the employee is subject to the prohibition at the time the amount would otherwise be paid, the amount still may not be paid until the payments to the employee are permitted.

A bonus, a retention award, or incentive compensation that an employee accrues while the employee is not subject to the prohibition on accrual or payment and is payable at a time when the employee has become subject to the prohibition, may not be paid until the employee is no longer subject to the

prohibition. In addition, as part of the conditions to a TARP recipient's receiving financial assistance under the TARP set forth in the contract between Treasury and the TARP recipient, the Federal government may require that certain other bonus, retention award, or incentive compensation not be paid during a designated period, such as the period during which the TARP recipient retains any financial assistance provided under TARP, or until some other condition related to the TARP recipient's financial health is satisfied. The issue has arisen as to whether the failure to pay such bonus, retention award, or incentive compensation would be treated as a subsequent deferral election that fails to comply with the requirements of section 409A of the Internal Revenue Code (26 U.S.C. 409A) or whether it would convert a payment that would otherwise be a short-term deferral, within the meaning of 26 CFR 1.409A-1(b)(4), into a payment of deferred compensation that would be subject to the restrictions in section 409A. Treasury and Internal Revenue Service officials have advised that the delay of the payment until such time as the recipient of the payment is no longer subject to the prohibition will not result in a failure to comply with the requirements of section 409A and will not result in a payment that otherwise would have been a short-term deferral being treated as a payment of deferred compensation, so long as the payment is made promptly following the first date upon which the payment could be made without violating the terms of the agreement between the TARP recipient and Treasury and in accordance with the Interim Final Rule. Accordingly, for purposes of the issuance of a restricted stock unit intended to qualify as long-term restricted stock as an exception to the bonus payment limitation, the unit may be structured with a payment date no later than the later of the end of the short-term deferral period or the first date upon which the payment is permissible under these rules and the applicable terms of the agreement between the TARP recipient and Treasury, and the unit will not be subject to section 409A provided the payment terms are satisfied.

Pursuant to section 111(d), § 30.12 (Q-12) of the Interim Final Rule requires that the board of directors of the TARP recipient adopt an excessive or luxury expenditures policy, file this policy with Treasury, and post the text of this policy on its Internet Web site, if the TARP recipient maintains a company Web site, before the later of ninety days after the closing date of the

agreement between Treasury and the TARP recipient or ninety days after June 15, 2009. Section 30.1 (Q-1) of the Interim Final Rule defines an excessive or luxury expenditures policy to require the inclusion of standards to ensure appropriate review and approval of potentially excessive and luxury expenditures. Section 30.1 (Q-1) of the Interim Final Rule requires that the policy (1) Identify the types and categories of expenses prohibited or requiring prior approval; (2) adopt approval procedures for those expenses requiring prior approval; (3) mandate PEO and PFO certification of the prior approval of any expenditures requiring the prior approval of any SEO, other similar executive officers, or the board of directors; (4) mandate prompt internal reporting of any violation of this policy; and (5) mandate accountability for adherence to this policy.

Section 30.12 (Q-12) of the Interim Final Rule requires that the board of directors of each TARP recipient determine what are excessive and luxury expenditures and establish a set of requirements specific to the TARP recipient under this policy. This is similar to the method by which public companies adopted a code of ethics under section 406 of Sarbanes-Oxley. Under the Federal securities regulations promulgated under section 406 of Sarbanes-Oxley (17 CFR 229.406), the SEC presented a general framework for a code of ethics, but the public company itself was required to adopt standards specific to the company using this general framework as a guide.

Pursuant to section 111(e), TARP recipients are required to permit a nonbinding shareholder resolution on SEO compensation as provided pursuant to the compensation disclosure rules under the Federal securities laws. Section 111(e) authorizes the SEC to promulgate any necessary final rules or regulations relating to this requirement. The Interim Final Rule requires TARP recipients to comply with any SEC guidance, rules, or regulations promulgated with respect to section 111(e).

Pursuant to section 111(h), and section 111(b)(2), the Secretary is authorized to establish additional executive compensation and corporate governance standards. The Secretary has determined to adopt four additional standards. First, § 30.11(a) (Q-11) of the Interim Final Rule requires that TARP recipients receiving exceptional financial assistance submit for approval the compensation payments and compensation structures of the SEO and most highly compensated employees

subject to the bonus payment limitation, and the compensation structures of all other executive officers and 100 most highly compensated employees, for approval by the Office of the Special Master for TARP Executive Compensation. However, if a TARP recipient limits the annual compensation for any executive who is not a SEO or a most highly compensated employee subject to the bonus limitation provision to \$500,000, with any additional compensation in long-term restricted stock, the compensation structure is not required to be submitted for approval. For this purpose, annual compensation and the value of the long-term restricted stock are determined in the same manner as provided in the long-term stock exception in § 30.10 (Q-10) of the Interim Final Rule.

Second, § 30.11(b) (Q-11) of the Interim Final Rule requires a TARP recipient to disclose to Treasury and its primary Federal regulator annually any perquisites whose total value exceeds \$25,000 for any employee who is subject to the limitations on bonus payments. TARP recipients are required to identify the amount and nature of the perquisites and disclose a justification for offering these perquisites. Existing Federal securities regulations require public companies only to identify for any of the top five executive officers or members of the boards of directors the type of perquisite if the total value of all perquisites exceeds \$10,000 for an individual officer or director; and the value of any perquisite if the value exceeds the greater of \$25,000 or 10% of the total amount of perquisites for an individual officer or director.

Third, § 30.11(c) (Q-11) of the Interim Final Rule requires a TARP recipient to disclose to Treasury and its primary Federal regulator annually whether the TARP recipient, the board, or the compensation committee has engaged a compensation consultant and all types of services the compensation consultant or any of its affiliates has provided to the TARP recipient, the board, or the compensation committee during the past three years, including any "benchmarking" or comparisons employed to identify certain percentile levels of compensation (for example, other peer group companies used for benchmarking and a justification for using these companies, and the lowest percentile level of other companies' employee compensation considered for compensation proposals). Existing Federal securities regulations require only that public companies identify compensation consultants and their role in setting executive and director compensation; whether the

compensation committee directly engages the compensation consultant; the nature and scope of the compensation consultant's assignment; and the material elements of the compensation consultant's duties under the engagement.

Fourth, § 30.11(d) (Q-11) of the Interim Final Rule prohibits TARP recipients from providing tax gross-ups or other reimbursements for the payment of taxes to any of the SEOs and next twenty most highly compensated employees relating to severance payments, perquisites, or any other form of compensation. Existing Federal securities regulations require only that public companies disclose "gross-ups" or other reimbursements to the SEOs for the payment of taxes. The Interim Final Rule excludes from this prohibition certain international tax equalization arrangements intended to compensate an employee for certain different taxes on account of an overseas assignment.

Section 30.14 (Q-14) of the Interim Final Rule includes a special rule for cases in which a TARP recipient (target) is acquired by an entity (acquirer) that is not a TARP recipient in an acquisition of any form. Under this rule, the acquirer does not become subject to section 111 of EESA as a result of the acquisition. In addition, the employees of the target who are SEOs or most highly compensated employees subject to section 111 immediately prior to the acquisition who continue employment with the acquirer will no longer be subject to section 111 of EESA after the acquisition. However, if the primary purpose of the acquisition is to avoid or evade application of section 111 of EESA, then the acquirer will be treated as a TARP recipient. For purposes of determining the affected employees, the principal executive officer and the principal financial officer of the post-acquisition acquirer are treated as SEOs. For purposes of identifying the most highly compensated employees, the acquirer employees and the pre-acquisition target employees who are employed at the acquirer (or anticipated to be employed at the acquirer) are aggregated and their most highly compensated employee status determined based upon the compensation earned during the most recently completed fiscal year at either the pre-acquisition acquirer or target, as appropriate.

Pursuant to section 111(b)(4), § 30.15 (Q-15) of the Interim Final Rule establishes a compliance reporting regime relating to the executive compensation requirements set forth in the Interim Final Rule. The Interim Final Rule requires that the PEO and the

PFO of the TARP recipient provide the following certifications within ninety days of the completion of each fiscal year any part of which is a TARP period: (1) The compensation committee has met at least every six months during the prior fiscal year with the senior risk officers of the TARP recipient to discuss and evaluate SEO compensation plans and employee compensation plans and the risks these plans pose to the TARP recipient; (2) the compensation committee has identified and limited the features in the SEO compensation plans that could lead SEOs to take unnecessary or excessive risks that could threaten the value of the TARP recipient, has identified any features in the employee compensation plans that pose risks to the TARP recipient, and has limited those features to ensure that the TARP recipient is not unnecessarily exposed to risks; (3) the compensation committee has reviewed at least every six months the terms of each employee compensation plan and identified and limited the features in the plan that could encourage the manipulation of reported earnings of the TARP recipient to enhance the compensation of an employee; (4) the compensation committee will certify to these reviews; (5) the compensation committee will provide a narrative description of how it limited the features in (i) SEO compensation plans that could lead SEOs to take unnecessary and excessive risks that could threaten the value of the TARP recipient, (ii) employee compensation plans to ensure that the TARP recipient is not unnecessarily exposed to risks, and (iii) employee compensation plans that could encourage the manipulation of reported earnings of the TARP recipient to enhance the compensation of an employee; (6) the TARP recipient has required that all bonuses, retention awards, and incentive compensation of the SEOs and next twenty most highly compensated employees be subject to a provision for recovery or "clawback" by the TARP recipient if the payments were based on materially inaccurate financial statements or any other materially inaccurate performance metric criteria; (7) the TARP recipient has prohibited any golden parachute payment to the SEOs and the next five most highly compensated employees; (8) the TARP recipient has limited bonuses, retention awards, and incentive compensation paid to or accrued by employees to whom the bonus payment limitation applies; (9) for a TARP recipient that has securities registered with the SEC under the Federal securities laws, it will permit a

non-binding shareholder resolution on the SEO compensation disclosures provided under the Federal securities laws in accordance with any guidance, rules, and regulations promulgated by the SEC; (10) the TARP recipient has adopted and maintains an excessive or luxury expenditures policy and has provided this policy to Treasury in each case in accordance with the requirements under the Interim Final Rule; (11) the TARP recipient will disclose the amount, nature, and justification for the offering of any perquisites whose total value exceeds \$25,000 for each of the employees subject to the bonus payment limitations; (12) the TARP recipient will disclose whether the TARP recipient, the board, or the compensation committee has engaged a compensation consultant, and the services the compensation consultant or any affiliate provided; (13) the TARP recipient has prohibited any tax gross-ups on compensation to the SEOs and the next twenty most highly compensated employees; (14) the TARP recipient has substantially complied with any compensation requirements set forth in the agreement between the TARP recipient and the Treasury, as may have been amended; (15) certain employees named in the certification are the SEOs and most highly compensated employees for the current fiscal year based on their compensation during the prior fiscal year; and (16) the officer certifying understands that a knowing and willful false or fraudulent statement made in connection with the certification may be punished by fine, imprisonment, or both (*See, for example* 18 U.S.C. 1001). In addition, the PEO and the PFO of a TARP recipient receiving exceptional financial assistance must certify that the TARP recipient has either limited annual compensation to \$500,000 (excluding grants of long-term restricted stock but including certain pension benefits and deferred compensation accruals otherwise excluded from annual compensation) for any executive officer or one of the 100 most highly compensated employees who is not subject to the bonus payment limitations and has or will pay any additional compensation in the form of long-term restricted stock, or to the extent not so limited the TARP recipient has had the compensation structure of those employees approved by the Office of the Special Master for TARP Executive Compensation.

Section 30.15 (Q-15) of the Interim Final Rule requires that TARP recipients that have securities registered with the

SEC pursuant to the Federal securities laws provide these certifications on Exhibit 99.1 in their annual report on Form 10-K and to Treasury, and that a TARP recipient that does not have securities registered with the SEC under the Federal securities laws provide these certifications to its primary regulatory agency and to Treasury. The TARP recipient must also 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, and must furnish promptly to Treasury any documentation and records requested by Treasury.

Section 30.15 (Q-15) of the Interim Final Rule also affirms that any individual or entity making or providing false information or certifications to Treasury pursuant to the Interim Final Rule or as required pursuant to this part may be subject to the criminal penalties under title 18 of the U.S. Code or other provision of Federal law.

To comply with EESA Section 111 and this Interim Final Rule, TARP recipients generally will need to modify compensation structures. For a small number of TARP recipients—those receiving exceptional assistance—the new compensation structures and compensation payments for SEOs and the most highly paid employees are subject to review and approval by the Office of the Special Master for TARP Executive Compensation (described below). In other instances, TARP recipients may find it helpful to have guidance as to how the rules apply to their particular circumstances, or confirmation that their modified compensation arrangements are compliant. In addition, under section 111(f), the Secretary is charged with reviewing bonuses, retention awards, and other compensation paid before February 17, 2009 to SEOs and the next twenty most highly compensated employees, and is required to determine whether any such payments were inconsistent with the purposes of EESA section 111 or the TARP, or were otherwise contrary to the public interest.

To conduct these reviews most efficiently, and to ensure that the rules are applied consistently and equitably, this Interim Final Rule establishes an Office of the Special Master for TARP Executive Compensation (Special Master). As described in Section 30.16 (Q-16) of the Interim Final Rule, the Special Master will be appointed by, and serve at the pleasure of, the Secretary. The Secretary may remove the Special Master without notice,

without cause, and before the naming of any successor Special Master. The scope of the Special Master's authority and responsibility is limited to compensation and corporate governance matters under section 111 with respect to TARP recipients, and the Special Master has no authority to provide guidance or review any submissions with respect to matters other than compensation and corporate governance matters under section 111, or to provide guidance or review any submissions with respect to compensation or corporate governance matters of employers that are not TARP recipients. The Secretary has delegated to the Special Master the authority to (1) interpret the application of the restrictions on executive compensation and corporate governance requirements for TARP recipient employees under EESA, these regulations, and any other applicable guidance, to specific facts and circumstances; (2) administer section 111(f) of EESA, which requires the Secretary to review bonuses, retention awards, and other compensation paid before February 17, 2009 to employees of each entity receiving TARP assistance, to determine whether any such payments were inconsistent with the purposes of EESA section 111 or the TARP, or otherwise contrary to the public interest, and which further requires that, if the Secretary makes such a determination, the Secretary seek to negotiate with the TARP recipient and the employee for appropriate reimbursements to the Federal Government with respect to compensation or bonuses; (3) approve compensation payments to, and compensation structures for, certain employees of TARP recipients receiving exceptional financial assistance; (4) provide opinions, as requested or otherwise as appropriate, regarding payments to, or compensation structures for, other employees of TARP recipients; and (5) perform such other duties as the Secretary may delegate from time to time to the Special Master relating to executive compensation issues under the TARP, including the specific application of any terms or conditions in a contract between the Treasury and a TARP recipient. Section 30.16 (Q-16) also outlines a set of principles that the Special Master is required to follow in conducting these reviews.

Treasury requests comments on potential procedures and terms under which employees may return compensation to the TARP recipient or the TARP recipient may reimburse Treasury either for compensation paid that the Special Master has determined

is inconsistent with the purposes of EESA section 111 or the TARP, or otherwise contrary to the public interest, or for compensation that was paid contrary to the requirements of EESA section 111 and this Interim Final Rule.

Section 30.17 (Q-17) of the Interim Final Rule states that the standards under the Interim Final Rule are effective upon June 15, 2009, except with respect to certain sections of the ARRA amendments that were effective immediately upon enactment of the statute (for example, amended section 111(d) requiring a nonbinding shareholder vote on executive compensation). Accordingly, the bonus payment limitations under the Interim Final Rule will not apply to bonuses, retention awards, and incentive compensation paid or accrued by TARP recipients or their employees prior to June 15, 2009, and the enhanced golden parachute prohibition will not apply to amounts paid prior to June 15, 2009. In addition, as discussed above, the bonus payment limitations under the Interim Final Rule will not apply to bonuses, retention awards, and incentive compensation required to be paid pursuant to a written employment contract executed on or before February 11, 2009 (a grandfathered arrangement), that is paid on or after June 15, 2009. However, the Special Master may provide an advisory opinion on either or both of these categories of payments, stating whether such payments are consistent with ARRA or EESA, or otherwise contrary to the public interest, under the same standards applied to the Special Master's review of compensation paid to certain employees prior to the enactment date of ARRA, and may seek reimbursement of such payments where appropriate. Finally, the Special Master will take into account any payment made prior to June 15, 2009, or any payment made or that may be made pursuant to a grandfathered arrangement, as part of the Special Master's review of the compensation payments and structures required to be approved by the Special Master for certain employees of TARP recipients receiving exceptional assistance, and for any advisory opinion the Special Master may issue with respect to a compensation structure for, or compensation payment to, a TARP recipient employee.

In addition, for the period before June 15, 2009, the provisions of the October 2008 Interim Final Rule, Notice 2008-PSSFI, and Notice 2008-TAAP, remained in effect. Subject to ARRA and this Interim Final Rule, all contractual provisions to which a TARP recipient

agreed prior to the enactment of ARRA or the publication of this Interim Final Rule also continue in effect.

IV. Procedural Requirements

Justification for Interim Rulemaking

The Interim Final Rule is promulgated pursuant to EESA, as amended, which immediately provides for authority and facilities that the Secretary can use to restore liquidity and stability to the financial system of the United States. Specifically, the Interim Final Rule implements certain provisions of section 111 of EESA, which directs Treasury to establish executive compensation and corporate governance standards for entities receiving financial assistance under the TARP.

To encourage entities to choose or continue to participate in the TARP, those entities must have timely and reliable information with respect to the applicable executive compensation and corporate governance rules that apply under the TARP. Accordingly, because of exigencies in the financial markets, 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 the 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), Treasury has determined that there is good cause for the Interim Final Rule to become effective immediately upon publication. While the Interim Final Rule is effective immediately upon publication, Treasury is inviting public comment on the Interim Final Rule during a sixty-day period and will consider all comments in developing a final rule.

Regulatory Planning and Review

The Interim Final Rule is designated as a "significant regulatory action" as defined in Executive Order 12866. The agency has not prepared a regulatory impact analysis consistent with the OMB Circular A-4 that examines the likely benefits and costs associated with this interim rule. The agency plans to prepare such analysis when it promulgates a final rule that will supersede this rulemaking.

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required, the 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 the Interim Final Rule has been submitted to the Office of Management

and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. 35) and OMB approval is pending. 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, DC 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.

■ Accordingly, under the authority of 12 U.S.C. 5221, for the reasons set out in the preamble, Treasury amends 31 CFR Subtitle A by revising part 30 to read as follows:

PART 30—TARP STANDARDS FOR COMPENSATION AND CORPORATE GOVERNANCE

Sec.

- 30.0 Executive compensation and corporate governance.
- 30.1 Q-1: What definitions apply in this part?
- 30.2 Q-2: To what entities does this part apply?
- 30.3 Q-3: How are the SEOs and the most highly compensated employees identified for purposes of compliance with this part?
- 30.4 Q-4: What actions are necessary for a TARP recipient to comply with the standards established under sections 111(b)(3)(A), 111(b)(3)(E), 111(b)(3)(F) and 111(c) of EESA (evaluation of employee plans and potential to encourage excessive risk or manipulation of earnings)?
- 30.5 Q-5: How does a TARP recipient comply with the requirements under § 30.4 (Q-4) of this part that the compensation committee discuss, evaluate, and review the SEO compensation plans and other employee compensation plans to ensure that the SEO compensation plans do not encourage the SEOs to take unnecessary and excessive risks that threaten the value of the TARP recipient, or that the employee compensation plans pose unnecessary risks to the TARP recipient?
- 30.6 Q-6: How does a TARP recipient comply with the requirement under § 30.4 (Q-4) of this part that the compensation committee discuss, evaluate, and review the employee compensation plans to ensure that these

plans do not encourage the manipulation of reported earnings of the TARP recipient to enhance the compensation of any of the TARP recipient's employees?

- 30.7 Q-7: How does a TARP recipient comply with the certification and disclosure requirements under § 30.4 (Q-4) of this part?
- 30.8 Q-8: What actions are necessary for a TARP recipient to comply with the standards established under section 111(b)(3)(B) of EESA (the "clawback" provision requirement)?
- 30.9 Q-9: What actions are necessary for a TARP recipient to comply with the standards established under section 111(b)(3)(C) of EESA (the prohibition on golden parachute payments)?
- 30.10 Q-10: What actions are necessary for a TARP recipient to comply with section 111(b)(3)(D) of EESA (the limitation on bonus payments)?
- 30.11 Q-11: Are TARP recipients required to meet any other standards under the executive compensation and corporate governance standards in section 111 of EESA?
- 30.12 Q-12: What actions are necessary for a TARP recipient to comply with section 111(d) of EESA (the excessive or luxury expenditures policy requirement)?
- 30.13 Q-13: What actions are necessary for a TARP recipient to comply with section 111(e) of EESA (the shareholder resolution on executive compensation requirement)?
- 30.14 Q-14: How does section 111 of EESA operate in connection with an acquisition, merger, or reorganization?
- 30.15 Q-15: What actions are necessary for a TARP recipient to comply with the certification requirements of section 111(b)(4) of EESA?
- 30.16 Q-16: What is the Office of the Special Master for TARP Executive Compensation, and what are its powers, duties and responsibilities?
- 30.17 Q-17: How do the effective date provisions apply with respect to the requirements under section 111 of EESA?

Authority: 12 U.S.C. 5221; 31 U.S.C. 321.

§ 30.0 Executive compensation and corporate governance.

The following questions and answers reflect the executive compensation and corporate governance requirements of section 111 of the Emergency Economic Stabilization Act of 2008, as amended (12 U.S.C. 5221) (EESA), with respect to participation in the Troubled Assets Relief Program (TARP) established by the Department of the Treasury (Treasury) thereunder.

§ 30.1 Q-1: What definitions apply in this part?

Affiliate. The term "affiliate" means an "affiliate" as that term is defined in Rule 405 of the Securities Act of 1933 (17 CFR 230.405).

Annual compensation. (1) *General rule.* The term "annual compensation"

means, except as otherwise explicitly provided in this part, the dollar value for total compensation for the applicable fiscal year as determined pursuant to Item 402(a) of Regulation S-K under the Federal securities laws (17 CFR 229.402(a)). Accordingly, for this purpose the amounts required to be disclosed pursuant to paragraph (c)(2)(viii) of Item 402(a) of Regulation S-K (actuarial increases in pension plans and above market earnings on deferred compensation) are not required to be included in annual compensation.

(2) *Application to private TARP recipients.* For purposes of determining annual compensation, a TARP recipient that does not have securities registered with the SEC pursuant to the Federal securities laws must follow the requirements set forth in paragraph (1) of this definition.

ARRA. The term "ARRA" means the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5).

Benefit plan. The term "benefit plan" means any plan, contract, agreement or other arrangement that is an "employee welfare benefit plan" as that term is defined in section 3(1) of the Employee Retirement Income Security Act of 1974, as amended (29 U.S.C. 1002(1)), or other usual and customary plans such as dependent care, tuition reimbursement, group legal services or cafeteria plans; provided, however, that this term does not include:

(1) Any plan that is a deferred compensation plan; or

(2) Any severance pay plan, whether or not nondiscriminatory, or any other arrangement that provides for payment of severance benefits to eligible employees upon voluntary termination for good reason, involuntary termination, or termination under a window program as defined in 26 CFR 1.409A-1(b)(9)(vi).

Bonus. The term "bonus" means any payment in addition to any amount payable to an employee for services performed by the employee at a regular hourly, daily, weekly, monthly, or similar periodic rate. Such term generally does not include payments to or on behalf of an employee as contributions to any qualified retirement plan (as defined in section 4974(c) of the Internal Revenue Code (26 U.S.C. 4974(c))), benefits under a broad-based benefit plan, bona fide overtime pay, or bona fide and routine expense reimbursements. In addition, provided that the rate of commission is pre-established and reasonable, and is applied consistently to the sale of substantially similar goods or services, commission compensation will not be treated as a bonus. For this purpose, a

bonus may include a contribution to, or other increase in benefits under, a nonqualified deferred compensation plan, regardless of when the actual payment will be made under the plan. A bonus may also qualify as a retention award or as incentive compensation.

Bonus payment. For purposes of this part, except where otherwise noted, the term “bonus payment” includes a payment that is, or is in the nature of, a bonus, incentive compensation, or retention award. Whether a payment is a bonus payment, or whether the right to a payment is a right to a bonus payment, is determined based upon all the facts and circumstances, and a payment may be a bonus payment regardless of the characterization of such payment by the TARP recipient or the employee. For purposes of this part, a bonus payment may include the forgiveness of a loan or other amount that otherwise may be required to be paid by the employee to the employer.

Commission compensation. (1)

Definition. The term “commission compensation” means:

(i) Compensation or portions of compensation earned by an employee consistent with a program in existence for that type of employee as of February 17, 2009, if a substantial portion of the services provided by this employee consists of the direct sale of a product or service to an unrelated customer, these sales occur frequently and in the ordinary course of business of the TARP recipient (but not a specified transaction, such as an initial public offering or sale or acquisition of a specified entity or entities), the compensation paid by the TARP recipient to the employee consists of either a portion of the purchase price for the product or service sold to the unrelated customer or an amount substantially all of which is calculated by reference to the volume of sales to the unrelated customers, and payment of the compensation is either contingent upon the TARP recipient receiving payment from the unrelated customer for the product or service or, if applied consistently to all similarly situated employees, is contingent upon the closing of the sales transaction and such other requirements as may be specified by the TARP recipient before the closing of the sales transaction with the unrelated customer;

(ii) Compensation or portions of compensation earned by an employee that meet the requirements of paragraph (1)(i) of this definition except that the transaction occurs with a related customer, provided that substantial sales from which commission compensation arises are made, or

substantial services from which commission compensation arises are provided, to unrelated customers by the service recipient, the sales and service arrangement and the commission arrangement with respect to the related customer are bona fide, arise from the service recipient's ordinary course of business, and are substantially the same, both in term and in practice, as the terms and practices applicable to unrelated customers to which individually or in the aggregate substantial sales are made or substantial services provided by the service recipient; or

(iii) Compensation or portions of compensation earned by an employee consistent with a program in existence for that type of employee as of February 17, 2009, if a substantial portion of the services provided by this employee to the TARP recipient consists of sales of financial products or other direct customer services with respect to unrelated customer assets or unrelated customer asset accounts that are generally intended to be held indefinitely (and not customer assets intended to be used for a specific transaction, such as an initial public offering, or sale or acquisition of a specified entity or entities), the unrelated customer retains the right to terminate the customer relationship and may move or liquidate the assets or asset accounts without undue delay (which may be subject to a reasonable notice period), the compensation consists of a portion of the value of the unrelated customer's overall assets or asset account balance, an amount substantially all of which is calculated by reference to the increase in the value of the overall assets or account balance during a specified period, or both, or is calculated by reference to a contractual benchmark (such as a securities index or peer results), and the value of the overall assets or account balance and commission compensation is determined at least annually. For purposes of this definition, a customer is treated as an unrelated customer if the person would not be treated as related to the TARP recipient under 26 CFR 1.409A-1(f)(2)(ii) and the person would not be treated as providing management services to the TARP recipient under 26 CFR 1.409A-1(f)(2)(iv).

(2) **Examples.** The following examples illustrate the provisions of paragraph (1) of this definition:

Example 1. Employee A is an employee of TARP recipient. Among TARP recipient's businesses is the sale of life insurance policies, and TARP recipient buys and sells such policies frequently as part of its ordinary course of business. Employee A's

primary duties consist of selling life insurance policies to customers unrelated to the TARP recipient. Under a commission program existing for all TARP Recipient employees selling life insurance policies as of February 17, 2009, Employee A is entitled to receive an amount equal to 75% of the total first year's premium paid by an unrelated customer to whom Employee A has sold a life insurance policy. The payments to Employee A under the program constitute commission compensation.

Example 2. The same facts as Example 1, except that under the program, the rate of commission increases to 80% of the total first year's premium paid by a customer once Employee A has sold \$10 million in policies in a year. Provided that 80% is a reasonable commission, the payments to Employee A under the program constitute commission compensation.

Example 3. Employee B is an employee of TARP recipient. Among TARP recipient's businesses is the investment management of unrelated customer asset accounts, and TARP recipient provides such services routinely and in the ordinary course of business. Employee B's primary duties as an employee consist of managing the investments of the asset accounts of specified unrelated customers who have deposited amounts with the TARP recipient. Under a program in existence on February 17, 2009, Employee B is entitled to receive an amount equal to 1% of the aggregate account balances of the assets under management, as determined each December 31. The payments to Employee B constitute commission compensation.

Example 4. TARP recipient employs Employee C. As part of Employee C's duties, Employee C is responsible for specified aspects of any acquisition of an unrelated entity by TARP Recipient. As part of an acquisition in 2009, Employee C is entitled to 1% of the purchase price if and when the transaction closes. Regardless of whether such an arrangement was customary or established under a specific program as of February 17, 2009, the amount is not commission compensation because the compensation relates to a specified transaction, in this case the purchase of the entity. Accordingly, the compensation is incentive compensation.

Example 5. TARP recipient employs Employee D. As part of Employee D's duties, Employee D is responsible for managing the initial public offerings of securities of unrelated customers of TARP recipient. As part of an initial public offering in 2009, Employee D is entitled to 1% of the purchase price if and when the initial public offering closes. Regardless of whether such an arrangement was customary or established under a specific program as of February 17, 2009, the amount is not commission compensation because the compensation relates to a specified transaction, in this case the initial public offering. Accordingly, the compensation is incentive compensation.

Compensation means all remuneration for employment, including but not limited to salary, commissions, tips, welfare benefits,

retirement benefits, fringe benefits and perquisites.

Compensation committee. (1) *General rule.* The term “compensation committee” means a committee of independent directors, whose independence is determined pursuant to Item 407(a) of Regulation S-K under the Federal securities laws (17 CFR 229.407(a)).

(2) *Application to private TARP recipients.* For purposes of determining director independence, a TARP recipient that does not have securities registered with the SEC pursuant to the Federal securities laws must follow the requirements set forth in Item 407(a)(1)(ii) of Regulation S-K under the Federal securities laws (17 CFR 229.407(a)(1)(ii)).

Compensation structure. The term “compensation structure” means the characteristics of the various forms of total compensation that an employee receives or may receive, including the amounts of such compensation or potential compensation relative to the amounts of other types of compensation or potential compensation, the amounts of such compensation or potential compensation relative to the total compensation over the relevant period, and how such various forms of compensation interrelate to provide the employee his or her ultimate total compensation. These characteristics include, but are not limited to, whether the compensation is provided as salary, short-term incentive compensation, or long-term incentive compensation, whether the compensation is provided as cash compensation, equity-based compensation, or other types of compensation (such as executive pensions, other benefits or perquisites), and whether the compensation is provided as current compensation or deferred compensation.

Deferred compensation plan. The term “deferred compensation plan” means

(1) Any plan, contract, agreement, or other arrangement under which an employee voluntarily elects to defer all or a portion of the reasonable compensation, wages, or fees paid for services rendered which otherwise would have been paid to the employee at the time the services were rendered (including a plan that provides for the crediting of a reasonable investment return on such elective deferrals), provided that the TARP recipient either:

(i) Recognizes a compensation expense and accrues a liability for the benefit payments according to GAAP; or

(ii) Segregates or otherwise sets aside assets in a trust which may only be used to pay plan and other benefits, except

that the assets of this trust may be available to satisfy claims of the TARP recipient's creditors in the case of insolvency; or

(2) A nonqualified deferred compensation or supplemental retirement plan, other than an elective deferral plan established by a TARP recipient:

(i) Primarily for the purpose of providing benefits for a select group of directors, management, or highly compensated employees in excess of the limitations on contributions and benefits imposed by sections 415, 401(a)(17), 402(g) or any other applicable provision of the Internal Revenue Code (26 U.S.C. 415, 401(a)(17), 402(g)); or

(ii) Primarily for the purpose for providing supplemental retirement benefits or other deferred compensation for a select group of directors, management or highly compensated employees (excluding severance payments).

EESA. The term “EESA” means the Emergency Economic Stabilization Act of 2008, as amended.

Employee. The term “employee” means an individual serving as a servant in the conventional master-servant relationship as understood by the common-law agency doctrine. In general, a partner of a partnership, a member of a limited liability company, or other similar owner in a similar type of entity, will not be treated as an employee for this purpose. However, to the extent that the primary purpose for the creation or utilization of such partnership, limited liability company, or other similar type of entity is to avoid or evade any or all of the requirements of section 111 of EESA or these regulations with respect to a partner, member or other similar owner, the partner, member or other similar owner will be treated as an employee. In addition, a personal service corporation or similar intermediary between the TARP recipient and an individual providing services to the TARP recipient will be disregarded for purposes of determining whether such individual is an employee of the TARP recipient.

Employee compensation plan. The term “employee compensation plan” means “plan” as that term is defined in Item 402(a)(6)(ii) of Regulation S-K under the Federal securities laws (17 CFR 229.402(a)(6)(ii)), but only any employee compensation plan in which two or more employees participate and without regard to whether an executive officer participates in the employee compensation plan.

Exceptional financial assistance. The term “exceptional financial assistance” means any financial assistance provided under the Programs for Systemically Significant Failing Institutions, the Targeted Investment Program, the Automotive Industry Financing Program, and any new program designated by the Secretary as providing exceptional financial assistance.

Excessive or luxury expenditures. The term “excessive or luxury expenditures” means excessive expenditures on any of the following to the extent such expenditures are not reasonable expenditures for staff development, reasonable performance incentives, or other similar reasonable measures conducted in the normal course of the TARP recipient's business operations:

(1) Entertainment or events;

(2) Office and facility renovations;

(3) Aviation or other transportation services; and

(4) Other similar items, activities, or events for which the TARP recipient may reasonably anticipate incurring expenses, or reimbursing an employee for incurring expenses.

Excessive or luxury expenditures policy. The term “excessive or luxury expenditures policy” means written standards applicable to the TARP recipient and its employees that address the four categories of expenses set forth in the definition of “excessive or luxury expenditures” (entertainment or events, office and facility renovations, aviation or other transportation services, and other similar items, activities or events), and that are reasonably designed to eliminate excessive and luxury expenditures. Such written standards must:

(1) Identify the types or categories of expenditures which are prohibited (which may include a threshold expenditure amount per item, activity, or event or a threshold expenditure amount per employee receiving the item or participating in the activity or event);

(2) Identify the types or categories of expenditures for which prior approval is required (which may include a threshold expenditure amount per item, activity, or event or a threshold expenditure amount per employee receiving the item or participating in the activity or event);

(3) Provide reasonable approval procedures under which an expenditure requiring prior approval may be approved;

(4) Require PEO and PFO certification that the approval of any expenditure requiring the prior approval of any SEO, any executive officer of a substantially similar level of responsibility, or the TARP recipient's board of directors (or

a committee of such board of directors), was properly obtained with respect to each such expenditure;

(5) Require the prompt internal reporting of violations to an appropriate person or persons identified in this policy; and

(6) Mandate accountability for adherence to this policy.

Executive officer. The term “executive officer” means an “executive officer” as that term is defined in Rule 3b-7 of the Securities Exchange Act of 1934 (Exchange Act) (17 CFR 240.3b-7).

Financial assistance. (1) *Definition.* The term “financial assistance” means any funds or fund commitment provided through the purchase of troubled assets under the authority granted to Treasury under section 101 of EESA or the insurance of troubled assets under the authority granted to Treasury under section 102 of EESA, provided that the term “financial assistance” does not include any loan modification under sections 101 and 109 of EESA. A change in the form of previously received financial assistance, such as a conversion of convertible preferred stock to common stock, is not treated as new or additional financial assistance.

(2) *Examples.* The following examples illustrate the provisions of paragraph (1) of this definition:

Example 1. Company A sells \$500,000,000 of preferred stock to Treasury through the Capital Purchase Program. Company A has received financial assistance.

Example 2. Company B posts collateral to and receives a loan from the Federal Reserve special purpose vehicle under the Term Asset-Backed Security Loan Facility program. Company B has neither sold troubled assets to Treasury, nor insured troubled assets through Treasury, and therefore has not received financial assistance.

Example 3. LP C is a limited partnership established for the purpose of participating in the Public Private Investment Program. LP C has a general partner (GP) that makes management decisions on behalf of LP C. A limited liability company controlled by an affiliate of GP (LLC partner) raises \$55,000,000 from twenty investors, with each investing equal shares, joins LP C as a limited partner, and invests those funds for a 55% equity interest in LP C. LP C sells a \$45,000,000 equity interest to Treasury. LP C, at the direction of the GP, will buy and sell securities as investments and manage those investments. LP C will contract for investment advice from an investment advisor that is an affiliate of GP. LP C has received financial assistance. LLC partner has received financial assistance because it is treated as the same employer as LP C according to the standards set forth in paragraph (1)(ii) of the definition of “TARP recipient”. The investors in the LLC partner have not received financial assistance because they are not treated as the same employer as LP C according to the standards

set forth in paragraph (1)(ii) of the definition of “TARP recipient”. GP is not an employee of LP C pursuant to the definition of “employee” in this rule, and is not treated as the same employer as LP C according to the standards set forth in paragraph (1)(ii) of the definition of “TARP recipient”. The investment advisor-contractor to LP C has not received financial assistance. Entities that sell securities to or buy securities from LP C have neither sold troubled assets to Treasury nor insured troubled assets through Treasury, and therefore have not received financial assistance.

Example 4. Company D, a servicer of mortgage loans or mortgaged-backed securities, issues a financial instrument to Treasury’s financial agent in which Company D commits to modify mortgages it is servicing consistent with guidelines established by Treasury under the Home Affordable Modification Program. Treasury, through its financial agent, commits to pay up to \$800,000,000 in incentive payments and credit enhancements for Company E’s commitment to modify mortgages. Company E has not received financial assistance.

GAAP. The term “GAAP” means U.S. generally accepted accounting principles.

Golden parachute payment. (1)

General rule. The term “golden parachute payment” means any payment for the departure from a TARP recipient for any reason, or any payment due to a change in control of the TARP recipient or any entity that is included in a group of entities treated as one TARP recipient, except for payments for services performed or benefits accrued. For this purpose, a change in control includes any event that would qualify as a change in control event as defined in 26 CFR 1.280G–1, Q&A–27 through Q&A–29 or as a change in control event as defined in 26 CFR 1.409A–3(i)(5)(i). For this purpose, a golden parachute payment includes the acceleration of vesting due to the departure or the change in control event, as applicable. A golden parachute payment is treated as paid at the time of departure or change in control event, and is equal to the aggregate present value of all payments made for a departure or a change in control event (including the entire aggregate present value of the payment if the vesting period was not otherwise completed but was accelerated due to departure, regardless of whatever portion of the required vesting period the employee had completed). Thus, a golden parachute payment may include a right to amounts actually payable after the TARP period.

(2) *Exclusions.* For purposes of this part, a golden parachute payment does not include any of the following:

(i) Any payment made pursuant to a pension or retirement plan which is qualified (or is intended within a

reasonable period of time to be qualified) under section 401 of the Internal Revenue Code (26 U.S.C. 401) or pursuant to a pension or other retirement plan which is governed by the laws of any foreign country;

(ii) Any payment made by reason of the departure of the employee due to the employee’s death or disability; or

(iii) Any severance or similar payment which is required to be made pursuant to a State statute or foreign law (independent of any terms of a contract or other agreement) which is applicable to all employers within the appropriate jurisdiction (with the exception of employers that may be exempt due to their small number of employees or other similar criteria).

(3) *Payments for services performed or benefits accrued.* (i) *General rules.*

Except as otherwise provided for payments made under a deferred compensation plan or a benefit plan in paragraph (4) of this definition, a payment made, or a right to a payment arising under a plan, contract, agreement, or other arrangement (including the acceleration of any vesting conditions) is for services performed or benefits accrued only if the payment was made, or the right to the payment arose, for current or prior services to the TARP recipient (except that an appropriate allowance may be made for services for a predecessor employer). Whether a payment is for services performed or benefits accrued is determined based on all the facts and circumstances. However, a payment, or a right to a payment, generally will be treated as a payment for services performed or benefits accrued only if the payment would be made regardless of whether the employee departs or the change in control event occurs, or if the payment is due upon the departure of the employee, regardless of whether the departure is voluntary or involuntary (other than reasonable restrictions, such as the forfeiture of the right to a payment for an involuntary departure for cause, but not restrictions relating to whether the departure was a voluntary departure for good reason or subsequent to a change in control).

(ii) *Examples.* The following examples illustrate the general rules in paragraph (3)(i) of this definition:

Example 1. Employee A is a SEO of Entity B at all relevant times. On September 1, 2007, Employee A received a stock appreciation right granting him the right to appreciation on the underlying shares that would vest 25% for every twelve months of continued services. Under the terms of the grant, the stock appreciation right would be immediately exercised and payable upon termination of employment. Entity B

becomes a TARP recipient in December 2008. On September 1, 2009, Entity B involuntarily terminates Employee A, at which time Employee A receives a payment equal to the post-September 1, 2007 appreciation on 50% of the shares under the stock appreciation right (the portion of the shares that had vested before the termination of employment). The payment is treated as a payment for services performed and does not constitute a golden parachute payment.

Example 2. The facts are the same as the facts in Example 1, except that under Employee A's employment agreement, Employee A is entitled to accelerate vesting if Employee A is terminated involuntarily other than for cause. If Entity B pays Employee A the post-September 1, 2007 appreciation on 100% of the shares under the stock appreciation right, the portion of the payment representing the additional 50% accelerated vesting due to the termination of employment would not be for services performed and would be a golden parachute payment.

(4) *Payments from benefit plans and deferred compensation plans.* A payment from a benefit plan or a deferred compensation plan is treated as a payment for services performed or benefits accrued only if the following conditions are met:

(i) The plan was in effect at least one year prior to the employee's departure;

(ii) The payment is made pursuant to the plan and is made in accordance with the terms of the plan as in effect no later than one year before the departure and in accordance with any amendments to the plan during this one year period that do not increase the benefits payable hereunder;

(iii) The employee has a vested right, as defined under the applicable plan document, at the time of the departure or the change in control event (but not due to the departure or the change in control event) to the payments under the plan;

(iv) Benefits under the plan are accrued each period only for current or prior service rendered to the TARP recipient (except that an appropriate allowance may be made for service for a predecessor employer);

(v) Any payment made pursuant to the plan is not based on any discretionary acceleration of vesting or accrual of benefits which occurs at any time later than one year before the departure or the change in control event; and

(vi) With respect to payments under a deferred compensation plan, the TARP recipient has previously recognized compensation expense and accrued a liability for the benefit payments according to GAAP or segregated or otherwise set aside assets in a trust which may only be used to pay plan benefits, except that the assets of this

trust may be available to satisfy claims of the TARP recipient's creditors in the case of insolvency and payments pursuant to the plan are not in excess of the accrued liability computed in accordance with GAAP.

Gross-up. The term "gross-up" means any reimbursement of taxes owed with respect to any compensation, provided that a gross-up does not include a payment under a tax equalization agreement, which is an agreement, method, program, or other arrangement that provides payments intended to compensate an employee for some or all of the excess of the taxes actually imposed by a foreign jurisdiction on the compensation paid by the TARP recipient to the employee over the taxes that would be imposed if the compensation were subject solely to U.S. Federal, State, and local income tax, or some or all of the excess of the U.S. Federal, State, and local income tax actually imposed on the compensation paid by the TARP recipient to the employee over the taxes that would be imposed if the compensation were subject solely to taxes in the applicable foreign jurisdiction, provided that the payment made under such agreement, method, program, or other arrangement may not exceed such excess and the amount necessary to compensate for the additional taxes on the amount paid under the agreement, method, program, or other arrangement.

Incentive compensation. The term "incentive compensation" means compensation provided under an incentive plan.

Incentive plan. (1) *Definition.* The term "incentive plan" means an "incentive plan" as that term is defined in Item 402(a)(6)(iii) of Regulation S-K under the Federal securities laws (17 CFR 229.402(a)(6)(iii)), and any plan providing stock or options as defined in Item 402(a)(6)(i) of Regulation S-K under the Federal securities laws (17 CFR 229.402(a)(6)(i)) or other equity-based compensation such as restricted stock units or stock appreciation rights, except for the payment of salary or other permissible payments in stock, stock units, or other property as described in paragraph (2) of this definition. An incentive plan does not include the payment of salary, but does include an arrangement under which an employee would earn compensation in the nature of a commission, unless such compensation qualifies as commission compensation (as defined above). Accordingly, an incentive plan includes an arrangement under which an employee receives compensation only upon the completion of a specified transaction, such as an initial public

offering or sale or acquisition of a specified entity or entities, regardless of how such compensation is measured. For examples, see the definition of "commission compensation," above. An incentive plan, or a grant under an incentive plan, may also qualify as a bonus or a retention award.

(2) *Salary or other permissible payments paid in property.* The term "incentive plan" does not include an arrangement under which an employee receives salary or another permissible payment in property, such as TARP recipient stock, provided that such property is not subject to a substantial risk of forfeiture (as defined in 26 CFR 1.83-3(c)) or other future period of required services, the amount of the payment is determinable as a dollar amount through the date such compensation is earned (for example, an agreement that salary payments will be made in stock equal to the value of the cash payment that would otherwise be due), and the amount of stock or other property accrues at the same time or times as the salary or other permissible payments would otherwise be paid in cash. The term "incentive plan" also does not include an arrangement under which an employee receives a restricted stock unit that is analogous to TARP recipient stock, that otherwise meets the requirements of the previous sentence. For this purpose, a unit is analogous to stock if the unit is based upon stock of the TARP recipient, or is applied as if the applicable entity, division, or other unit were a corporation with one class of stock and the number of units of stock granted is determined based on a fixed percentage of the overall value of this corporation, and the term "TARP recipient stock" with respect to a particular employee recipient means the stock of a corporation (or the entity, division, or other unit the value of which forms the basis for the unit) that is an "eligible issuer of service recipient stock" under 26 CFR 1.409A-1(b)(5)(iii)(E) (applied by analogy to non-corporate entities).

(3) *Examples.* The following examples illustrate the provisions of paragraph (2) of this definition.

Example 1. Employee is an employee of TARP recipient. For 2010, TARP recipient agrees to pay a salary of \$15,000, payable monthly. At each salary payment date Employee will receive a \$10,000 payment in cash, and be transferred a number of shares of common stock of TARP recipient equal to \$5,000 divided by the fair market value of a share of common stock on the salary payment date. The arrangement is for the payment of salary, and is not an incentive plan.

Example 2. Same facts as Example 1, except that pursuant to a valid elective deferral election, Employee elects to defer

20% of each salary payment into a nonqualified deferred compensation plan. At each salary payment date Employee will receive an \$8,000 payment in cash, be transferred a number of shares of common stock of TARP recipient equal to \$4,000 divided by the fair market value of a share of common stock on the salary payment date, and a \$3,000 contribution to an account under a nonqualified deferred compensation plan. The arrangement is for the payment of salary, and is not an incentive plan.

Example 3. Employee is an employee of TARP recipient. For 2010, TARP recipient agrees to pay a salary of \$15,000, payable monthly. At each salary payment date, Employee will receive a \$10,000 payment in cash, and accrue a right to a number of shares of common stock of TARP recipient equal to \$5,000 divided by the fair market value of a share of common stock on the salary payment date. At the end of the year, TARP recipient will transfer the total number of accrued shares to Employee, subject to a multi-year holding period (a restriction that the shares may not be transferred or otherwise disposed of by Employee for a specified number of years). If Employee's employment with the TARP recipient terminates during the holding period, the termination will not affect the duration or application of the holding period or Employee's right to retain the shares and to transfer or otherwise dispose of them at the end of the holding period. The arrangement is for the payment of salary, and is not an incentive plan. The arrangement would also be for the payment of salary, and not an incentive plan, if the arrangement provided that the holding period was to last until the later of a specified time period or a specified time following Employee's retirement or other termination of employment.

Example 4. Employee is an employee of TARP recipient. For 2010, TARP recipient agrees to pay a salary of \$15,000, payable monthly. At each salary payment date, Employee will receive a \$10,000 payment in cash, and accrue a right to a contribution to an account equal to \$5,000 divided by the fair market value of a share on the salary payment date. The account balance will be subject to notional gains and losses based on the investment return on TARP recipient common stock. The amount will be payable upon the last day of the second year immediately following the year the services are performed. The arrangement is for the payment of salary, and is not an incentive plan. However, the arrangement generally will provide deferred compensation for purposes of section 409A of the Internal Revenue Code.

Internal Revenue Code. The term "Internal Revenue Code" means the Internal Revenue Code of 1986, as amended.

Long-term restricted stock. The term "long-term restricted stock" means restricted stock or restricted stock units that include the following features:

(1) The restricted stock or restricted stock units are issued with respect to common stock of the TARP recipient. For this purpose, a restricted stock unit

includes a unit that is payable, or may be payable, in cash or stock, provided that the value of the payment is equal to the value of the underlying stock. With respect to a specified division or other unit within a TARP recipient or a TARP recipient that is not a stock corporation, a unit analogous to common stock may be used. For this purpose, a unit is analogous to common stock if applied as if the entity, division, or other unit were a corporation with one class of common stock and the number of units of common stock granted is determined based on a fixed percentage of the overall value of this corporation. Notwithstanding the foregoing, with respect to a particular employee recipient, the corporation the stock of which is utilized (or the entity, division, or other unit the value of which forms the basis for the unit) must be an "eligible issuer of service recipient stock" under 26 CFR 1.409A-1(b)(5)(iii)(E) (applied by analogy to non-corporate entities).

(2) The restricted stock or restricted stock unit may not become transferable (as defined in 26 CFR 1.83-3(d)), or payable as applied to a restricted stock unit, at any time earlier than permitted under the following schedule (except as necessary to reflect a merger or acquisition of the TARP recipient):

(i) 25% of the shares or units granted at the time of repayment of 25% of the aggregate financial assistance received.

(ii) An additional 25% of the shares or units granted (for an aggregate total of 50% of the shares or units granted) at the time of repayment of 50% of the aggregate financial assistance received.

(iii) An additional 25% of the shares or units granted (for an aggregate total of 75% of the shares or units granted) at the time of repayment of 75% of the aggregate financial assistance received.

(iv) The remainder of the shares or units granted at the time of repayment of 100% of the aggregate financial assistance received.

(3) Notwithstanding the foregoing, in the case of restricted stock for which the employee does not make an election under section 83(b) of the Internal Revenue Code (26 U.S.C. 83(b)), at any time beginning with the date upon which the stock becomes substantially vested (as defined in 26 CFR 1.83-3(b)) and ending on December 31 of the calendar year including that date, a portion of the restricted stock may be made transferable as may reasonably be required to pay the Federal, State, local, or foreign taxes that are anticipated to apply to the income recognized due to this vesting, and the amounts made transferable for this purpose shall not

count toward the percentages in the schedule above.

(4) The employee must be required to forfeit the restricted stock or restricted stock unit if the employee does not continue performing substantial services for the TARP recipient for at least two years from the date of grant, other than due to the employee's death or disability, or a change in control event (as defined in 26 CFR 1.280G-1, Q&A-27 through Q&A-29 or as defined in 26 CFR 1.409A-3(i)(5)(i)) with respect to the TARP recipient before the second anniversary of the date of grant.

(5) Nothing in paragraphs (1), (2), (3), and (4) of this definition is intended to prevent the placement on such restricted stock or restricted stock unit of any additional restrictions, conditions, or limitations that are not inconsistent with the requirements of these paragraphs.

Most highly compensated employee.

(1) In general. The term "most highly compensated employee" means the employee of the TARP recipient, other than the CEOs of the TARP recipient, whose annual compensation is determined to be the highest among all employees of the TARP recipient, provided that, for this purpose, a former employee who is no longer employed as of the first day of the relevant fiscal year of the TARP recipient is not a most highly compensated employee unless it is reasonably anticipated that such employee will return to employment with the TARP recipient during such fiscal year.

(2) **Application to new entities.** For an entity that is created or organized in the same year that the entity becomes a TARP recipient, a most highly compensated employee for the first year includes the person that the TARP recipient determines will be the most highly compensated employee for the next year based upon a reasonable, good faith determination of the projected annual compensation of such person earned during that year. This determination must be made as of the later of the date the entity is created or organized or the date the entity becomes a TARP recipient, and must be made only once. However, a person need not yet be an employee to be treated as a most highly compensated employee, if it is reasonably anticipated that the person will become an employee of the TARP recipient during the first year.

Obligation. (1) **Definition.** The term "obligation" means a requirement for, or an ability of, a TARP recipient to repay financial assistance received from Treasury, as provided in the terms of the applicable financial instrument and related agreements, through the

repayment of a debt obligation or the redemption or repurchase of an equity security, but not including warrants to purchase common stock of the TARP recipient.

(2) *Examples.* The following examples illustrate the provisions of paragraph (1) of this definition.

Example 1. TARP recipient sells \$500 million of preferred stock to Treasury, and provides warrants to Treasury for the purchase of \$75 million of common stock. The TARP recipient has an ability to redeem the preferred stock and thus maintains an outstanding obligation to Treasury.

Example 2. Same facts as *Example 1*, except that TARP recipient redeems the \$500 million of preferred stock, so that Treasury holds only the \$75 million of warrants to purchase common stock outstanding. TARP recipient does not maintain an outstanding obligation to Treasury.

Example 3. TARP recipient sells \$120 million of securities backed by Small Business Administration-guaranteed loans to Treasury through the Consumer and Business Lending initiative, and provides warrants to Treasury for the purchase of \$10 million of common stock. Because the TARP recipient does not as a result of this transaction owe a debt obligation or have a requirement or right to redeem or repurchase an equity security (other than the warrants to purchase common stock provided to the Treasury), the TARP recipient does not have an outstanding obligation to Treasury as a result of this transaction.

PEO. The term “PEO” means the principal executive officer or an employee acting in a similar capacity.

Perquisite. The term “perquisite” means a “perquisite or other personal benefit” the amount of which is required to be included in the amount reported under Item 402(c)(2)(ix)(A) of Regulation S-K under the Federal securities laws (17 CFR 229.402(c)(2)(ix)(A)) (Column (i) of the Summary Compensation Table (All Other Compensation)), modified to also include any such perquisite or other personal benefit provided to a most highly compensated employee subject to § 30.11(b) (Q-11).

PFO. The term “PFO” means the principal financial officer or an employee acting in a similar capacity.

Primary regulatory agency. The term “primary regulatory agency” means the Federal regulatory agency that has primary supervisory authority over the TARP recipient. For a TARP recipient that is a State-chartered bank that does not have securities registered with the SEC pursuant to the Federal securities laws, the primary regulatory agency is the TARP recipient’s primary Federal banking regulator. If a TARP recipient is not subject to the supervision of a Federal regulatory agency, the term

“primary regulatory agency” means the Treasury.

Repayment. The term “repayment” means satisfaction of an obligation.

Retention award. (1) *General definition.* The term “retention award” means any payment to an employee, other than a payment of commission compensation, a payment made pursuant to a pension or retirement plan which is qualified (or is intended within a reasonable period of time to be qualified) under section 401 of the Internal Revenue Code (26 U.S.C. 401), a payment made pursuant to a benefit plan, or a payment of a fringe benefit, overtime pay, or reasonable expense reimbursement that:

(i) Is not payable periodically to an employee for services performed by the employee at a regular hourly, daily, weekly, monthly, or similar periodic rate (or would not be payable in such manner absent an elective deferral election);

(ii) Is contingent on the completion of a period of future service with the TARP recipient or the completion of a specific project or other activity of the TARP recipient; and

(iii) Is not based on the performance of the employee (other than a requirement that the employee not be separated from employment for cause) or the business activities or value of the TARP recipient.

(2) *New hires.* With respect to newly hired employees, a payment that will be made only if the new hire continues providing services for a specified period generally constitutes a retention award. For example, a signing bonus that must be repaid unless the newly hired employee completes a certain period of service is a retention award. Similarly, a “make-whole” agreement under which a newly hired employee is provided benefits intended to make up for benefits foregone at his former employer, where these new benefits are subject to a continued service period vesting requirement (such as a continuation of the vesting period at the former employer), is a retention award.

(3) *Deferred compensation plans.* Whether a benefit under a deferred compensation plan that is subject to a service vesting period is a retention award depends on all the facts and circumstances. However, to the extent an employee continues to accrue, or becomes eligible to accrue, a benefit under a plan the benefits under which have not been materially enhanced for a significant period of time prior to the employee becoming an SEO or most highly compensated employee (including through expansion of the eligibility for such plan), the benefits

accrued generally will not be a retention award. However, to the extent the plan is amended to materially enhance the benefits provided under the plan or to make such employee eligible to participate in such plan, and such benefits are subject to a requirement of a continued period of service, such an amendment generally will be a retention award.

SEC. The term “SEC” means the U.S. Securities and Exchange Commission.

Senior executive officer or SEO. (1)

General definition. The term “senior executive officer” or “SEO” means a “named executive officer” as that term is determined pursuant to Instruction 1 to Item 402(a)(3) of Regulation S-K under the Federal securities laws (17 CFR 229.402(a)) who is an employee of the TARP recipient.

(2) *Application to smaller reporting company.* A TARP recipient that is a smaller reporting company must identify SEOs pursuant to paragraph (1) of this definition. Such a TARP recipient must identify at least five SEOs, even if only three named executive officers are provided in the disclosure pursuant to Item 402(m)(2) of Regulation S-K under the Federal securities laws (17 CFR 229.402(m)(2)), provided that no employee must be identified as a SEO if the employee’s total annual compensation does not exceed \$100,000 as defined in Item 402(a)(3)(1) of Regulation S-K under the Federal securities laws (17 CFR 229.402(a)(3)(1)).

(3) *Application to private TARP recipients.* A TARP recipient that does not have securities registered with the SEC pursuant to the Federal securities laws must identify SEOs in accordance with rules analogous to the rules in paragraph (1) of this definition.

SEO compensation plan. The term “SEO compensation plan” means “plan” as that term is defined in Item 402(a)(6)(ii) of Regulation S-K under the Federal securities laws (17 CFR 229.402(a)(6)(ii)), but only with regard to a SEO compensation plan in which a SEO participates.

Senior risk officer. The term “senior risk officer” means a senior risk executive officer or employee acting in a similar capacity.

Smaller reporting company. The term “smaller reporting company” means a “smaller reporting company” as that term is defined in Item 10(f) of Regulation S-K under the Federal securities laws (17 CFR 229.10(f)).

Sunset date. The term “sunset date” means the date on which the authorities provided under EESA section 101 and 102 terminate, pursuant to EESA section

120, taking into account any extensions pursuant to EESA section 120(b).

TARP. The term “TARP” means the Troubled Asset Relief Program, established pursuant to EESA.

TARP fiscal year. The term “TARP fiscal year” means a fiscal year of a TARP recipient, or the portion of a fiscal year of a TARP recipient, that is also a TARP period.

TARP period. The term “TARP period” means the period beginning with the TARP recipient’s receipt of any financial assistance and ending on the last date upon which any obligation arising from financial assistance remains outstanding (disregarding any warrants to purchase common stock of the TARP recipient that the Treasury may hold).

TARP recipient. (1) *General definition.* The term “TARP recipient” means

(i) Any entity that has received or holds a commitment to receive financial assistance; and

(ii) Any entity that would be treated as the same employer as an entity receiving financial assistance based on the rules in sections 414(b) and 414(c) of the Internal Revenue Code (26 U.S.C. 414(b) or (c)), but modified by substituting “50%” for “80%” in each place it appears in section 414(b) or 414(c) and the accompanying regulations. However, for purposes of applying the aggregation rules to determine the applicable employer, the rules for brother-sister controlled groups and combined groups are disregarded (including disregarding the rules in section 1563(a)(2) and (a)(3) of the Internal Revenue Code (26 U.S.C. 1563(a)(2) and (a)(3)) with respect to corporations and the parallel rules that are in 26 CFR 1.414(c)-2(c) with respect to other organizations conducting trades or businesses).

(2) *Certain excluded entities.* Neither any entity receiving funds under TARP pursuant to section 109 of EESA nor any Federal Reserve bank as that term is used in the Federal Reserve Act (12 U.S.C. 221 *et seq.*) will be treated as a TARP recipient subject to section 111 of EESA and any rules and regulations promulgated thereunder.

(3) *Anti-abuse rule.* Notwithstanding paragraph (1) of this definition, the term “TARP recipient” means any entity that has received, or holds a commitment to receive, financial assistance; and any entity related to such TARP recipient to the extent that the primary purpose for the creation or utilization of such entity is to avoid or evade any or all of the requirements of section 111 of EESA or these regulations.

Treasury. The term “Treasury” means the U.S. Department of the Treasury.

Valid employment contract. The term “valid employment contract” means a written employment contract that is:

(1)(i) A material contract as determined pursuant to Item 601(b)(10)(iii)(A) of Regulation S-K under the Federal securities laws (17 CFR 229.601(b)(10)(iii)(A)); or

(ii) A contract that would be deemed a material contract as determined pursuant to Item 601(b)(10)(iii) of Regulation S-K under the Federal securities laws (17 CFR 229.601(b)(10)(iii)), but for the fact that the material contract relates to one or more employee who is not an executive officer; and

(2) Is enforceable under the law of the applicable jurisdiction.

§ 30.2 Q-2: To what entities does this part apply?

This part applies to any TARP recipient, provided that the requirements of sections 111(b) (portions of § 30.4 (Q-4), § 30.5 (Q-5) and § 30.7 (Q-7), as applicable, § 30.6 (Q-6), and § 30.8 (Q-8) through § 30.11 (Q-11), and § 30.15 (Q-15)), and section 111(e) (§ 30.13 (Q-13)) apply only during the period during which any obligation to the Federal government arising from financial assistance provided under the TARP remains outstanding. The requirements of section 111(c) (including portions of § 30.4 (Q-4), § 30.5 (Q-5) and § 30.7 (Q-7), as applicable) and section 111(d) (§ 30.12 (Q-12)) apply through the later of the last day of the period during which any obligation to the Federal government arising from financial assistance provided under the TARP remains outstanding for TARP recipients with an obligation, or the last day of the TARP recipient’s fiscal year including the sunset date for a TARP recipient that has never had an obligation. For this purpose, an obligation includes the ownership by the Federal government of common stock of a TARP recipient.

§ 30.3 Q-3: How are the SEOs and most highly compensated employees identified for purposes of compliance with this part?

(a) *Identification.* The SEOs for a year are the “named executive officers” who are employees and are identified in the TARP recipient’s annual report on Form 10-K or annual meeting proxy statement for that year (reporting the SEOs’ compensation for the immediately preceding year). These employees are considered the SEOs throughout that entire year. For purposes of the standards in this part applicable to the

most highly compensated employees, the determination of whether an employee is a most highly compensated employee in a current fiscal year looks back to the annual compensation for the last completed fiscal year without regard to whether the compensation is includible in the employee’s gross income for Federal income tax purposes.

(b) *Compliance.* Regardless of when during the current fiscal year the TARP recipient determines the SEOs or the most highly compensated employees, the TARP recipient must ensure that any of the SEOs or employees potentially subject to the requirements in this part for the current fiscal year complies with the requirements in this part as applicable.

§ 30.4 Q-4: What actions are necessary for a TARP recipient to comply with the standards established under sections 111(b)(3)(A), 111(b)(3)(E), 111(b)(3)(F) and 111(c) of EESA (evaluation of employee plans and potential to encourage excessive risk or manipulation of earnings)?

(a) *General rule.* To comply with the standards established under sections 111(b)(3)(A), 111(b)(3)(E), 111(b)(3)(F) and 111(c) of EESA, a TARP recipient must establish a compensation committee by the later of ninety days after the closing date of the agreement between the TARP recipient and Treasury or September 14, 2009, and maintain a compensation committee during the remainder of the TARP period. If a compensation committee is already established before the later of the closing date or September 14, 2009, the TARP recipient must maintain its compensation committee. During the remainder of the TARP period after the later of ninety days after the closing date of the agreement between the TARP recipient and Treasury or September 14, 2009, the compensation committee must:

(1) Discuss, evaluate, and review at least every six months with the TARP recipient’s senior risk officers the SEO compensation plans to ensure that the SEO compensation plans do not encourage SEOs to take unnecessary and excessive risks that threaten the value of the TARP recipient;

(2) Discuss, evaluate, and review with senior risk officers at least every six months employee compensation plans in light of the risks posed to the TARP recipient by such plans and how to limit such risks;

(3) Discuss, evaluate, and review at least every six months the employee compensation plans of the TARP recipient to ensure that these plans do not encourage the manipulation of

reported earnings of the TARP recipient to enhance the compensation of any of the TARP recipient's employees;

(4) At least once per TARP recipient fiscal year, provide a narrative description of how the SEO compensation plans do not encourage the SEOs to take unnecessary and excessive risks that threaten the value of the TARP recipient, including how these SEO compensation plans do not encourage behavior focused on short-term results rather than long-term value creation, the risks posed by employee compensation plans and how these risks were limited, including how these employee compensation plans do not encourage behavior focused on short-term results rather than long-term value creation, and how the TARP recipient has ensured that the employee compensation plans do not encourage the manipulation of reported earnings of the TARP recipient to enhance the compensation of any of the TARP recipient's employees; and

(5) Certify the completion of the reviews of the SEO compensation plans and employee compensation plans required under paragraphs (a)(1), (2), and (3) of this section.

(b) *Exclusion of TARP recipients with no employees or no affected employees.* For any period during which a TARP recipient has no employees, or has no SEO or compensation plan subject to the review process, the TARP recipient is not subject to the requirements of paragraph (a) of this section.

(c) *Application to private TARP recipients.* The rules provided in paragraph (a) of this section are also applicable to TARP recipients that do not have securities registered with the SEC pursuant to the Federal securities laws. A TARP recipient that does not have securities registered with the SEC pursuant to the Federal securities laws and has received \$25,000,000 or less in financial assistance is subject to paragraph (a) of this section, except that, in lieu of establishing and maintaining a compensation committee, such a TARP recipient is permitted to ensure that all the members of the board of directors carry out the duties of the compensation committee as described in paragraph (a) of this section. However, such a TARP recipient will be required to establish and maintain a compensation committee satisfying the requirements of paragraph (a) of this section for the first fiscal year following a fiscal year during which the TARP recipient either registers securities with the SEC pursuant to the Federal securities laws or has received more than \$25,000,000 in financial assistance,

and during subsequent years of the TARP period.

(d) *Application to TARP recipients that have never had an outstanding obligation.* For TARP recipients that have never had an outstanding obligation, only paragraphs (a)(2), (a)(4), (a)(5) (but for the narrative and certification requirements of (a)(4) and (a)(5), applied only to the requirements of paragraph (a)(2)), (b) and (c) of this § 30.4 (Q-4) shall apply.

§ 30.5 Q-5: How does a TARP recipient comply with the requirements under § 30.4 (Q-4) of this part that the compensation committee discuss, evaluate, and review the SEO compensation plans and employee compensation plans to ensure that the SEO compensation plans do not encourage the SEOs to take unnecessary and excessive risks that threaten the value of the TARP recipient, or that the employee compensation plans do not pose unnecessary risks to the TARP recipient?

At least every six months, the compensation committee must discuss, evaluate, and review with the TARP recipient's senior risk officers any risks (including long-term as well as short-term risks) that the TARP recipient faces that could threaten the value of the TARP recipient. The compensation committee must identify the features in the TARP recipient's SEO compensation plans that could lead SEOs to take these risks and the features in the employee compensation plans that pose risks to the TARP recipient, including any features in the SEO compensation plans and the employee compensation plans that would encourage behavior focused on short-term results and not on long-term value creation. The compensation committee is required to limit these features to ensure that the SEOs are not encouraged to take risks that are unnecessary or excessive and that the TARP recipient is not unnecessarily exposed to risks.

§ 30.6 Q-6: How does a TARP recipient comply with the requirement under § 30.4 (Q-4) of this part that the compensation committee discuss, evaluate, and review the employee compensation plans to ensure that these plans do not encourage the manipulation of reported earnings of the TARP recipient to enhance the compensation of any of the TARP recipient's employees?

The compensation committee must discuss, evaluate, and review at least every six months the terms of each employee compensation plan and identify and eliminate the features in these plans that could encourage the manipulation of reported earnings of the TARP recipient to enhance the compensation of any employee.

§ 30.7 Q-7: How does a TARP recipient comply with the certification and disclosure requirements under § 30.4 (Q-4) of this part?

(a) *Certification.* The compensation committee must provide the certifications required by § 30.4 (Q-4) of this part stating that it has reviewed, with the TARP recipient's senior risk officers, the SEO compensation plans to ensure that these plans do not encourage SEOs to take unnecessary and excessive risks, the employee compensation plans to limit any unnecessary risks these plans pose to the TARP recipient, and the employee compensation plans to eliminate any features of these plans that would encourage the manipulation of reported earnings of the TARP recipient to enhance the compensation of any employee. For any period during which no obligation arising from financial assistance provided under the TARP remains outstanding, the requirements under this paragraph shall be modified to be consistent with § 30.4(d) (Q-4(d)). Providing a statement similar to the following and in the manner provided in paragraphs (c) and (d) of this section, as applicable, would satisfy this standard: "The compensation committee certifies that:

(1) It has reviewed with senior risk officers the senior executive officer (SEO) compensation plans and has made all reasonable efforts to ensure that these plans do not encourage SEOs to take unnecessary and excessive risks that threaten the value of [identify TARP recipient];

(2) It has reviewed with senior risk officers the employee compensation plans and has made all reasonable efforts to limit any unnecessary risks these plans pose to the [identify TARP recipient]; and

(3) It has reviewed the employee compensation plans to eliminate any features of these plans that would encourage the manipulation of reported earnings of [identify TARP recipient] to enhance the compensation of any employee."

(b) *Disclosure.* At least once per TARP recipient fiscal year, the compensation committee must provide a narrative description identifying each SEO compensation plan and explaining how the SEO compensation plan does not encourage the SEOs to take unnecessary and excessive risks that threaten the value of the TARP recipient. The compensation committee must also identify each employee compensation plan, explain how any unnecessary risks posed by the employee compensation plan have been limited, and further explain how the employee

compensation plan does not encourage the manipulation of reported earnings to enhance the compensation of any employee.

(c) *Location.* For TARP recipients with securities registered with the SEC pursuant to the Federal securities law, the compensation committee must provide these certifications and disclosures in the Compensation Committee Report required pursuant to Item 407(e) of Regulation S-K under the Federal securities laws (17 CFR 229.407(e)) and to Treasury. These disclosures must be provided in the Compensation Committee Report for any disclosure pertaining to any fiscal year any portion of which is a TARP period (for a TARP recipient with an obligation), or for any disclosure pertaining to any fiscal year including a date on or before the sunset date (for a TARP recipient that has never had an obligation). Within 120 days of the completion of a fiscal year during any part of which is a TARP period (for a TARP recipient with an obligation), or the completion of a fiscal year including a date on or before the sunset date (for a TARP recipient that has never had an obligation), a TARP recipient that is a smaller reporting company must provide the certifications of the compensation committee to its primary regulatory agency and to Treasury.

(d) *Application to private TARP recipients.* The rules provided in paragraphs (a), (b), and (c) of this section are also applicable to TARP recipients that do not have securities registered with the SEC pursuant to the Federal securities laws. Within 120 days of the completion of the fiscal year during any part of which is a TARP period (for a TARP recipient with an obligation), or the completion of a fiscal year including a date on or before the sunset date (for a TARP recipient that has never had an obligation), a private TARP recipient must provide the certification of the compensation committee (or board of directors, as applicable under § 30.4 (Q-4)) to its primary regulatory agency and to Treasury.

§ 30.8 Q-8: What actions are necessary for a TARP recipient to comply with the standards established under section 111(b)(3)(B) of EESA (the “clawback” provision requirement)?

To comply with the standards established under section 111(b)(3)(B) of EESA, a TARP recipient must ensure that any bonus payment made to a SEO or the next twenty most highly compensated employees during the TARP period is subject to a provision for recovery or “clawback” by the TARP

recipient if the bonus payment was based on materially inaccurate financial statements (which includes, but is not limited to, statements of earnings, revenues, or gains) or any other materially inaccurate performance metric criteria. Whether a financial statement or performance metric criteria is materially inaccurate depends on all the facts and circumstances. However, for this purpose, a financial statement or performance metric criteria shall be treated as materially inaccurate with respect to any employee who knowingly engaged in providing inaccurate information (including knowingly failing to timely correct inaccurate information) relating to those financial statements or performance metrics. Otherwise, with respect to a performance criteria, whether the inaccurate measurement of the performance or inaccurate application of the performance to the performance criteria is material depends on whether the actual performance or accurate application of the actual performance to the performance criteria is materially different from the performance required under the performance criteria or the inaccurate application of the actual performance to the performance criteria. The TARP recipient must exercise its clawback rights except to the extent it demonstrates that it is unreasonable to do so, such as, for example, if the expense of enforcing the rights would exceed the amount recovered. For the purpose of this section, a bonus payment is deemed to be made to an individual when the individual obtains a legally binding right to that payment.

§ 30.9 Q-9: What actions are necessary for a TARP recipient to comply with the standards established under section 111(b)(3)(C) of EESA (the prohibition on golden parachute payments)?

(a) *Prohibition on golden parachute payments.* To comply with the standards established under section 111(b)(3)(C) of EESA, a TARP recipient must prohibit any golden parachute payment to a SEO and any of the next five most highly compensated employees during the TARP period. A golden parachute payment is treated as paid at the time of departure and is equal to the aggregate present value of all payments made for a departure. Thus, a golden parachute payment during the TARP period may include a right to amounts actually payable after the TARP period.

(b) *Examples.* The following examples illustrate the provisions of paragraph (a) of this section:

Example 1. Employee A is a SEO of a TARP recipient. Employee A is entitled to a

payment of three times his annual compensation upon an involuntary termination of employment or voluntary termination of employment for good reason, but such amount is not payable unless and until the TARP period expires with respect to TARP recipient. Employee A terminates employment during the TARP period. Because, for purposes of the prohibition on golden parachute payments, the payment is made at the time of departure, Employee A may not obtain the right to the payment upon the termination of employment.

Example 2. Employee B involuntarily terminated employment on July 1, 2008, at which time Employee B was a SEO of a financial institution. Employee B's employment agreement provided that if Employee B were involuntarily terminated or voluntarily terminated employment for good reason, Employee B would be entitled to a series of five equal annual payments. After the first payment, but before any subsequent payment, the entity became a TARP recipient. Because, for purposes of the prohibition on golden parachute payments, all of the five payments are deemed to have occurred at termination of employment and because, in this case, termination of employment occurred before the beginning of the applicable TARP period, the payment of the four remaining payments due under the agreement will not violate the requirements of this section.

§ 30.10 Q-10: What actions are necessary for a TARP recipient to comply with section 111(b)(3)(D) of EESA (the limitations on bonus payments)?

(a) *General rule.* To comply with section 111(b)(3)(D) of EESA, pursuant to the schedule under paragraph (b) of this section and subject to the exclusions under paragraph (e) of this section, a TARP recipient must prohibit the payment or accrual of any bonus payment during the TARP period to or by the employees identified pursuant to paragraph (b) of this section.

(b)(1) *Schedule.* The prohibition required under paragraph (a) of this section applies as follows to:

- (i) The most highly compensated employee of any TARP recipient receiving less than \$25,000,000 in financial assistance;
 - (ii) At least the five most highly compensated employees of any TARP recipient receiving \$25,000,000 but less than \$250,000,000 in financial assistance;
 - (iii) The SEOs and at least the ten next most highly compensated employees of any TARP recipient receiving \$250,000,000 but less than \$500,000,000 in financial assistance; and
 - (iv) The SEOs and at least the twenty next most highly compensated employees of any TARP recipient receiving \$500,000,000 or more in financial assistance.
- (2) *Changes in level of financial assistance.* The determination of which

schedule in paragraph (b) of this section is applicable to a TARP recipient during the TARP period is determined by the gross amount of all financial assistance provided to the TARP recipient, valued at the time the financial assistance was received. Whether a TARP recipient's financial assistance has increased during a fiscal year to the point in the schedule under paragraph (b) of this section that the SEOs or a greater number of the most highly compensated employees will be subject to the requirements under paragraph (a) of this section is determined as of the last day of the TARP recipient's fiscal year, and the increase in coverage is effective for the subsequent fiscal year.

(3) *Application to first year of financial assistance.* For employers who become TARP recipients after June 15, 2009, the bonus payment limitation provision under this paragraph (b) does not apply to bonus payments paid or accrued by TARP recipients or their employees before the first date of the TARP period. Certain bonus payments may relate to a service period beginning before and ending after the first date of the TARP period. In these circumstances, the employee will not be treated as having accrued the bonus payment on or after the first date of the TARP period if the bonus payment is reduced to reflect at least the portion of the service period that occurs on or after the first date of the TARP period. However, if the employee is a SEO or most highly compensated employee at the time the amount would otherwise be paid, the bonus payment amount as reduced in accordance with the previous sentence still may not be paid until such time as bonus payments to that employee are permitted.

(c) *Accrual.* (1) *General rule.* Whether an employee has accrued a bonus payment is determined based on the facts and circumstances. An accrual may include the granting of service credit (whether toward the calculation of the benefit or any vesting requirement) or credit for the compensation received (or that otherwise would have been received) during the period the employee was subject to the restriction under paragraph (a) of this section. For application of this rule to the fiscal year including June 15, 2009, see § 30.17 (Q-17).

(2) *Payments or accruals after the employee is no longer a SEO or most highly compensated employee.* If after the employee is no longer a SEO or most highly compensated employee, the employee is paid a bonus payment or provided a legally binding right to a bonus payment that is based upon

services performed or compensation received during the period the employee was a SEO or most highly compensated employee, the employee will be treated as having accrued such bonus payment during the period the employee was a SEO or most highly compensated employee. For example, if the employee is retroactively granted service credit under an incentive plan (whether for vesting or benefit calculation purposes) for the period in which the employee was a SEO or most highly compensated employee, the employee will be treated as having accrued that benefit during the period the employee was a SEO or most highly compensated employee.

(3) *Multi-year service periods.* Certain bonus payments may relate to a multi-year service period, during some portion of which the employee is a SEO or most highly compensated employee subject to paragraph (a) of this section, and during some portion of which the employee is not. In these circumstances, the employee will not be treated as having accrued the bonus payment during the period the employee was a SEO or most highly compensated employee if the bonus payment is at least reduced to reflect the portion of the service period that the employee was a SEO or most highly compensated employee. If the employee is a SEO or most highly compensated employee at the time the net bonus payment amount after such reduction would otherwise be paid, the amount still may not be paid until such time as bonus payments to that employee are permitted.

(d) *Examples.* The following examples illustrate the rules of paragraphs (a) through (c) of this section:

Example 1. Employee A is a SEO of a TARP recipient in 2010, but not in 2011. The TARP recipient maintains an annual bonus program, generally paying bonus payments in March of the following year. Employee A may not be paid a bonus payment in 2010 (for services performed in 2009 or any other year). In addition, Employee A may not be paid a bonus payment in 2011 to the extent such bonus payment is based on services performed in 2010.

Example 2. Same facts as in *Example 1*, provided further that Employee A receives a salary increase for 2011. The salary increase equals the same percentage as similarly situated executive officers, with an additional percentage increase which, over the course of twelve months, equals the bonus that would have been payable to Employee A in 2011 (for services performed in 2010), except for application of paragraph (a) of this section. Under these facts and circumstances, the additional percentage increase will be treated as a bonus payment accrued in 2010 and Employee A may not be paid this bonus payment.

Example 3. Same facts as in *Example 1*, provided further that on March 1, 2011,

Employee A is granted a stock option under the TARP recipient stock incentive plan with a value approximately equal to the bonus that would have been payable to Employee A in 2011 (for services performed in 2010), except for application of paragraph (a) of this section. Other similarly situated employee not covered by the bonus limitation for 2010 do not receive such a grant. Under these facts and circumstances, the stock option grant will be treated as a bonus payment accrued in 2010 and will not be permitted to be paid to Employee A.

Example 4. Employee B is not a SEO or a most highly compensated employee of a TARP recipient during 2009. On July 1, 2009, Employee B is granted the right to a bonus payment of \$50,000 if Employee B is employed by the TARP recipient through July 1, 2011 (two years). Employee B is a SEO of a TARP recipient during 2010, but is not a SEO or a most highly compensated employee of the TARP recipient during 2011. Employee B is employed by the TARP recipient on July 1, 2011. Thus, Employee B was a SEO or most highly compensated employee during one-half of the two-year required service period. Provided that Employee B is paid not more than half of the otherwise payable bonus payment, or \$25,000, Employee B will not be treated as having accrued a bonus payment while Employee B was a SEO or a most highly compensated employee.

(e) *Exclusions—*(1) *Long-term restricted stock—*(i) *General rule.* The TARP recipient is permitted to award long-term restricted stock to the employees whose compensation is limited according to the schedule under paragraph (b) of this section, provided that the value of this grant may not exceed one third of the employee's annual compensation as determined for that fiscal year (that is, not using the look-back method for the prior year). For purposes of this paragraph, in determining an employee's annual compensation, all equity-based compensation granted in fiscal years ending after June 15, 2009 will only be included in the calculation in the year in which it is granted at its total fair market value on the grant date, and all equity-based compensation granted in fiscal years ending prior to June 15, 2009 will not be included in the calculation of annual compensation for any subsequent fiscal year. For purposes of this paragraph, in determining the value of the long-term restricted stock grant, the long-term restricted stock granted in accordance with this paragraph will only be included in the calculation in the year in which the restricted stock is granted at its total fair market value on the grant date.

(ii) *Example.* During 2008, Employee A receives compensation of \$1 million salary and a \$1,200,000 long-term restricted stock grant subject to a three-year vesting period. During 2009, Employee A received

compensation of \$1 million salary and no grant of long-term restricted stock. During 2010, Employee A receives compensation of \$600,000 salary and a \$300,000 long-term restricted stock grant subject to a three-year vesting period. Under the general SEC compensation disclosure rules used to define annual compensation in § 30.1 (Q-1) of this part, the compensation related to the long-term restricted stock grants would be allocated over the vesting period. Assume for this purpose, that for 2010, \$400,000 of the 2008 long-term restricted stock grant is allocated as compensation, and \$100,000 of the 2010 long-term restricted stock grant is allocated as compensation, so that the total annual compensation is \$1,100,000 (\$600,000 salary + \$400,000 + \$100,000). However, for purposes of determining Employee A's annual compensation to apply the limit on the value of the long-term restricted stock that may be granted to Employee A in 2010, the entire \$300,000 value of the 2010 grant is included but the \$400,000 value attributed to the 2008 grant is excluded. Accordingly, Employee A's adjusted annual compensation is \$900,000 (\$1,100,000 – \$100,000 + \$300,000 – \$400,000). In addition, the entire fair market value of the 2010 long-term restricted stock grant is included for purposes of determining whether the limit has been exceeded. Because the \$300,000 adjusted value of the long-term restricted stock grant does not exceed one-third of the \$900,000 adjusted annual compensation, the grant complies with paragraph (e)(1)(i).

(2) *Legally binding right under valid employment contracts*—(i) *General rule.*

The prohibition under paragraph (a) of this section does not apply to bonus payments required to be paid under a valid employment contract if the employee had a legally binding right under the contract to a bonus payment as of February 11, 2009. For purposes of determining whether an employee had a legally binding right to a bonus payment, see 26 CFR 1.409A-1(b)(i). In addition, the bonus payment must be made in accordance with the terms of the contract as of February 11, 2009 (which may include application of an elective deferral election under a qualified retirement plan or a nonqualified deferred compensation plan), such that any subsequent amendment to the contract to increase the amount payable, accelerate any vesting conditions, or otherwise materially enhance the benefit available to the employee under the contract will result in the bonus payment being treated as not made under the employment contract executed on or before February 11, 2009. However, amendment of a valid employment contract executed on or before February 11, 2009 under which an employee has a legally binding right to a bonus payment to reduce the amount of the bonus payment or to enhance or include service-based or performance-based

vesting requirements or holding period requirements will not result in this treatment. The amended employment contract would still be deemed a valid employment contract and the employee would still be treated as having a legally binding right to the bonus payment under the original employment contract. The TARP recipient and the employees of the TARP recipient should be cognizant of the restrictions under section 409A of the Internal Revenue Code (26 U.S.C. 409A) in the case of an amendment described in the preceding sentence.

(ii) *Examples.* The following examples illustrate the provisions of this paragraph (2).

Example 1. TARP recipient sponsors a written restricted stock unit plan. Under the plan, restricted stock units are traditionally granted each July 1, and are subject to a three-year vesting requirement. Employee A, a SEO of TARP recipient, received grants on July 1, 2007, July 1, 2008, and July 1, 2009. The July 1, 2007 and July 1, 2008 grants are excluded from the limitation on payments, because although the awards were subject to a continuing service vesting requirement, Employee A retained a legally binding right to the restricted stock units as of February 11, 2009. However, regardless of the fact that the restricted stock unit program was in existence on February 11, 2009, Employee A did not retain a legally binding right to a restricted stock unit for 2009 as of February 11, 2009, but rather obtained the legally binding right only when the restricted stock unit was granted on July 1, 2009. Accordingly, the July 1, 2009 grant is subject to the limitation and is not permitted to be accrued or paid (unless such grant complies with the exception for certain grants of long-term restricted stock).

Example 2. TARP recipient sponsors an annual bonus program documented in a written plan. Under the bonus program, the board of directors retains the discretion to eliminate or reduce the bonus of any employee in the bonus pool. Employees B and C, both SEOs, are in the bonus pool for 2008. On January 15, 2009, the compensation committee determines the bonuses to which the employees of the division in which Employee B works are entitled, and awards Employee B a \$10,000 bonus payable on June 1. Employee B has a legally binding right to the bonus as of February 11, 2009 and payment of the bonus is not subject to the limitation. However, as of February 11, 2009, the board of directors has not met to determine which employees of the division in which Employee C works will be entitled to a bonus or the amount of such bonus. Accordingly, Employee C did not have a legally binding right to a bonus as of February 11, 2009 and may be subject to the bonus payment limitation.

Example 3. TARP recipient sponsors a written stock option plan under which stock options may be granted to SEOs designated by the compensation committee. Designations and grants typically occur at a meeting in August of every year, and no

meeting occurred in 2009 before August. Regardless of the existence of the general plan, no SEO had a legally binding right to a stock option grant for 2009 as of February 11, 2009 because no grants had been made under the plan. Accordingly, any 2009 grant will be subject to the limitation and is not permitted to be made.

Example 4. Employee D is an SEO of a TARP recipient. Under Employee D's written employment agreement executed before February 11, 2009, Employee D is entitled to the total of whatever bonuses are made available to Employee E and Employee F. As of February 11, 2009, Employee E had a legally binding right to a \$100,000 bonus. Employees E and F are never at any time SEOs or highly compensated employees subject to the limitation. As of February 11, 2009, Employee F had no legally binding right to a bonus, but was eligible to participate in a bonus pool and was ultimately awarded a bonus of \$50,000. As of February 11, 2009, Employee D had a legally binding right to a \$100,000 bonus, so that bonus is not subject to the limitation. However, as of February 11, 2009, Employee D did not have a legally binding right to the additional \$50,000 bonus, so that bonus is subject to the bonus payment limitation and, if not paid before June 15, 2009 is not permitted to be paid.

(f) *Application to private TARP recipients.* The rules set forth in this section are also applicable to TARP recipients that do not have securities registered with the SEC pursuant to the Federal securities laws.

§ 30.11 Q-11: Are TARP recipients required to meet any other standards under the executive compensation and corporate governance standards in section 111 of EESA?

(a) *Approval of compensation payments to, and compensation structures for, certain employees of TARP recipients receiving exceptional financial assistance.* For any period during which a TARP recipient is designated as a TARP recipient that has received exceptional financial assistance, the TARP recipient must obtain the approval by the Special Master of all compensation payments to, and compensation structures for, SEOs and most highly compensated employees subject to paragraph (b) of § 30.10 (Q-10). TARP recipients that receive exceptional financial assistance must also receive approval by the Special Master for all compensation structures for other employees who are executive officers (as defined under the Securities and Exchange Act, Rule 3b-7) or one of the 100 most highly compensated employees of a TARP recipient receiving exceptional assistance (or both), who are not subject to the bonus limitations under § 30.10 (Q-10). For this purpose, compensation payments and compensation structures

may include awards or other rights to compensation which an employee has already received but not yet been paid or, in some instances, fully accrued. Accordingly, the Special Master has the authority to require that such compensation payments or compensation structures be altered to meet the standards set forth in § 30.16 (Q-16). However, this approval requirement is not applicable to payments that are not subject to paragraph (a) of § 30.10 (Q-10) due to the application of paragraph (e)(2) of § 30.10 (Q-10) or the effective date provisions of § 30.17 (Q-17), though the Special Master will take such payments into account in reviewing the compensation structure and amounts payable, as applicable, that are subject to review. Notwithstanding any of the foregoing, approval is not required with respect to an employee not subject to the bonus payment limitations to the extent that the employee's annual compensation, as modified in § 30.16 (Q-16) to include certain deferred compensation and pension accruals but to disregard any grant of long-term restricted stock, is limited to \$500,000 or less, and any further compensation is provided in the form of long-term restricted stock. For details, see § 30.16 (Q-16).

(b) *Perquisite disclosure*—(1) *General rule*. TARP recipients must annually disclose during the TARP period any perquisite whose total value for the TARP recipient's fiscal year exceeds \$25,000 for each of the SEOs and most highly compensated employees that are subject to paragraph (a) of § 30.10 (Q-10). TARP recipients must provide a narrative description of the amount and nature of these perquisites, the recipient of these perquisites, and a justification for offering these perquisites (including a justification for offering the perquisite, and not only for offering the perquisite with a value that exceeds \$25,000). Such disclosure must be provided within 120 days of the completion of a fiscal year any part of which is a TARP period.

(2) *Location*. A TARP recipient must provide this disclosure to Treasury and to its primary regulatory agency.

(c) *Compensation consultant disclosure*—(1) *General rule*. The compensation committee of the TARP recipient must provide annually a narrative description of whether the TARP recipient, the board of directors of the TARP recipient, or the compensation committee has engaged a compensation consultant; and all types of services, including non-compensation related services, the compensation consultant or any of its affiliates has

provided to the TARP recipient, the board, or the compensation committee during the past three years, including any "benchmarking" or comparisons employed to identify certain percentile levels of compensation (for example, entities used for benchmarking and a justification for using these entities and the lowest percentile level proposed for compensation). Such disclosure must be provided within 120 days of the completion of a fiscal year any part of which is a TARP period.

(2) *Application to TARP recipients not required to maintain compensation committees*. For those TARP recipients not required to establish and maintain compensation committees under § 30.4(c) (Q-4), the board of directors must provide the disclosure under § 30.4(c)(1).

(3) *Location*. A TARP recipient must provide this disclosure to Treasury and to its primary regulatory agency.

(d) *Prohibition on gross-ups*. Except as explicitly permitted under this part, TARP recipients are prohibited from providing (formally or informally) gross-ups to any of the SEOs and next twenty most highly compensated employees during the TARP period. For this purpose, providing a gross-up includes providing a right to a payment of such a gross-up at a future date, for example a date after the TARP period.

§ 30.12 Q-12: What actions are necessary for a TARP recipient to comply with section 111(d) of EESA (the excessive or luxury expenditures policy requirement)?

To comply with section 111(d) of EESA, by the later of ninety days after the closing date of the agreement between the TARP recipient and Treasury or September 14, 2009, the board of directors of the TARP recipient must adopt an excessive or luxury expenditures policy, provide this policy to Treasury and its primary regulatory agency, and post the text of this policy on its Internet Web site, if the TARP recipient maintains a company Web site. After adoption of the policy, the TARP recipient must maintain the policy during the remaining TARP period (if the TARP recipient has an obligation), or through the last day of the TARP recipient's fiscal year including the sunset date (if the TARP recipient has never had an obligation). If, after adopting an excessive or luxury expenditures policy, the board of directors of the TARP recipient makes any material amendments to this policy, within ninety days of the adoption of the amended policy, the board of directors must provide the amended policy to Treasury and its primary regulatory agency and post the amended

policy on its Internet Web site, if the TARP recipient maintains a company Web site. This disclosure must continue through the TARP period (if the TARP recipient has an obligation), or through the last day of the TARP recipient's fiscal year that includes the sunset date (if the TARP recipient has never had an obligation).

§ 30.13 Q-13: What actions are necessary for a TARP recipient to comply with section 111(e) of EESA (the shareholder resolution on executive compensation requirement)?

(a) *General rule*. As provided in section 111(e) of EESA, any proxy or consent or authorization for an annual or other meeting of the shareholders of any TARP recipient that occurs during the TARP period must permit a separate shareholder vote to approve the compensation of executives, as required to be disclosed pursuant to the Federal securities laws (including the compensation discussion and analysis, the compensation tables, and any related material). To meet this standard, a TARP recipient must comply with any rules, regulations, or guidance promulgated by the SEC.

§ 30.14 Q-14: How does section 111 of EESA operate in connection with an acquisition, merger, or reorganization?

(a) *Special rules for acquisitions, mergers, or reorganizations*. In the event that a TARP recipient (target) is acquired by an entity that is not an affiliate of the target (acquirer) in an acquisition of any form, including a purchase of substantially all of the assets of the target, such that the acquirer after the transaction would have been treated as a TARP recipient if the target had received the TARP funds immediately after the transaction, acquirer will not become subject to section 111 of EESA merely as a result of the acquisition. If the acquirer is not subject to section 111 of EESA immediately after the transaction, then any employees of the acquirer immediately after the transaction (including target employees who were SEOs or most highly compensated employees immediately prior to the transaction and became acquirer employees as a result of the transaction) will not be subject to section 111 of EESA.

(b) *Anti-abuse rule*. Notwithstanding the provisions of paragraph (a) of this section, if the primary purpose of a transaction involving the acquisition, in any form, of a TARP recipient is to avoid or evade the application of any of the requirements of section 111 of EESA, the acquirer will be treated as a TARP recipient immediately upon such acquisition. In such a case, the SEOs

and the most highly compensated employees to whom any of the requirements of section 111 of EESA and this Interim Final Rule apply shall be redetermined as of the date of the acquisition. The redetermined SEOs and most highly compensated employees of the post-acquisition acquirer shall consist of the PEO and PFO of the post-acquisition acquirer, plus the applicable number of next most highly compensated employees determined by aggregating the post-acquisition employees of the acquirer (to include the pre-acquisition employees of the target employed by the acquirer, or anticipated to be employed by the acquirer), and ranking such employees in order of compensation for the immediately preceding fiscal year of the pre-acquisition target or pre-acquisition acquirer, as appropriate. In the case of an asset acquisition, the entity or entities to whom the target's assets are transferred shall be treated as the direct recipient of the financial assistance for purposes of determining which other related entities are treated, in the aggregate, as the TARP recipient under the definition of "TARP recipient" in § 30.1 (Q-1).

§ 30.15 Q-15: What actions are necessary for a TARP recipient to comply with certification requirements of section 111(b)(4) of EESA?

(a) *Certification Requirements*—(1) *General*. To comply with section 111(b)(4) of EESA, the PEO and the PFO of the TARP recipient must provide the following certifications with respect to the compliance of the TARP recipient with section 111 of EESA as implemented under this part:

(2) *First Fiscal Year Certification*. (i) Within ninety days of the completion of the first annual fiscal year of the TARP recipient any portion of which is a TARP period, the PEO and the PFO of the TARP recipient must provide certifications similar to the model provided in appendix A to this section.

(ii) If the first annual fiscal year of a TARP recipient any portion of which is a TARP period ends within thirty days after the closing date of the applicable agreement between the TARP recipient and Treasury, the TARP recipient shall have an additional sixty days beginning on the day after the end of the fiscal year during which it can establish the compensation committee, if not already established, and during which the compensation committee shall meet with senior risk officers to discuss, review, and evaluate the SEO compensation plans and employee compensation plans in accordance with § 30.4 (Q-4) of this part. The

certifications of the PEO and the PFO of the TARP recipient must be amended to reflect the timing of the establishment and reviews of the compensation committee.

(3) *Years Following First Fiscal Year Certification*. Within ninety days of the completion of each TARP fiscal year of the TARP recipient after the first TARP fiscal year, the PEO and the PFO of the TARP recipient must provide a certification similar to the model provided in Appendix B to this section.

(4) *Location*. A TARP recipient with securities registered with the SEC pursuant to the Federal securities law must provide these certifications as an exhibit (pursuant to Item 601(b)(99)(i) of Regulation S-K under the Federal securities laws (17 CFR 229.601(b)(99)(i)) to the TARP recipient's annual report on Form 10-K and to Treasury. To the extent that the PEO or the PFO of the TARP recipient is unable to provide any of these certifications in a timely manner, the PEO or the PFO must provide Treasury an explanation of the reason such certification has not been provided. These certifications are in addition to the compensation committee certifications required by § 30.5 (Q-5) of this part.

(5) *Application to private TARP recipients*. The rules provided in this section are also applicable to TARP recipients that do not have securities registered with the SEC pursuant to the Federal securities laws, except the certifications under paragraphs (a)(2)(x) and (a)(3)(x) of this section are not required. A private TARP recipient must provide these certifications to its primary regulatory agency and to Treasury.

(6) *Application to TARP recipients that have never had an obligation*. For those TARP recipients that have never had an obligation, the PEO and PFO must provide the certifications pursuant to this paragraph (a) only with respect to the requirements applicable to a TARP recipient that has never had an obligation (generally certain compensation committee reviews of employee compensation plans and the issuance of, and compliance with, an excessive or luxury expenses policy).

(b) *Recordkeeping requirements*. The TARP recipient must preserve appropriate documentation and records to substantiate each certification required under paragraph (a) of this section 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 TARP recipient must furnish promptly to Treasury legible, true, complete, and current copies of the

documentation and records that are required to be preserved under paragraph (b) of this section that are requested by any representative of Treasury.

(c) *Penalties for making or providing false or fraudulent Statements*. Any individual or entity that provides information or makes a certification to Treasury pursuant to the Interim Final Rule or as required pursuant to 31 CFR Part 30 may be subject to 18 U.S.C. 1001, which generally prohibits the making of any false or fraudulent statement in a matter within the jurisdiction of the Federal government. 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, Treasury shall refer such information to the Department of Justice and the Special Inspector General for the Troubled Asset Relief Program.

Appendix A to § 30.15—Model Certification for First Fiscal Year Certification

"I, [identify certifying individual], certify, based on my knowledge, that:

(i) The compensation committee of [identify TARP recipient] has discussed, reviewed, and evaluated with senior risk officers at least every six months during the period beginning on the later of the closing date of the agreement between the TARP recipient and Treasury or June 15, 2009 and ending with the last day of the TARP recipient's fiscal year containing that date, senior executive officer (SEO) compensation plans and employee compensation plans and the risks these plans pose to [identify TARP recipient];

(ii) The compensation committee of [identify TARP recipient] has identified and limited during the period beginning on the later of the closing date of the agreement between the TARP recipient and Treasury or June 15, 2009 and ending with the last day of the TARP recipient's fiscal year containing that date, the features in the SEO compensation plans that could lead SEOs to take unnecessary and excessive risks that could threaten the value of [identify TARP recipient] and identified any features in the employee compensation plans that pose risks to [identify TARP recipient] and limited those features to ensure that [identify TARP recipient] is not unnecessarily exposed to risks;

(iii) The compensation committee has reviewed at least every six months during the period beginning on the later of the closing date of the agreement between the TARP recipient and Treasury or June 15, 2009 and ending with the last day of the TARP recipient's fiscal year containing that date, the terms of each employee compensation plan and identified the features in the plan that could encourage the manipulation of reported earnings of [identify TARP recipient] to enhance the compensation of an employee and has limited those features;

(iv) The compensation committee of [identify TARP recipient] will certify to the reviews of the SEO compensation plans and employee compensation plans required under (i) and (iii) above;

(v) The compensation committee of [identify TARP recipient] will provide a narrative description of how it limited during any part of the most recently completed fiscal year that included a TARP period the features in

(A) SEO compensation plans that could lead SEOs to take unnecessary and excessive risks that could threaten the value of [identify TARP recipient];

(B) Employee compensation plans that unnecessarily expose [identify TARP recipient] to risks; and

(C) Employee compensation plans that could encourage the manipulation of reported earnings of [identify TARP recipient] to enhance the compensation of an employee;

(vi) [Identify TARP recipient] has required that bonus payments, as defined in the regulations and guidance established under section 111 of EESA (bonus payments), of the SEOs and twenty next most highly compensated employees be subject to a recovery or "clawback" provision during any part of the most recently completed fiscal year that was a TARP period if the bonus payments were based on materially inaccurate financial statements or any other materially inaccurate performance metric criteria;

(vii) [Identify TARP recipient] has prohibited any golden parachute payment, as defined in the regulations and guidance established under section 111 of EESA, to an SEO or any of the next five most highly compensated employees during the period beginning on the later of the closing date of the agreement between the TARP recipient and Treasury or June 15, 2009 and ending with the last day of the TARP recipient's fiscal year containing that date;

(viii) [Identify TARP recipient] has limited bonus payments to its applicable employees in accordance with section 111 of EESA and the regulations and guidance established thereunder during the period beginning on the later of the closing date of the agreement between the TARP recipient and Treasury or June 15, 2009 and ending with the last day of the TARP recipient's fiscal year containing that date, *[for recipients of exceptional assistance]*; and has received or is in the process of receiving approvals from the Office of the Special Master for TARP Executive Compensation for compensation payments and structures as required under the regulations and guidance established under section 111 of EESA, and has not made any payments inconsistent with those approved payments and structures;

(ix) The board of directors of [identify TARP recipient] has established an excessive or luxury expenditures policy, as defined in the regulations and guidance established under section 111 of EESA, has provided this policy to Treasury and its primary regulatory agency, and [identify TARP recipient] and its employees have complied with this policy during the period beginning on the later of the closing date of the agreement between the

TARP recipient and Treasury or June 15, 2009 and ending with the last day of the TARP recipient's fiscal year containing that date, and that any expenses requiring approval of the board of directors, a committee of the board of directors, an SEO, or an executive officer with a similar level of responsibility, were properly approved;

(x) [Identify TARP recipient] will permit a non-binding shareholder resolution in compliance with any applicable Federal securities rules and regulations on the disclosures provided under the Federal securities laws related to SEO compensation paid or accrued during the period beginning on the later of the closing date of the agreement between the TARP recipient and Treasury or June 15, 2009 and ending with the last day of the TARP recipient's fiscal year containing that date;

(xi) [Identify TARP recipient] will disclose the amount, nature, and justification for the offering during the period beginning on the later of the closing date of the agreement between the TARP recipient and Treasury or June 15, 2009 and ending with the last day of the TARP recipient's fiscal year containing that date of any perquisites, as defined in the regulations and guidance established under section 111 of EESA, whose total value exceeds \$25,000 for each employee subject to the bonus payment limitations identified in paragraph (vii);

(xii) [Identify TARP recipient] will disclose whether [identify TARP recipient], the board of directors of [identify TARP recipient], or the compensation committee of [TARP recipient] has engaged during the period beginning on the later of the closing date of the agreement between the TARP recipient and Treasury or June 15, 2009 and ending with the last day of the TARP recipient's fiscal year containing that date, a compensation consultant; and the services the compensation consultant or any affiliate of the compensation consultant provided during this period;

(xiii) [Identify TARP recipient] has prohibited the payment of any gross-ups, as defined in the regulations and guidance established under section 111 of EESA, to the SEOs and the next twenty most highly compensated employees during the period beginning on the later of the closing date of the agreement between the TARP recipient and Treasury or June 15, 2009 and ending with the last day of the TARP recipient's fiscal year containing that date;

(xiv) [Identify TARP recipient] has substantially complied with all other requirements related to employee compensation that are provided in the agreement between [identify TARP recipient] and Treasury, including any amendments;

(xv) The following employees are the SEOs and the twenty next most highly compensated employees for the current fiscal year and the most recently completed fiscal year, with the non-SEO's ranked in order of level of annual compensation starting with the greatest amount: [identify name, title, and employer of each SEO and most highly compensated employee]; and

(xvi) I understand that a knowing and willful false or fraudulent statement made in connection with this certification may be

punished by fine, imprisonment, or both. (See, for example, 18 U.S.C. 1001.)"

Appendix B to § 30.15—Model Certification for Years Following First Fiscal Year Certification

"I, [identify certifying individual], certify, based on my knowledge, that:

(i) The compensation committee of [identify TARP recipient] has discussed, reviewed, and evaluated with senior risk officers at least every six months during any part of the most recently completed fiscal year that was a TARP period, senior executive officer (SEO) compensation plans and employee compensation plans and the risks these plans pose to [identify TARP recipient];

(ii) The compensation committee of [identify TARP recipient] has identified and limited during any part of the most recently completed fiscal year that was a TARP period the features in the SEO compensation plans that could lead SEOs to take unnecessary and excessive risks that could threaten the value of [identify TARP recipient] and identified any features in the employee compensation plans that pose risks to [identify TARP recipient] and limited those features to ensure that [identify TARP recipient] is not unnecessarily exposed to risks;

(iii) The compensation committee has reviewed at least every six months during any part of the most recently completed fiscal year that was a TARP period the terms of each employee compensation plan and identified the features in the plan that could encourage the manipulation of reported earnings of [identify TARP recipient] to enhance the compensation of an employee and has limited these features that would encourage the manipulation of reported earnings of [identify TARP recipient];

(iv) The compensation committee of [identify TARP recipient] will certify to the reviews of the SEO compensation plans and employee compensation plans required under (i) and (iii) above;

(v) The compensation committee of [identify TARP recipient] will provide a narrative description of how it limited during any part of the most recently completed fiscal year that was a TARP period the features in

(A) SEO compensation plans that could lead SEOs to take unnecessary and excessive risks that could threaten the value of [identify TARP recipient];

(B) Employee compensation plans that unnecessarily expose [identify TARP recipient] to risks; and

(C) Employee compensation plans that could encourage the manipulation of reported earnings of [identify TARP recipient] to enhance the compensation of an employee;

(vi) [Identify TARP recipient] has required that bonus payments to SEOs or any of the next twenty most highly compensated employees, as defined in the regulations and guidance established under section 111 of EESA (bonus payments), be subject to a recovery or "clawback" provision during any part of the most recently completed fiscal year that was a TARP period if the bonus payments were based on materially inaccurate financial statements or any other

materially inaccurate performance metric criteria;

(vii) [Identify TARP recipient] has prohibited any golden parachute payment, as defined in the regulations and guidance established under section 111 of EESA, to a SEO or any of the next five most highly compensated employees during any part of the most recently completed fiscal year that was a TARP period;

(viii) [Identify TARP recipient] has limited bonus payments to its applicable employees in accordance with section 111 of EESA and the regulations and guidance established thereunder during any part of the most recently completed fiscal year that was a TARP period [for recipients of exceptional assistance] and has received or is in the process of receiving approvals from the Office of the Special Master for TARP Executive Compensation for compensation payments and structures as required under the regulations and guidance established under section 111 of EESA, and has not made any payments inconsistent with those approved payments and structures;

(ix) [Identify TARP recipient] and its employees have complied with the excessive or luxury expenditures policy, as defined in the regulations and guidance established under section 111 of EESA, during any part of the most recently completed fiscal year that was a TARP period, and that any expenses requiring approval of the board of directors, a committee of the board of directors, an SEO, or an executive officer with a similar level of responsibility, were properly approved;

(x) [Identify TARP recipient] will permit a non-binding shareholder resolution in compliance with any applicable Federal securities rules and regulations on the disclosures provided under the Federal securities laws related to SEO compensation paid or accrued during any part of the most recently completed fiscal year that was a TARP period;

(xi) [Identify TARP recipient] will disclose the amount, nature, and justification for the offering during any part of the most recently completed fiscal year that was a TARP period of any perquisites, as defined in the regulations and guidance established under section 111 of EESA, whose total value exceeds \$25,000 for each employee subject to the bonus payment limitations identified in paragraph (viii);

(xii) [Identify TARP recipient] will disclose whether [identify TARP recipient], the board of directors of [identify TARP recipient], or the compensation committee of [identify TARP recipient] has engaged during any part of the most recently completed fiscal year that was a TARP period a compensation consultant; and the services the compensation consultant or any affiliate of the compensation consultant provided during this period;

(xiii) [Identify TARP recipient] has prohibited the payment of any gross-ups, as defined in the regulations and guidance established under section 111 of EESA, to the SEOs and the next twenty most highly compensated employees during any part of the most recently completed fiscal year that was a TARP period;

(xiv) [Identify TARP recipient] has substantially complied with all other requirements related to employee compensation that are provided in the agreement between [identify TARP recipient] and Treasury, including any amendments;

(xv) The following employees are the SEOs and the twenty most highly compensated employees for the current fiscal year, with the non-SEO ranked in order of level of annual compensation starting with the greatest amount: [identify name, title, and employer of each SEO]; and

(xvi) I understand that a knowing and willful false or fraudulent statement made in connection with this certification may be punished by fine, imprisonment, or both. (See, for example 18 U.S.C. 1001.)"

§ 30.16 Q-16: What is the Office of the Special Master for TARP Executive Compensation, and what are its powers, duties and responsibilities?

(a) *The Office of the Special Master for TARP Executive Compensation.* The Secretary of the Treasury shall establish the Office of the Special Master for TARP Executive Compensation (Special Master). The Special Master shall serve at the pleasure of the Secretary, and may be removed by the Secretary without notice, without cause, and prior to the naming of any successor Special Master. The Special Master shall have the following powers, duties and responsibilities:

(1) *Interpretative authority.* The Special Master shall have responsibility for interpreting section 111 of EESA, these regulations, and any other applicable guidance, to determine how the requirements under section 111 of EESA, these regulations, and any other applicable guidance, apply to particular facts and circumstances. Accordingly, the Special Master shall make all determinations, as required, as to the meaning of such guidance and whether such requirements have been met in any particular circumstances. In addition, a TARP recipient or a TARP recipient employee may submit a request, in accordance with paragraph (c)(3) of this section, for an advisory opinion with respect to the requirements under section 111 of EESA, these regulations and any other applicable guidance.

(2) *Review of prior payments to employees.* Section 111(f) of EESA provides that the Secretary shall review bonuses, retention awards, and other compensation paid before February 17, 2009, to employees of each entity receiving TARP assistance before February 17, 2009, to determine whether any such payments were inconsistent with the purposes of section 111 of EESA or TARP, or otherwise contrary to the public interest. Section 111(f) of EESA provides that, if the Secretary makes

such a determination, 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. The Special Master shall have the responsibility for administering these provisions, including the identification of the payments that are inconsistent with the purposes of EESA or TARP, or otherwise contrary to the public interest, and the Special Master shall have responsibility for the negotiation with the TARP recipient and the subject employee for appropriate reimbursements to the Federal Government with respect to compensation or bonuses. The Special Master shall make this determination by application of the principles outlined in paragraph (b) of this section. The Special Master's administration of these provisions may provide for the scope of review by the Special Master of a payment, including a limited review or no review, depending on the payment amount, the type of payment, the overall compensation earned by the employee during the relevant period, a combination thereof, or such other factors as the Special Master may determine, where the Special Master determines that such factors demonstrate that such payments are not, or are highly unlikely to be, inconsistent with the purposes of section 111 of EESA or TARP, or otherwise contrary to the public interest, or that renegotiation of such payments is not in the public interest. The Special Master may request in writing any information from TARP recipients necessary to carry out the review of prior compensation required under section 111(f) of EESA. TARP recipients must submit any requested information to the Special Master within 30 days of the request.

(3) *Approval of certain payments to employees of TARP recipients receiving exceptional financial assistance.* (i) *SEOs and most highly compensated employees.* The Special Master shall determine whether the compensation structure for each SEO or most highly compensated employee of a TARP recipient receiving exceptional assistance, including the amounts payable or potentially payable under such compensation structure, will or may result in payments that are inconsistent with the purposes of section 111 of EESA or TARP, or are otherwise contrary to the public interest. The Special Master shall make such determinations by applying the principles outlined in paragraph (b) of this section, subject to the requirement

that the compensation structure and payments satisfy the applicable limitations under § 30.10 (Q–10). This requirement shall apply to any compensation accrued or paid during any period the SEO or most highly compensated employee is subject to the limitations under § 30.10 (Q–10). Initial requests for such approval must be submitted no later than August 14, 2009. The Special Master's administration of these provisions may provide for the Special Master's scope of review, including a limited review or no review, of a portion of a compensation structure or payment depending on the amount of such payments, the type of such payments, the overall compensation earned by the employee during the relevant period, a combination thereof, or such other factors as the Special Master determines, if the Special Master has determined that such factors demonstrate that such payments are not, or are highly unlikely to be, inconsistent with the purposes of section 111 of EESA or TARP, or otherwise contrary to the public interest. The Special Master shall issue a determination within 60 days of the receipt of a substantially complete submission. The TARP recipient must make a further request for approval to the extent the compensation structure for any SEO or most highly compensated employee, including the amounts that are or may be payable, for any SEO or highly compensated employee is materially modified. In reviewing compensation structures and compensation payments for any period subject to Special Master review, the Special Master may take into account other compensation structures and other compensation earned, accrued or paid, including such compensation and compensation structures that are not subject to the restrictions of Section 111 of EESA pursuant to section 111(b)(3)(D)(iii) (*see* § 30.10(e)(2) (Q–30.10(e)(2) (certain legally binding rights under valid written employment contracts)), and amounts that were accrued or paid prior to June 15, 2009 and are therefore not subject to review by the Special Master.

(ii) *Other executive officers and most highly compensated employees.* With respect to any employee who is either an executive officer (as defined under the Securities and Exchange Act Rule 3b–7) or one of the 100 most highly compensated employees of a TARP recipient receiving exceptional assistance (or both), who is not subject to the bonus limitations under § 30.10 (Q–10), the Special Master shall determine whether the compensation

structure for such employees will or may result in payments that are inconsistent with the purposes of section 111 of EESA or TARP, or are otherwise contrary to the public interest. The Special Master shall make such determination through application of the principles outlined in paragraph (b) of this section. With respect to the scope of the required review, the Special Master shall determine only whether the compensation arrangements are adequately structured, and is not required to rule with respect to the amounts that are or may be payable thereunder. However, the TARP recipient may also request an advisory opinion with respect to the amounts that are or may be payable, which the Special Master may provide in his sole discretion. Notwithstanding the foregoing, if the total annual compensation to an employee complies with the rules applicable to an SEO under § 30.10 (Q–10) applied without any limits on the grant of long-term restricted stock, and the annual compensation other than long-term restricted stock does not exceed \$500,000 (or for 2009, \$500,000 prorated to reflect the remaining portion of 2009 after June 15, 2009), the compensation structure will automatically be deemed to meet the requirements and no prior approval by the Special Master will be required. For purposes of the \$500,000 limit, in determining annual compensation, all equity-based compensation granted in fiscal years ending after June 15, 2009 will be included in the calculation only in the year in which they are granted at their total fair market value on the grant date and all equity-based compensation granted in fiscal years ending prior to June 15, 2009 will not be included in the calculation of annual compensation. In addition, solely for purposes of applying the limit (and not for purposes of identifying the most highly compensated employees), the term annual compensation includes amounts required to be disclosed under paragraph (viii) of Item 402(a) of Regulation S–K of the Federal securities laws (change in the actuarial present value of benefits under a pension plan and above-market earnings on deferred compensation). The Special Master's administration of these provisions may provide for limited or no review of a portion of a compensation structure by the Special Master depending on the amount of potential payments, the type of such payments, the overall compensation earned by the employee during the relevant period, a combination thereof, or such other

factors as the Special Master determines, where the Special Master has determined that such factors demonstrate that such payments are not, or are highly unlikely to be, inconsistent with the purposes of section 111 of EESA or TARP, or otherwise contrary to the public interest. Initial requests for such approval must be submitted no later than 120 days after publication of the final rule. Separate requests need not be submitted for each individual covered employee, but should be submitted for identified groups of employees subject to the same compensation structures to the extent possible as long as sufficient detail regarding individual compensation awards are provided as necessary to evaluate such employee's compensation structure. The Special Master shall issue a determination within 60 days of the receipt of a substantially complete submission. The TARP recipient must make a further request for approval to the extent the compensation structure, including the amounts that are or may be payable, for any executive officer is materially amended. In reviewing compensation structures for any period subject to Special Master review, the Special Master may take into account other compensation structures and other compensation earned, accrued or paid, including such compensation and compensation structures that are not subject to the restrictions of Section 111 of EESA pursuant to section 111(b)(3)(D)(iii) (*see* § 30.10(e)(2) (Q–30.10(e)(2) (certain legally binding rights under valid written employment contracts))), and amounts that were accrued or paid prior to June 15, 2009 and are therefore not subject to review by the Special Master.

(iii) *Period from June 15, 2009 through final determination.* For the period from June 15, 2009 through the date of the Special Master's final determination, the TARP recipient will be treated as complying with this section if, with respect to employees covered by paragraph (a)(3)(i) of this section, the TARP recipient continues to pay compensation to such employees in accordance with the terms of employment as of June 14, 2009 to the extent otherwise permissible under this Interim Final Rule (for example, continued salary payments but not any bonus payments) and if, with respect to employees covered by paragraph (a)(3)(ii) of this section, the TARP recipient continues to pay compensation to such employees under the compensation structure established as of June 14, 2009, and if in addition the TARP recipient promptly complies

with any modifications that may be required by the Special Master's final determination. However, the Special Master may take into account the amounts paid to an employee during such period in determining the appropriate compensation amounts and compensation structures, as applicable, for the remainder of the year.

(4) *Advisory opinions on compensation structures or compensation payments to employees of TARP recipients.* A TARP recipient or TARP recipient employee may request an advisory opinion from the Special Master as to whether a compensation structure is, or will or may result in payments that are, inconsistent with the purposes of EESA or TARP, or otherwise contrary to the public interest. In addition, the Special Master may become aware of compensation structures or payments at any TARP recipient for which it may be useful to provide an advisory opinion as to whether such structure or payments meets this standard. Accordingly, the Special Master shall have the authority to render advisory opinions upon request or at the Special Master's initiative, as to whether a compensation structure is, or will or may result in payments to an employee that are inconsistent with the purposes of section 111 of EESA or TARP, or otherwise contrary to the public interest, or whether a compensation payment made, or to be made, was or will be inconsistent with the purposes of section 111 of EESA or TARP, or otherwise contrary to the public interest. If the Special Master renders an adverse opinion, the Special Master shall have the authority to seek to negotiate with the TARP recipient and the subject employee for appropriate reimbursements to the TARP recipient or the Federal government. Any advisory opinion shall reflect the Special Master's application of the principles outlined in paragraph (b) of this section. The Special Master shall not be required to render an advisory opinion in every instance, but may do so only where the Special Master deems appropriate and feasible in the context of the Special Master's other responsibilities. In any case, the Special Master shall render an opinion, or affirmatively decline to render an advisory opinion, within 60 days of the receipt of a substantially complete submission. The Special Master shall not be required to explain any decision to decline to render an advisory opinion.

(5) *Other designated duties and powers.* The Special Master shall have such other duties and powers related to

the application of compensation issues arising in the administration of EESA or TARP as the Secretary or the Secretary's designate may delegate to the Special Master, including, but not limited to, the interpretation or application of contractual provisions between the Federal government and a TARP recipient as those provisions relate to the compensation paid to, or accrued by, an employee of such TARP recipient.

(b) *Determination of whether compensation is inconsistent with the purposes of section 111 of EESA or TARP or is otherwise contrary to the public interest—(1) Principles.* In reviewing a compensation structure or a compensation payment to determine whether it is inconsistent with the purposes of section 111 of EESA or TARP or is otherwise contrary to the public interest, the Special Master shall apply the principles enumerated below. The principles are intended to be consistent with sound compensation practices appropriate for TARP recipients, and to advance the purposes and considerations described in EESA sections 2 and 103, including the maximization of overall returns to the taxpayers of the United States and providing stability and preventing disruptions to financial markets. The Special Master has discretion to determine the appropriate weight or relevance of a particular principle depending on the facts and circumstances surrounding the compensation structure or payment under consideration, such as whether a payment occurred in the past or is proposed for the future, the role of the employee within the TARP recipient, the situation of the TARP recipient within the marketplace and the amount and type of financial assistance provided. To the extent that two or more principles may appear inconsistent in a particular situation, the Special Master will determine the relative weight to be accorded each principle. In the case of any review of payments already made under paragraph (c)(2) of this section, or of any rights to bonuses, awards, or other compensation already granted, the Special Master shall apply these principles by considering the facts and circumstances at the time the compensation was granted, earned, or paid, as appropriate.

(i) *Risk.* The compensation structure should avoid incentives to take unnecessary or excessive risks that could threaten the value of the TARP recipient, including incentives that reward employees for short-term or temporary increases in value, performance, or similar measure that

may not ultimately be reflected by an increase in the long-term value of the TARP recipient. Accordingly, incentive payments or similar rewards should be structured to be paid over a time horizon that takes into account the risk horizon so that the payment or reward reflects whether the employee's performance over the particular service period has actually contributed to the long-term value of the TARP recipient.

(ii) *Taxpayer return.* The compensation structure, and amount payable where applicable, should reflect the need for the TARP recipient to remain a competitive enterprise, to retain and recruit talented employees who will contribute to the TARP recipient's future success, and ultimately to be able to repay TARP obligations.

(iii) *Appropriate allocation.* The compensation structure should appropriately allocate the components of compensation such as salary, short-term and long-term incentives, as well as the extent to which compensation is provided in cash, equity or other types of compensation such as executive pensions, other benefits, or perquisites, based on the specific role of the employee and other relevant circumstances, including the nature and amount of current compensation, deferred compensation, or other compensation and benefits previously paid or awarded. The appropriate allocation may be different for different positions and for different employees, but generally, in the case of an executive or other senior level position a significant portion of the overall compensation should be long-term compensation that aligns the interest of the employee with the interests of shareholders and taxpayers.

(iv) *Performance-based compensation.* An appropriate portion of the compensation should be performance-based over a relevant performance period. Performance-based compensation should be determined through tailored metrics that encompass individual performance and/or the performance of the TARP recipient or a relevant business unit taking into consideration specific business objectives. Performance metrics may relate to employee compliance with relevant corporate policies. In addition, the likelihood of meeting the performance metrics should not be so great that the arrangement fails to provide an adequate incentive for the employee to perform, and performance metrics should be measurable, enforceable, and actually enforced if not met. The appropriate allocation and the appropriate performance metrics may be

different for different positions and for different employees, but generally a significant portion of total compensation should be performance-based compensation, and generally that portion should be greater for positions that exercise higher levels of responsibility.

(v) *Comparable structures and payments.* The compensation structure, and amount payable where applicable, should be consistent with, and not excessive, taking into account compensation structures and amounts for persons in similar positions or roles at similar entities that are similarly situated, including, as applicable, entities competing in the same markets and similarly situated entities that are financially distressed or that are contemplating or undergoing reorganization.

(vi) *Employee contribution to TARP recipient value.* The compensation structure, and amount payable where applicable, should reflect the current or prospective contributions of an employee to the value of the TARP recipient, taking into account multiple factors such as revenue production, specific expertise, compliance with company policy and regulation (including risk management), and corporate leadership, as well as the role the employee may have had with respect to any change in the financial health or competitive position of the TARP recipient.

(2) *Further guidance.* The Secretary reserves the discretion to modify or amend the foregoing principles through notice, announcement or other generally applicable guidance, provided that such guidance shall apply only prospectively from its date of publication and shall not provide a basis for reconsideration of a determination of the Special Master, except as the Special Master deems appropriate in light of such modification or amendment.

(c) *Special Master determinations—*
(1) *Initial determinations.* The Special Master shall provide an initial determination in writing, within 60 days of the receipt of a substantially complete submission, setting forth the facts and analysis that formed the basis for the determination. The TARP

recipient shall have 30 days to request in writing that the Special Master reconsider the initial determination. The request for reconsideration must specify a factual error or relevant new information not previously considered, and must demonstrate that such error or lack of information resulted in a material error in the initial determination. The Special Master must provide a final determination in writing within 30 days, setting forth the facts and analysis that formed the basis for the determination. If a TARP recipient does not request reconsideration within 30 days, the initial determination shall be treated as a final determination.

(2) *Final determinations.* In the case of any final determination that the TARP recipient is required to receive, the final determination of the Special Master shall be final and binding and treated as the determination of the Treasury.

(3) *Advisory Opinions.* An advisory opinion of the Special Master shall not be binding upon any TARP recipient or employee, but may be relied upon by a TARP recipient or employee if the advisory opinion applies to the TARP recipient and the employee and the TARP recipient and employee comply in all respects with the advisory opinion.

(d) *Submissions to the Special Master—*(1) *Submission procedures.* Submissions to the Special Master may be made under such procedures as the Special Master shall determine. The Special Master may reserve the right to request further information at any time and a submission shall not be treated as substantially complete unless the Special Master has so designated.

(2) *Disclosure procedures.* Materials submitted to the Special Master and the initial and final determinations of the Special Master are subject to disclosure under the standards provided in the Freedom of Information Act (FOIA, (5 U.S.C. 552 *et seq.*)). In addition, the final determinations of the Special Master shall be disclosed to the public. The Special Master shall promulgate procedures for ensuring that disclosed materials have been subject to appropriate redaction to protect personal privacy, privileged or

confidential commercial or financial information or other appropriate redactions permissible under the FOIA, which may include a procedure for the person or entity making the submission to request redactions and to review and request reconsideration of any proposed redactions before such redacted materials are released.

§ 30.17 Q–17: How do the effective date provisions apply with respect to the requirements under section 111 of EESA?

(a) *General rule.* The requirements under this part with respect to sections 111(b), 111(c), 111(d) and 111(f) are effective upon June 15, 2009. The guidance under this part with respect to those sections supersedes any previous guidance applicable to a TARP recipient to the extent that guidance is inconsistent with those requirements, but supersedes that guidance only as of June 15, 2009. To the extent previous contractual provisions are not inconsistent with ARRA or the guidance under this part, those contractual provisions remain in effect and continue to apply in accordance with their terms.

(b) *Bonus payment limitation.* The bonus payment limitation provision under § 30.10 (Q–10) of this part does not apply to bonus payments paid or accrued by TARP recipients or their employees before June 15, 2009. Certain bonus payments may relate to a service period beginning before and ending after June 15, 2009. In these circumstances, the employee will not be treated as having accrued the bonus payment on or after June 15, 2009 if the bonus payment is at least reduced to reflect the portion of the service period that occurs after June 15, 2009. If the employee is an SEO or most highly compensated employee at the time the net bonus payment after such reduction would otherwise be paid, the amount still may not be paid until such time as bonus payments to that employee are permitted.

Andrew Mayock,

Executive Secretary.

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