Executive Compensation Rules Under the Emergency Economic Stabilization Act of 2008

October 23, 2008

On October 3, 2008, the President signed into law the Emergency Economic Stabilization Act of 2008 (the "Act"), which authorizes the U.S. Department of Treasury ("Treasury") to access up to $700 billion to protect the U.S. economy and restore confidence and stability to the financial markets.[1]

The Act provides for a gradual allocation of the $700 billion:

- $250 billion is available to Treasury immediately;
- $100 billion more is available upon certification from the President to Congress that the additional funds are needed; and
- The remaining $350 billion will be allocated as and when the President submits a written report to Congress detailing additional needs and programs, unless Congress objects within 15 days after receiving the report.

The Act authorizes Treasury to use these funds to purchase troubled assets from financial institutions. Troubled assets include mortgage-related instruments or any other assets the purchase of which is necessary to promote financial market stability, as determined by the Treasury after consultation with the Chairman of the Federal Reserve. Financial institutions include any institution established and regulated under the laws of the U.S. or any U.S. state, territory or possession and having significant operations in the U.S.

The Act authorizes Treasury to use the funds to engage in auction purchases, direct purchases and guarantees of troubled assets. The Act establishes a number of executive compensation requirements applicable to institutions participating in auctions and direct purchases.

[1] A comprehensive review of the Act and Treasury's Capital Purchase Program under the Act can be found in our recent client memoranda Emergency Economic Stabilization Act of 2008 dated October 4, 2008 and Emergency Economic Stabilization Act of 2008: US Government Capital Injections dated October 15, 2008.

On October 14, 2008, Treasury launched its first program under the Act and issued guidance on how the executive compensation rules will apply under this program and two additional programs still under development.[2] This memorandum provides a brief summary of each of the three programs and a more detailed description of the executive compensation requirements applicable under each program.

Capital Purchase Program ("CPP")

The CPP is the first program to be launched by Treasury and earmarks a significant portion of the first $250 billion available under the Act to provide funding to U.S. financial institutions in exchange for the issuance to Treasury of senior preferred stock and warrants for common stock in the institutions. The purpose of the CPP is to provide capital and incentive to financial institutions to extend credit into the markets.

» Initial Participants – Nine of the largest U.S. banks have signed on for an aggregate of $125 billion under the CPP and the closing of the funding for these banks is expected to occur shortly.

» Additional Eligible Participants – Other U.S. controlled banks, savings associations and certain bank and S&L holding companies can apply for funding under the CPP until November 14, 2008.

» Maximum Funding – The maximum available to each institution is the lesser of $25 billion or 3% of the institution's risk weighted capital. It has been estimated that if all qualifying public institutions subscribe for the maximum funding under the CPP, the aggregate commitment would be approximately $220 billion. Private institutions are eligible as well.

» Securities Issued – Each participating institution will issue to Treasury non-voting preferred stock with a liquidation value equal to the funding provided, plus warrants. The preferred stock will constitute Tier 1 capital for the issuing institution.

» Dividend – The preferred stock will pay a 5% dividend, adjusted to 9% after five years.

» Redemption – The preferred stock is freely redeemable by the institution after three years, but prior to three years the preferred stock can only be redeemed by the institution to the extent that the institution raises

[2] The Treasury guidance can be found in: (1) {TARP Capital Purchase Program, Interim Final Rules 31 C.F.R. Part 30;} (2) {Treasury Notice 2008-TAAP;} (3) {Treasury Notice 2008-94;} and (4) {Treasury Notice 2008-PSSFI.}

replacement capital in an offering of common stock or perpetual preferred stock in an amount equal to at least 25% of the liquidation value of the preferred.

- Restrictions – A participating institution may not increase dividends on its common stock or engage in stock repurchases while Treasury continues to hold the preferred stock.
- Transferability – Treasury may transfer the preferred stock at any time.
- Warrants – Treasury will also receive a 10-year warrant on common shares equal to 15% of the liquidation value of the preferred stock with an exercise price equal to the 20-trading-day-average trading price of the common stock on the date of the funding, but if the institution raises common or perpetual preferred stock equal to at least 100% of the liquidation value of the Treasury preferred stock by December 31, 2009, the number of warrants will be reduced by 50%.

Executive Compensation Rules Under the CPP

The executive compensation rules under the CPP, which go beyond the requirements that are explicitly mandated by the Act, require institutions participating in the CPP to:

- Limit severance benefits to senior executives to less than three times the executive's trailing five-year average annual taxable compensation;
- Agree to limit to $500,000 the federal income tax deduction the institution will take for annual compensation paid to each of its senior executives;
- Adopt measures to avoid incentive compensation which encourages senior executives to take unnecessary and excessive risks that threaten the value of the institution; and
- Require clawback of any bonus or incentive compensation paid to a senior executive during the covered period based on financial statements or performance metrics later determined to be materially inaccurate.

An institution participating in the CPP must modify its existing compensation arrangements to conform with the rules above and must procure from its senior executives a waiver of any claims against the government as a result of these rules, as a pre-condition to receiving funding under the CPP.

Covered Period. The executive compensation rules will apply to a participating institution in the CPP for as long as Treasury continues to hold any equity or debt interest in the institution.

Senior Executives. The term "senior executives" is defined in a manner that will typically include any executive serving as CEO or CFO during the relevant period and the next three most highly compensated executive officers, determined based on the methodologies applied under the SEC compensation disclosure rules for the annual proxy statements of public companies. Specifically, the rules provide that for a participating institution which has registered equity securities and is therefore required to file annual proxy or information statements, the institution's senior executives will include the named executive officers who are:

- » employed by the institution during the period that Treasury holds equity or debt in the institution and are, during such time:
  - the principal executive officer;
  - the principal financial officer; or
  - one of the three most highly compensated executive officers (other than the principal executive officer and principal financial officer), based on total compensation determined under the proxy rules.

Institutions that are not subject to the proxy disclosure rules must nonetheless apply the methodologies under those rules to determine their senior executives for purposes of these rules. The rules generally identify the three most highly compensated executive officers by reference to the last completed fiscal year, but state that, for purposes other than the $500,000 compensation deduction limit, a participating institution should make best efforts to identify the three most highly compensated for the current year where possible.

For purposes of the $500,000 deduction limit, once any executive is deemed to be a senior executive, that executive's compensation will continue to be subject to the $500,000 deduction limit for the duration of the period that Treasury continues to hold any equity or debt in the relevant institution, even if the officer is bumped out of the top three in a future year or ceases employment in mid-year. It does not appear that this rule applies for the other executive compensation restrictions and, accordingly, it appears that for the other restrictions the determination of the affected senior executive officers will be made on a year-by-year basis.

Controlled Groups. The rules provide that if any member of a controlled group of entities participates in the CPP, the entire group of commonly controlled entitles will be treated as one entity, which means that the senior executives that will be affected by the compensation restrictions will typically be the management team at the parent entity. An 80% common control threshold is used for these purposes.

Corporate Acquisitions. The rules provide that, generally, if an institution that has not participated in CPP acquires an entity that has participated, the acquiror will not become subject to the executive compensation rules merely by virtue of the acquisition, and the acquired entity will remain subject to the executive compensation rules until the earlier of the first anniversary of the acquisition or the date Treasury ceases to hold any equity or debt in the entity.

Severance Limitation Under CPP. The severance rules limit the severance benefits to any senior executive to less than three times the executive's average annual taxable compensation for the five years prior to the severance event. This limit applies to any severance payments or benefits that are contingent upon the involuntary termination of a senior executive, or upon the bankruptcy, liquidation or receivership of the participating institution. An involuntary termination includes a termination by the institution, a resignation by the executive due to the institution's refusal to renew the executive's employment contract or a resignation by the executive for good reason due to a material negative change in the employment relationship. The limit only applies to severance payments and benefits that are triggered by an involuntary termination, bankruptcy, liquidation or receivership, such as severance pay, accelerated vesting of incentive awards and special enhancements of retirement benefits. Benefits that an executive is otherwise entitled to receive upon any resignation or retirement should not be affected. There is also an exception for extra benefits paid under qualified pension plans, even where the executive's departure is not entirely voluntary.

Annual Compensation Deduction Limit Under CPP. The rules under the CPP require participating institutions to agree to an annual $500,000 compensation deduction limit per senior executive, a requirement incorporated from the rules applicable to other programs under the Act. The Act added this limit to Section 162(m) of U.S. Internal Revenue Code of 1986, as amended (the "Code"). The pre-existing provisions of Section 162(m) impose a $1 million limit on the deductibility of compensation paid by public companies to certain top executives, but the new limit reduces the deduction cap to $500,000 and expands its application in several ways:

» The $500,000 deduction limit applies to both public and privately held financial institutions, whereas the $1 million limit applies only to companies with publicly registered equity securities.

- The $500,000 limitation will apply to a participating institution starting with the first tax year in which the institution receives funding under the CPP and to each future tax year during the covered period. The $500,000 deduction limitation and the compensation paid to a senior executive for any taxable year are prorated for the portion of the taxable year that the Treasury holds equity or debt in the participating institution.

- All compensation awarded or earned in an applicable tax year is subject to this deduction limit. The exception for performance-based awards which is applicable under the pre-existing $1 million limit of Section 162(m) does not apply with respect to the $500,000 limit.

- Amounts in excess of the $500,000 cap earned during the covered period but deferred to a future year will be non-deductible when they are eventually paid, even if they are paid after the end of the covered period under the CPP rules.

- As noted, once an executive is within the defined group of senior executives for any year after an institution has entered the CPP, the executive will remain subject to the $500,000 deduction limit for the duration of the period that Treasury continues to hold any equity or debt of the relevant institution.

Risk-Avoidance Requirement Under CPP. A participating institution is required to eliminate incentives for its senior executives to take unnecessary and excessive risks that threaten the value of the institution. The rules require the participating institution's compensation committee, or a committee acting in a similar capacity, to:

- promptly, and in any case within 90 days after the Treasury's funding of the institution under the CPP, review the institution's senior executive compensation arrangements with the institution's senior risk officer, or other personnel acting in a similar capacity, to ensure that the compensation arrangements do not encourage senior executives to take unnecessary and excessive risks that threaten the value of the financial institution;

- meet at least annually with the senior risk officer to discuss and review the relationship between the institution's risk management policies and practices and senior executive incentive compensation arrangements; and

- certify annually that the committee has completed these reviews.

For institutions with publicly registered equity, the certification must be set forth as part of the Compensation Discussion and Analysis in the institution's annual proxy statement. Private institutions are required to file the annual certification with their primary regulatory agency.

Clawback Under CPP. A participating institution must require that any bonus and incentive compensation payments to its senior executives during the covered period be subject to recovery or "clawback" by the institution if the payments were based on financial statements or inaccurate performance metrics later determined to be materially inaccurate.

Existing provisions of the Securities Exchange Act adopted pursuant to the Sarbanes-Oxley Act of 2002 ("SOX") require the chief financial officer or chief executive officer of a public company to reimburse the company for any bonus or other incentive-based or equity-based compensation, or profits from the sale of securities, that were received in the year prior to an accounting restatement made necessary by "the material noncompliance of the issuer, as a result of misconduct, with any financial reporting requirement under the securities laws." Some have argued that the effectiveness of the SOX clawback has been limited, in part, because it requires a restatement of a company's financial statements as a predicate to clawback and does not specify what constitutes "misconduct" or whose misconduct triggers the clawback.

The new clawback provision required under Act:

- is triggered by a material inaccuracy either in a financial statement or in calculating achievement of relevant performance metrics, whether or not the inaccuracy involves misconduct;
- applies to all five senior executives, not just the CEO and CFO; and
- applies to privately held as well as publicly traded institutions.

It is unclear how this clawback might apply, for example, in a situation where an institution has an incentive plan that pays awards at the end of a three-year performance cycle, where the employees who served as senior executives during the cycle are not the same set of employees serving as senior executives on the award payment date.

Troubled Asset Auction Program ("TAAP")

Under the TAAP, Treasury intends to hold auctions through which it will offer to purchase troubled mortgage-related assets from financial institutions. Although the auction parameters are still under development, it is expected that the auctions will take the form of reverse auctions in which institutions offer assets and indicate the lowest price they are willing to accept for the assets. Questions that remain open include:

- How will auctions be structured?
- What institutions will be eligible to participate?
- Will there be separate auctions for different types of assets or institutions?
- Will registered investment companies and pension trusts be permitted to participate and, if so, will there be separate rules or limits applicable to these sellers?
- If pension trusts are permitted to participate, will the executive compensation rules apply to the companies sponsoring the pension trusts?

Pension trusts are separate entities maintained for the benefit of plan participants and are typically managed by third party investment managers. Accordingly, from a policy standpoint it seems neither logical nor appropriate to subject a company to the Act's executive compensation rules based on a pension trust's participation in programs made available under the Act.

Executive Compensation Rules Under the TAAP

The Act and the Treasury rules establish the following executive compensation restrictions applicable to any financial institution from whom troubled assets in excess of $300 million are acquired by the Treasury in one or more auctions under the TAAP or in a combination of auctions and direct sales:

- The institution is subject to the same $500,000 annual deduction limitation on the compensation paid to its senior executives that applies to institutions under the CPP described above;
- The institution is prohibited from entering into any new arrangement with a senior executive that would provide severance equal to or greater than three times the executive's average trailing five-year average annual taxable compensation; and
- If, under a pre-existing arrangement, any senior executive receives severance in equal to or greater than three times the executive's trailing five-year average annual taxable compensation, amounts in excess of one times the executive's average annual compensation will be non-deductible by the institution and subject to a 20% excise tax payable by the executive.

An institution's participation in the CPP will presumably be counted for purposes of the $300 million threshold, so that an institution that accepts more than $300 million of funding under the CPP will likely be subject to the TAAP rules as soon as it sells assets in a TAAP auction. As described below, however, the executive compensation rules under the CPP and TAAP are largely overlapping.

Covered Period. The executive compensation rules under the TAAP will apply to an institution participating in the TAAP from the date the institution exceeds the applicable $300 million threshold until the expiration of Treasury authority to promulgate programs under the Act and will apply to any and all senior executives during that period. The Treasury's authority expires on December 31, 2009, but can be extended by Congress to October 3, 2010, upon request by the Treasury.

Senior Executives. Although the Act had prescribed slightly different definitions of "senior executive" for the different requirements applicable under direct purchase programs (such as the CPP) and auctions, the Treasury's rules homogenize these definitions so that the definition of "senior executive" for purposes of the TAAP rules is essentially the same as under the CPP rules described above. For purposes of the $500,000 annual compensation deduction limit and the 20% excise tax applicable to excess severance benefits under the TAAP rules, once an executive is among the senior executive group for any year during the covered period, the executive will remain part of the senior executive group for the remainder of the covered period.

Controlled Groups. If any member of a controlled group of entities participates in auctions under the TAAP, the entire group of commonly controlled entities will be treated as one entity, which means that:

» whether the applicable $300 million threshold has been exceeded will be determined on a controlled group basis; and

» the senior executives that will be impacted by the compensation restrictions, will typically be the management team at the parent entity.

An 80% common control threshold is used for these purposes.

Corporate Acquisitions. The TAAP rules provide that if an institution acquires another institution, any prior sales of the acquired institution under the CPP or the TAAP will not be attributed to the acquirer. Accordingly, whether an acquired institution has sold more or less than $300 million of assets under TAAP, the institution's prior sales will not be aggregated with any prior or subsequent sales by the acquiring institution for purposes of determining whether the acquiring institution is subject to the executive compensation rules under the TAAP. The $300 million threshold for the acquiring institutions will be judged based on the acquiring institution's prior transactions under the TAAP and any direct purchase programs and any post-acquisition sales by the combined group under the TAAP. An acquired institution that had separately become subject to the executive compensation rules under TAAP prior to the acquisition will remain subject to the executive compensation rules until the earlier of the first anniversary of the acquisition or the expiration of Treasury authority under the Act.

New Severance Arrangements. Under the TAAP rules, after an institution has exceeded the applicable $300 million threshold, the institution is prohibited from entering into any new arrangement that would provide for the payment of severance to a senior executive during the covered period in an amount equal to or greater than three times the executive's trailing five-year average annual taxable compensation. New severance arrangements that provide for payments beneath this limit are permitted. The limit applies to any severance payments or benefits triggered by an involuntary termination of employment or bankruptcy, insolvency or receivership of the institution occurring during an applicable tax year, even if the payments or benefits are received by the executive at a later date. The limit applies to any payments and benefits that are triggered by the listed events, such as severance pay, accelerated vesting of incentive awards and special enhancements of retirement benefits, but should not limit the benefits that an executive is entitled to receive upon any resignation or retirement.

Tax Rules Applicable to Pre-Existing Severance Arrangements. If, under a pre-existing arrangement, any senior executive receives severance equal to or greater than three times the executive's trailing five-year average annual taxable compensation, amounts in excess of one times the executive's average annual compensation will be non-deductible by the institution and subject to a 20% excise tax payable by the executive. This rule applies to any severance payments or benefits triggered by an involuntary termination of employment or bankruptcy, insolvency or receivership of the institution occurring during the covered period, even if the payments or benefits are received by the executive at a later date after the end of the covered period. The Act added this rule by amending Section 280G of the Code to subject the severance payments to senior executives of auction program participants to the same tax rules that apply to golden parachutes paid in connection with corporate change in control transactions. Institutions with existing arrangements providing excise tax gross-ups to executives under the existing golden parachute rules will need to review those arrangements to determine whether the gross-up will apply to excise taxes imposed under the new severance rule.

Annual Compensation Deduction Limit. The annual compensation deduction limit of $500,000 per senior executive under the TAAP is identical to the limit under the CPP, except that for institutions that participate in the TAAP this limit is mandated by the Act, while institutions that participate in the CPP must agree to be subject to the limit as a condition to participation in the CPP.

Implication of TAAP Rules for CPP Participants. An institution that participates in the CPP and subsequently participates in auctions under the TAAP will be subject to the executive compensation rules under both the CPP and the TAAP.

While Both the CPP and TAAP Rules Apply. The institution's transactions under both programs will be counted for purpose of the $300 million threshold applicable under the TAAP. However, participation in the TAAP does not really add any restrictions that are not already imposed under the CPP, except for the prohibition on new arrangements with a senior executive that would provide severance equal to or greater than three times the executive's trailing five-year average annual taxable compensation (but in any case the CPP rules prohibit the payment of severance in excess of this limit to a senior executive for as long as Treasury continues to hold any equity or debt of the relevant institution). Accordingly, while both sets of rules apply to an institution, the institution will be subject to:

» the CPP rules relating to the avoidance of incentive compensation, which encourages senior executives to take unnecessary and excessive risks that threaten the value of the institution;

» the CPP rules relating to the clawback of any bonus or incentive compensation paid to a senior executive based on materially inaccurate financial statements or performance metrics;

» the institution's agreement under the CPP rules to limit to $500,000 its deduction for the annual compensation paid to any senior executive officer;

» the CPP rules limiting severance benefits to a senior executive to less than three times the executive's trailing five-year average annual taxable compensation; and

» the TAAP rule prohibiting any new arrangement with a senior executive that would provide severance equal to or greater than three times the executive's trailing five-year average annual taxable compensation.

If the TAAP Rules Lapse But the CPP Rules Continue to Apply. If, as of the date Treasury's authority to promulgate new programs under the Act expires (e.g., December 31, 2009 or the October 3, 2010 extension date), Treasury continues to hold equity or debt in an institution acquired in transactions stemming from the CPP, the institution would continue to be subject to virtually all of the above restrictions. The institution would no longer be subject to the prohibition against new severance arrangements with senior executives in excess of the three-times limit, but until the Treasury ceases to hold any equity or debt in an institution, the senior executives could not be paid severance in excess of these limits.

If the CPP Rules Lapse But the TAAP Rules Continue to Apply. If the Treasury ceases to hold any equity or debt in an institution before the expiration of Treasury's authority to promulgate new programs under the Act (e.g., before December 31, 2009 or the October 3, 2010 extension date), the institution will no longer be subject to the risk-avoidance, clawback and severance limit rules under the CPP, but the institution will remain subject to the TAAP rules until the expiration of Treasury's authority to promulgate new programs under the Act. Accordingly, the institution will be subject to:

- the $500,000 limit on its deduction for the annual compensation paid to any senior executive officer;
- the prohibition on new arrangements providing a senior executive severance benefits equal to or greater than three times the executive's trailing five-year average annual taxable compensation; and
- the deduction limit and 20% excise tax on severance amounts in excess of one times a senior executive's trailing 5-year average annual compensation if the senior executive's severance is equal to or greater than three times the executive's trailing five-year average annual compensation.

Program for Systemically Significant Failing Institutions ("PSSFI")

The PSSFI will permit Treasury to offer direct assistance to systemically significant failing institutions on terms negotiated on a case-by-case basis. As with the TAAP, the specifics of the PSSFI are still under development. For example, Treasury has not yet indicated:

- how it will determine if an institution is systemically significant and if action is required;
- what types of assistance will be provided, other than the direct purchase of troubled assets; or

» whether the CPP and PSSFI will be the only programs for direct purchase or funding of institutions under the Act, outside the TAAP auctions.

Executive Compensation Rules Under the PSSFI

Any institution receiving Treasury assistance under the PSSFI will be subject to the same executive compensation rules that apply under the CPP, except that all severance benefits to senior executives will be absolutely prohibited. Accordingly, no severance payments or benefits to a senior executive may be triggered by an involuntary termination of employment or bankruptcy, insolvency or receivership of the institution.

With the exception of this more stringent severance provision, the PSSFI rules incorporate all the operative and definitional requirements under the CPP executive compensation rules. Accordingly, the executive compensation rules under the PSSFI will apply to an institution for as long as Treasury continues to hold any equity or debt interest in the institution and the CPP rules relating to controlled groups and corporate acquisitions will apply equally with respect to institutions receiving assistance under the PSSFI.

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This memorandum is a summary for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. To ensure compliance with requirements imposed by the IRS, we inform you that the discussion of U.S. federal tax issues contained in this memorandum is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

If you have questions about Treasury's recent initiatives or the executive compensation rules described above, please feel free to call your Davis Polk contact.

Executive Compensation Rules of EESA
Summary Comparison of Pre-EESA Rules and New Rules Applicable to EESA Program Participants

	Existing Pre-EESA Rules	Rules Applicable to CPP Participants	Rules Applicable to TAAP Participants	Rules Applicable to PSSFI Participants
Golden Parachutes	» Code §§ 280G and 4999 golden parachute rules provide that if the payments and benefits payable to an executive of a company in connection with a change in control of the company equals or exceeds 3 times the executive's average annual taxable compensation over the preceding 5-year period ("AATC"), amounts in excess of 1 times the executive's AATC will be non-deductible by the company and subject to a 20% excise tax payable by the executive. » Rules are applicable to a broad group of up to 250 executives. » Private companies are exempt from §§ 280G and 4999, if the shareholders of the company approve the golden parachute payments ("**Shareholder Approval Exemption**").	» Institutions must agree to limit severance benefits to a senior executive to less than 3 times the executive's AATC over the 5-year period preceding the severance from employment. » No change in control nexus – the severance benefit limit applies to any severance benefits triggered by a severance from employment (i) due to an involuntary termination of employment or (ii) in connection with bankruptcy, insolvency or receivership (an "**Applicable Severance from Employment**"). » Limit applies to CEO, CFO and next 3 most highly compensated executive officers (the "senior executive officers" or "**SEOs**"). » No Shareholder Approval Exception.	» Amends Code §§ 280G and 4999 to provide that if the severance benefits received by an SEO are equal to or greater than 3 times the executive's AATC, amounts in excess of 1 times the executive's AATC will be non-deductible by the employer and subject to a 20% excise tax payable by the executive. » No change in control nexus – the deduction limit and excise tax apply to any severance benefits triggered by an Applicable Severance from Employment. » Rules apply to SEOs. » No Shareholder Approval Exemption.	» Absolute prohibition on any severance benefits to SEOs triggered by an Applicable Severance » from Employment. » No change in control nexus – the prohibition applies to any severance benefits triggered by an Applicable Severance » from Employment. » Rule applies to SEOs. » No Shareholder Approval Exception.

	Existing Pre-EESA Rules	Rules Applicable to CPP Participants	Rules Applicable to TAAP Participants	Rules Applicable to PSSFI Participants
Deduction Limit	» Code § 162(m) imposes a $1 million limit on the deductibility of compensation paid by public companies to their CEO and the next 3 most highly paid officers whose compensation is disclosed in the summary compensation table in the company's annual proxy statement (other than the CFO). » Covered executives are determined based on the executives listed in the annual proxy statement who continue employment as of the end of the relevant year. » There is an exception for performance-based compensation, which excludes from the $1 million limit most stock option grants, annual and long-term performance incentives and other awards paid pursuant to predetermined performance criteria. » Deferral of compensation in excess of the $1 million limit can preserve the deduction when the amounts are ultimately paid.	» Institution must agree to limit to $500,000 their annual deduction for compensation paid to any SEO. » Limit applies to SEOs of both public and private institutions. » No exception for performance-based compensation. » Deferral does not avoid the deduction limit – deferred compensation in excess of the limit will be non-deductible when paid.	» Institution is subject to new provisions of Code § 162(m), which limit to $500,000 their annual deduction for compensation paid to any SEO. » Limit applies to SEOs of both public and private institutions. » No exception for performance-based compensation. » Deferral does not avoid the deduction limit – deferred compensation in excess of the limit will be non-deductible when paid.	» Same as CPP – institution must agree to limit to $500,000 their annual deduction for compensation paid to any SEO.

	Existing Pre-EESA Rules	Rules Applicable to CPP Participants	Rules Applicable to TAAP Participants	Rules Applicable to PSSFI Participants
Risk Aversion	» No legal requirement.	» Institution must eliminate incentives for SEOs to take unnecessary and excessive risks that threaten the value of the institution. Institution's compensation committee (or similar board committee) must: • promptly (w/in 90 days) review its SEO compensation arrangements with its senior risk officer (or other personnel acting in like capacity) to ensure that compensation arrangements do not encourage SEOs to take unnecessary and excessive risks. • meet at least annually with the senior risk officer to discuss and review the relationship between the institution's risk management policies and practices and SEO incentive compensation arrangements; and • certify annually that it has complied with the above. » Public institutions must include the annual certification in the Compensation Discussion and Analysis in the institution's annual proxy statement. Private institutions must file the annual certification with their primary regulatory agency.	» No legal requirement.	» Same as CPP.

	Existing Pre-EESA Rules	Rules Applicable to CPP Participants	Rules Applicable to TAAP Participants	Rules Applicable to PSSFI Participants
Clawback	» Provisions of the Securities Exchange Act adopted pursuant to the Sarbanes-Oxley Act of 2002 require the CFO and CEO of a public company to reimburse the company for any bonus or other incentive-based or equity-based compensation, or profits from the sale of securities, received in the year prior to an accounting restatement due to "the material noncompliance of the issuer, as a result of misconduct, with any financial reporting requirement under the securities laws." » Provisions do not specify what constitutes "misconduct" or whose misconduct triggers the clawback.	» Institution must require that any bonus and incentive compensation paid to any SEO is subject to clawback by the institution if the payments were based on financial statements or performance metrics later determined to be materially inaccurate. » Accounting restatement is not required and misconduct is not required. » Rule applies to SEOs. » Rule applies to public and private institutions.	» No legal requirement.	» Same as CPP.