



## **CLIENT ALERT**

### **TARP REGULATIONS ON EXECUTIVE PAY AND CORPORATE GOVERNANCE**

**June 24, 2009**

On June 10, 2009, the Treasury released long-awaited regulations in an Interim Final Rule (IFR) that sets standards for complying with the executive compensation and corporate governance provisions for TARP recipients contained in the Emergency Economic Stabilization Act of 2008 (EESA) as amended by the American Recovery & Reinvestment Act of 2009 (ARRA). The IFR is effective as of June 15, 2009, and supersedes all prior Treasury guidance on executive compensation and corporate governance for TARP recipients.

The specific requirements for implementing the executive compensation and corporate governance standards provisions of Section 111 of EESA are set out in question and answer format in the IFR. This Client Alert summarizes the IFR by discussing the guidance for each of the standards. Note that the IFR, in addition to the executive compensation and corporate government standards specifically provided in EESA, includes additional standards added by Treasury under its authority granted in EESA to promulgate additional standards.

#### **IFR BASED STANDARDS FOR COMPENSATION AND CORPORATE GOVERNANCE**

- Prohibits the payment or accrual of bonus, retention award and incentive compensation (with the exception of limited amounts of restricted stock) for specified individuals, depending upon the level of government assistance received by the institution.
- Prohibits making any golden parachute payments to a CEO or any of the next five most highly compensated employees.
- Prohibits tax gross-ups to CEOs and any of the next 20 most highly compensated employees.
- Provides for the recovery of any bonus, retention award, or incentive compensation paid to a CEO or the next 20 most highly compensated employees based on materially inaccurate statements of earnings, revenues, gains, or other criteria ("clawback").
- Requires the 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 institution.
- Limits compensation to exclude incentives for senior executive officers (SEOs) to take unnecessary and excessive risk that threaten the value of the institution.
- Prohibits employee compensation plans that would encourage manipulation of earnings to enhance an employee's compensation.
- Requires the adoption of an excessive or luxury expenditures policy.
- Requires compliance with Federal securities laws and regulations regarding non-binding resolution on CEO compensation to shareholders ("say on pay").
- Requires disclosure of perquisites offered to CEOs and certain highly compensated employees.
- Requires disclosures related to compensation consultant engagements.
- Establishes the Office of Special Master for TARP Executive Compensation (Special Master) to address the application of the rules to TARP recipients and their employees.

**SPECIFIC REGULATIONS FOR COMPENSATION AND CORPORATE GOVERNANCE STANDARDS**

**Definitions Used in the IFR.**

- **Senior Executive Officers (SEO or SEOs).** Defined as the “named executive officers” (CEO, CFO and three highest paid executive officers) of a public company whose compensation is required to be disclosed pursuant to SEC regulations and non-public counterparts. Analogous rules apply to private companies.
- **Most Highly Compensated Employee (MHCE).** Defined as an employee of the TARP recipient, other than the SEOs of the company, whose annual compensation is determined to be the highest among all employees of the TARP recipient. (Commissions are not treated as bonuses for purposes of bonus limitations discussed below; rather commissions are classified as salary and are a component of compensation for purposes of ranking employees.) Ranking employees by compensation is accomplished on a look-back basis to compensation in the preceding year for purposes of determining MHCEs for the current year. However, an employee who is not employed by the company on the first day of the current year is not a MHCE unless it is reasonably anticipated that the employee will return to employment with the company during the current fiscal year.
- **Annual Compensation.** 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)), not including actuarial increases in pension plans and above market earnings on deferred compensation. A TARP recipient that does not have securities registered with the SEC pursuant to the federal securities laws must follow this same definition.

**Standard: Prohibition of bonus, retention award and incentive compensation (referred to as bonus payments).**

TARP recipients must prohibit payment or accrual of any bonus payment during the TARP period to the following employees (based on the level of financial assistance received under the TARP):

<u>Amount of Assistance</u>	<u>Bonus Restrictions Apply To</u>
Less than \$25 million	The most highly-compensated employee
\$25 million but less than \$250 million	The five most highly-compensated employees
\$250 million but less than \$500 million	SEOs plus the 10 next most highly-compensated employees (Up to 15 employees)
\$500 million or more	SEOs plus the 20 next most highly-compensated employees (Up to 25 employees)

The prohibition does not apply to bonus payments paid or accrued before June 15, 2009. For bonus payments that relate to service that begins prior to and ends after June 15, 2009, the bonus payment will not be considered paid or accrued on or after June 15, 2009 if the bonus payment is reduced to reflect the portion of service that occurs after June 15, 2009. If the employee is an SEO or most highly compensated employee; however, the reduced payment may not be paid until such time as bonus payments to that employee are permitted.

There are two significant exceptions to the bonus prohibition.

1. **Long-term restricted stock (or restricted stock units that may be payable in cash or stock).** These amounts may be awarded to employees whose compensation is otherwise limited under the bonus restrictions. Such restricted stock or stock units:
  - May not exceed one-third of the employee’s total compensation for the current year (not a look-back to the prior year). For purposes of the one-third of total annual compensation limitation, the restricted stock or units are to be valued at the grant-date fair market value and equity-based compensation will be included in the calculation of total annual compensation at the grant-date fair value only in the year of grant. (Note that this differs from compensation accounting and income tax reporting methodology.)

- May not become transferrable (or payable for stock units) earlier than 25% of the shares at the time 25% of the aggregate financial assistance is repaid to the government and in additional 25% tranches when each additional 25% of aggregate financial assistance is repaid. (Shares of restricted stock may be made transferrable as reasonably needed to pay Federal, State and local income taxes due to vesting of shares and these shares will not count towards the percentages permitted.)
  - In addition, employees must forfeit restricted stock or units if the employee does not continue to perform substantial services for at least two years from the date of grant, other than on account of death, disability or a change-in-control event.
2. ***Bonus payments may be made for a legally binding right under an employment contract executed on or before February 11, 2009.*** Note that the employee must have the legally binding right to the bonus amount as of February 11, 2009, not just be a participant in a plan or agreement that will provide a bonus at future date.

***Observations***

- For purposes of this exception to the bonus prohibitions, the IFR uses rules defining a legally binding right as specified in 26 CFR 1.409A-(b)(1).
- This exception is distinguished from the exception for bonus payments made or accrued prior to June 15, 2009, in that this exception permits bonus payments under an employment contract executed on or before February 11, 2009 if the employee had a legally binding right to that payment as of February 11, 2009, whereas bonuses paid or accrued prior to the IFR effective date of June 15, 2009 are permissible because they precede the effective date.

There are three additional items of note under the bonus limitation provisions.

1. ***Commissions for sales to unrelated parties are generally exempted from the definition of bonus payments (or incentive compensation).*** Commission compensation must be earned in a program in existence for that type of employee on February 17, 2009 and generally must be for sales that occur frequently to unrelated customers in the normal course of business. Therefore, commission compensation for employees working in 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 will not be limited by the bonus limitations. Compensation for specified transactions such as initial public offerings or the sale of an entity do not meet the definition of commissions for purposes of exclusion from the bonus limitations.
2. ***Stock options*** The use of stock options is specifically included in the definition of an incentive plan and is therefore subject to the bonus limitation provisions. In other words, stock options cannot be used.
3. ***Salary can be paid in cash or in other property such as stock (not stock options).*** When salary is paid in stock (or other property), the stock must not be subject to a substantial risk of forfeiture, the amount of stock must be determinable as a dollar amount and the stock must accrue at the same time as cash salary would have been paid. (Holding requirements that limit the transferability or sale of the stock by the employee may be imposed by the company without jeopardizing treatment as salary.)

***Observation***

- The IFR does not impose hard caps on salary or compensation in general. However, previous Treasury guidance (October, 2008 Interim Final Rule) required the TARP recipients 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 company. 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. Under the transition rules in this IFR, 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. Therefore, 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 for CEO annual compensation in excess of \$500,000. In addition, Treasury anticipates requiring this condition in any future agreements to provide TARP assistance.

**Standard: Prohibition of Golden Parachute Payments**

TARP recipients must prohibit any golden parachute payment to a CEO and any of the next five most highly compensated employees during the TARP period. A golden parachute payment:

- Is any payment for the departure for any reason or any payment due to a change in control of the TARP recipient.
- Includes acceleration of vesting due to the departure or the change in control event.
- Is treated as paid at the time of departure or change in control event and thus may include a right to amounts actually payable after the TARP period.
- Excludes payments for services performed or benefits accrued. Payments are 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 departure, regardless of whether the departure is voluntary or involuntary (other than restrictions for a departure for cause).
- Excludes payments from benefit plans and deferred compensation plans if (a) the plan was in effect at least one year prior to the employee's departure, (b) the payment is made pursuant to the plan and in accordance with terms of the plan as in effect no later than one year before departure, (c) the employee has a vested right to the payments at the time of the departure or change in control event, (d) benefits under the plan are accrued each period only for current or prior service, (e) any payments are not based on discretionary acceleration of vesting or accrual of benefits that occurs at any time later than one year before the departure or the change in control event, and (f) with respect to deferred compensation plans, the TARP recipient has previously recognized compensation expense and accrued a liability for the benefit payments in accordance with GAAP.
- Excludes payments from pension or qualified retirement plans.
- Excludes payments made for a departure on account of the employee's death or disability.
- Excludes severance or similar payments required to be made pursuant to a state statute or foreign law that is applicable to all employers within the appropriate jurisdiction.

**Standard: Prohibition of tax gross-ups.**

TARP recipients are prohibited from providing gross-ups to any of the CEOs and the next 20 most highly compensated employees during the TARP period. Providing a gross-up includes providing a right to a gross-up payment at a future date (for example, after the TARP period). A gross-up is any reimbursement of taxes owed with respect to any compensation, except that it does not include a payment under a tax equalization agreement to compensate an employee for the difference between the taxes imposed by a foreign jurisdiction and the U.S. Federal, state and local taxes imposed on the compensation. As an example, gross-up payments for covered individuals are precluded for items such as country club usage, company automobile allowances in addition to the more traditional gross-up on any termination amounts.

**Standard: Clawback of Bonus, Retention Award, or Incentive Compensation.**

TARP recipients must ensure that any bonus payment (including retention awards and incentive compensation) made to a CEO or one of the next 20 most highly compensated employees during the TARP period is subject to a recovery or “clawback” provision if the bonus payment was based on materially inaccurate financial statements or any other materially inaccurate performance metric criteria. A bonus payment is deemed to have been made to the employee when the employee obtains a legally binding right to that payment.

This requirement differs considerably from the clawback provision required under Section 304 of the Sarbanes-Oxley Act of 2002 in that this requirement:

- Applies to a broader group of employees.
- Applies to both public and private TARP recipients.
- Applies to retention awards.
- Is not exclusively triggered by an accounting restatement.
- Does not limit the recovery period.
- Covers material inaccuracies beyond financial reporting (such as performance metrics).

**Standard: Requires the Establishment of a Compensation Committee of Independent Directors to Review Compensation Plans and the Risks Posed by these Plans to the Institution.**

TARP recipients must establish a compensation committee of independent directors within the later of 90 days following the closing date of the agreement between the TARP recipient and the Treasury or September 14, 2009. An exception is granted to private TARP recipients that have received less than \$25 million of financial assistance under the TARP; those companies may either establish a compensation committee of independent directors or delegate the duties of the compensation committee to the full board of directors. The compensation committee, whether pre-existing or established to meet the TARP requirements, must be maintained until the end of the TARP period. In general, the compensation committee is required to meet at least every six months to review the CEO and employee compensation plans and the risks posed by these plans to the institution. The specific requirements of the compensation committee for reviewing CEO and employee compensation plans are described in more detail in the following two sections. In addition to the plan reviews, the compensation committee must also certify the completion of the reviews of the CEO and employee compensation plans.

Last, the compensation committee must, at least once per fiscal year, provide a narrative description that:

- Identifies each CEO compensation plan and explains how the CEO compensation plans do not encourage the CEOs to take unnecessary and excessive risks that threaten the value of the company, including how the CEO compensation plans do not encourage behavior focused on short term results rather than on long-term value creation.
- Identifies each employee compensation plan and the risks posed by employee compensation plans and explains how these risks were limited, including how these employee compensation plans do not encourage behavior focused on short term results rather than on long-term value creation.
- Explains how the company has ensured that the employee compensation plans do not encourage manipulation of earnings to enhance the compensation of any employee.

For public companies, the narrative disclosure and the certification by the compensation committee must be provided in the Compensation Committee Report (in the company’s proxy) and to Treasury. For private or smaller companies, the narrative disclosure and certification must be provided to the company’s primary regulatory agency and to Treasury within 120 days of the end of the fiscal year, any part of which is a TARP period.

**Standard: Limits to Exclude Incentives for Senior Executive Officers to Take Unnecessary and Excessive Risk.**

To be in compliance with this standard, the compensation committee must:

- Discuss, evaluate and review at least every six months, with the company's Senior Risk Officer (SRO), the SEO compensation plans to ensure that such plans do not encourage SEOs to take unnecessary and excessive risks that threaten the value of the institution.
- Discuss, evaluate and review at least every six months, with the company's SRO, the employee compensation plans in light of the risk posed to the institution by such plans and how to limit such risks.

To meet these two requirements, at least every six months the compensation committee must:

- Discuss, evaluate and review with the SRO any risks (long-term and short-term) that could threaten the value of the institution.
- Identify features in the SEO compensation plans that could lead SEOs to take these risks.
- Identify features in the employee compensation plans that pose risks to the company, including any feature in the SEO or employee compensation plans that would encourage behavior focused on short-term results and not on long-term value creation.
- Limit these features to ensure SEOs are not encouraged to take risks that are unnecessary and excessive and that the company is not unnecessarily exposed to risks.

**Standard: Prohibits employee compensation plans that would encourage manipulation of earnings.**

To be in compliance with this standard, the compensation committee must:

- Discuss, evaluate and review at least every six months the employee compensation plans to ensure that these plans do not encourage manipulation of earnings to enhance the compensation of any employees.

To meet this requirement the compensation committee must discuss, evaluate and review the terms of each employee compensation plan and identify and eliminate the features in these plans that could encourage the manipulation of reported earnings to enhance the compensation of any employee.

**Standard: Requires the adoption of an excessive or luxury expenditures policy.**

The board of directors of a TARP recipient must, by the later of 90 days after the closing date of the agreement between the company and Treasury or September 14, 2009, adopt an excessive or luxury expenditures policy. This policy must be written standards applicable to the company and its employees that address four categories of expenses and that are reasonably designed to eliminate excessive and luxury expenditures. The four categories of expenses are:

- Entertainment or events.
- Office and facility renovations.
- Aviation or other transportation services.
- Similar items, activities or events.

The written standards must:

- Identify the types or categories of expenditures which are prohibited (and 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).
- Identify the types or categories of expenditures for which prior approval is required.
- Provide reasonable approval procedures under which such an expenditure may be approved.

- Require principal executive officer (PEO) and principal financial officer (PFO) certification that the approval of any expenditures requiring the approval of any SEO, any executive officer of a substantially similar level of responsibility or the board of directors (or committee thereof) was properly obtained.
- Require the prompt internal reporting of violations to an appropriate person or persons identified in the policy.
- Mandate accountability for adherence to this policy.

The policy must:

- Be maintained for the duration of the TARP period.
- Be provided to the Treasury and the company's primary regulatory agency.
- Be posted on its internet web site (if the company maintains a web site).

**Standard: Requires Compliance with Federal Securities Laws and Regulations Regarding Non-binding Resolution on SEO Compensation to Shareholders ("say on pay").**

Any proxy or consent or authorization for an annual or other meeting of the shareholders of a 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 (generally SEOs), including the compensation discussion and analysis, the compensation tables and any related materials. The TARP recipient must comply with any rules, regulations or guidance promulgated by the SEC.

This provision was effective upon the passage of ARRA and was in effect for proxies filed in 2009.

**Standard: Requires disclosure of perquisites offered to SEOs and certain highly compensated employees.**

Tarp recipients must annually disclose any perquisites whose total value exceeds \$25,000 each fiscal year for each SEO and each of the most highly compensated employees subject to the bonus limitations (from one to twenty highly compensated employees plus the SEOs depending upon the level of TARP assistance received). The company must provide a narrative description of the amount, nature of the perquisite, recipient and a justification for offering the perquisite. The disclosure must be provided to Treasury and the TARP recipient's primary regulatory agency within 120 days of the end of each fiscal year, any part of which is a TARP period.

**Standard: Requires disclosures related to compensation consultant engagements.**

TARP recipients must provide an annual narrative description of whether the company or committee uses a compensation consultant, the types of services provided, including non-compensation consulting provided to the company or the compensation committee during the past three years. The disclosure must be provided to Treasury and the TARP recipient's primary regulatory agency within 120 days of the end of each fiscal year, any part of which is a TARP period.

**Standard: Establishes the Office of Special Master for TARP Executive Compensation (Special Master) to address the application of the rules to TARP recipients and their employees.**

The IFR provides that Treasury must establish the Office of the Special Master for TARP Executive Compensation (Special Master). The Special Master has the following powers, duties and responsibilities that apply to all TARP recipients:

- ***Interpretative authority.*** The Special Master has the responsibility for interpreting section 111 of EESA, the regulations in the IFR, and any other applicable guidance, to determine how the requirements under section 111 of EESA, the regulations, and any other applicable guidance, apply to particular facts and circumstances. The IFR specifies that the Special Master has the responsibility for administering the provisions of Section 111,

including making all determinations, as required, as to the meaning of such guidance and whether such requirements have been met

- ***Review of prior payments to employees.*** Section 111(f) of EESA directs the Secretary to review bonuses, retention awards, and other compensation paid before February 17, 2009, to employees of entities receiving TARP assistance before February 17, 2009, to determine whether any such payments were inconsistent with the purposes of section 111 of EESA, or otherwise contrary to the public interest and provides that upon making such a determination the Secretary will seek to negotiate with TARP recipients and the subject employees for appropriate reimbursement to the government with respect to compensation or bonuses. The IFR specifies that the Special Master has the responsibility for administering the provisions of Section 111(f), including the determination of whether payments are inconsistent with TARP legislation and guidance or contrary to the public interest and conducting negotiations for reimbursement to the government. The Special Master will make this determination based on the following compensation principles:
  - ***Risk.*** The compensation structure should avoid incentives to take unnecessary and excessive risks.
  - ***Taxpayer return.*** The compensation structure should appropriately allocate the components of compensation 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 awarded or paid.)
  - ***Performance-based compensation.*** An appropriate portion of the compensation should be performance-based over a relevant performance period.
  - ***Comparable structures and payments.*** The compensation structure 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.
  - ***Employee contribution to TARP recipient value.*** The compensation structure 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 company.

The Special Master has broad discretion on the scope of the review of prior payments, including whether to conduct a limited review or no review, and is empowered to request in writing any information from a TARP recipient necessary to carry out such reviews of prior compensation (recipients must submit requested information within 30 days of the request).

- ***Advisory opinions on compensation structures or compensation payments to employees of TARP recipients.*** A TARP recipient or an employee of a TARP recipient 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, although the Special Master is not required to render an advisory opinion in every instance and is not required to explain any decision to decline to render an advisory opinion. The Special Master may also become aware of compensation structures or payments at any TARP recipient that warrants such an advisory opinion.

If the Special Master renders an adverse opinion, the Special Master has the authority to seek to negotiate with the TARP recipient and the subject employee for appropriate reimbursements to the company or the government. Any such adverse opinion must reflect the compensation principles outlined above.

The Special Master must render an advisory opinion or decline to render an advisory opinion within 60 days of the receipt of a substantially complete submission.

### ***Observations***

- The Special Master will review payments made prior to February 17, 2009 for appropriateness.
- The compensation principles set forth in this section may foreshadow future regulatory initiatives on compensation best practices for all institutions.
- The Special Master advisory opinions are not binding on the TARP recipient or employees but may be relied upon if complied with completely by the company and the employees.

In addition to the powers, duties and responsibilities that may apply to all TARP recipients discussed above, the Special Master has broad powers to approve compensation payments to, and the compensation structures for, certain employees of TARP recipients receiving exceptional financial assistance (financial assistance provided under the Programs for Systemically Significant Failing Institutions, the Targeted Investment Program and the Automotive Industry Financing Program.) The highlights of the Special Masters powers, duties and responsibilities regarding TARP recipients receiving exception financial assistance are set forth below.

- The Special Master will determine whether the compensation structure for each CEO 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 compensation principles outlined above, subject to the requirement that the compensation structure and payments satisfy the applicable bonus limitations.
- 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, 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 determinations by applying the compensation principles outlined above. 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 there under.

### ***Compliance Certification Requirements***

The Primary Executive Officer (PEO) and Primary Financial Officer (PFO) must provide certification of compliance within 90 days of the completion of each fiscal year, any part of which is a TARP period. The certifications include the following 16 points of certification:

- The compensation committee has met at least every six months with the senior risk officer to discuss and evaluate CEO compensation plans and employee compensation plans and the risks these plans pose to the company.
- The compensation committee has identified and limited the features in the CEO compensation plans that could lead CEOs 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 company, and has limited those features to ensure that the company is not unnecessarily exposed to risks.
- 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 company to enhance the compensation of an employee.
- The compensation committee will certify to these reviews.

- The compensation committee will provide a narrative description of how it limited the features in:
  - SEO compensation plans that could lead SEOs to take unnecessary and excessive risks that could threaten the value of the TARP recipient, and
  - employee compensation plans to ensure that the company is not unnecessarily exposed to risks, and
  - employee compensation plans that could encourage the manipulation of reported earnings of the TARP recipient to enhance the compensation of an employee.
- The company has required that all bonuses, retention awards, and incentive compensation of the SEOs and next twenty most highly compensated employees be subject to a “clawback” provision by the company if the payments were based on materially inaccurate financial statements or any other materially inaccurate performance metric criteria.
- The company has prohibited any golden parachute payment to the SEOs and the next five most highly compensated employees.
- The company has limited bonuses, retention awards, and incentive compensation paid to or accrued by employees to whom the bonus payment limitation applies.
- For a company with 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.
- The company has adopted and maintains an excessive or luxury expenditures policy and has provided this policy to Treasury.
- The company 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.
- The company will disclose whether the company, the board, or the compensation committee has engaged a compensation consultant, and the services the compensation consultant or any affiliate provided.
- The company has prohibited any tax gross-ups on compensation to the SEOs and the next twenty most highly compensated employees.
- The company has substantially complied with any compensation requirements set forth in the agreement between the TARP recipient and the Treasury, as may have been amended.
- 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.
- 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.

#### **Additional Certification for Institutions Receiving Exceptional Financial Assistance**

In addition to the certification requirements for all TARP participants described above, 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 company has had the compensation structure of those employees approved by the Office of the Special Master for TARP Executive Compensation.

## ABOUT AMALFI CONSULTING, LLC

Amalfi Consulting, LLC (formerly the Compensation Group of Clark Consulting), has been providing bank compensation consulting solutions to clients for over a decade. Our consulting focus is on the financial services industry, primarily banking and other financial institutions.

Amalfi has served over 400 clients on a national basis through our 14 full time professionals located in Minneapolis, Dallas, and Boston. Amalfi is focused on solving today's bank compensation issues. Our full array of compensation services aims to serve clients from start-up organizations to those that are publicly traded. Amalfi Consulting is truly independent. The owners are also employees of Amalfi Consulting, working with our clients each and every day.

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