

Treasury Regulations Governing Compensation for TARP Participants

June 17, 2009

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On June 10, 2009, the U.S. Department of Treasury issued [regulations](#) implementing the [compensation requirements under the American Recovery and Reinvestment Act of 2009 \(ARRA\)](#), which amended the requirements of the Emergency Economic Stabilization Act of 2008. Davis Polk has separately prepared a client memorandum entitled [Compensation Restrictions in the American Recovery and Reinvestment Act of 2009](#), dated February 17, 2009. The regulations became applicable to existing and new TARP recipients upon publication in the Federal Register on June 15, 2009, but are subject to comment during a period scheduled to end on August 14, 2009.

Overview

ARRA requirements. The regulations make effective the compensation provisions of ARRA and include rules requiring:

- » Review of prior compensation by a Special Master
- » Restrictions on paying or accruing bonuses, retention awards or incentive compensation (collectively referred to in the regulations and in this memorandum as “bonus payments”) for certain employees
- » Regular review of all employee compensation arrangements by the compensation committee to ensure that the arrangements do not encourage unnecessary and excessive risk-taking or manipulation of reporting earnings
- » Recoupment of bonus payments based on materially inaccurate information
- » Prohibition on severance or change in control payments for certain employees
- » Adoption of policies and procedures to avoid excessive luxury expenses
- » Mandatory “say on pay” (has been effective since February 2009)

New requirements. The regulations also introduce several additional requirements and restrictions, including:

- » Special Master review of ongoing compensation in certain situations
- » Prohibition on tax gross-ups for certain employees
- » Disclosure of perquisites
- » Disclosure regarding compensation consultants

Categories of Firms Receiving Government Funds

- » **TARP recipients with outstanding obligations to Treasury**
 - Subject to the regulations, with TARP recipients receiving exceptional assistance subject to more rigorous requirements
- » **TARP recipients that previously had obligations to Treasury but have fully repaid those obligations, even if warrants are outstanding**
 - Not subject to the regulations, but may be subject to “tail” requirements as a function of the prior application of the regulations and may be subject to continuing requirements under terms of contracts with Treasury
- » **TARP recipients that have never had an obligation to Treasury**
 - Subject to limited requirements under the regulations
- » **Participants in government programs that do not involve transactions with Treasury**
 - Not subject to the regulations

Firms and Employees Covered by Compensation Restrictions

Firms covered. The regulations, which apply to current and future TARP recipients, effectively create four categories of firms receiving government funds.

- » **TARP recipients with outstanding obligations to Treasury.** This category presently includes over 500 banks participating in the Capital Purchase Program (CPP) and TARP recipients receiving exceptional assistance under TARP (e.g., AIG, BofA, Chrysler, Chrysler Financial, Citigroup, GM and GMAC). This category might also include companies that incur obligations under future programs by accepting funding from Treasury or causing Treasury to pay on a credit insured by Treasury under a TARP program. These TARP recipients will be subject to the full breadth of the regulations’ requirements, which will apply until the TARP recipient fully repays its obligation (notwithstanding if Treasury continues to hold warrants of the TARP recipient), the so-called “TARP period.”

TARP recipients incurring an obligation to Treasury have typically been required to enter into agreements with Treasury that impose contractual compensation requirements. To the extent that these contractual requirements are not inconsistent with the requirements of the regulations, the contractual requirements will continue to apply. This means that, for TARP recipients that have received funding solely under CPP, most of the contractual requirements previously agreed to will be superseded by the regulations’ more stringent requirements, although the \$500,000 annual deduction limit for the compensation of senior executive officers to which the CPP participants have contractually agreed will continue to apply as is, as this requirement is not affected by the regulations. TARP recipients that have received exceptional assistance beyond CPP have agreed to a variety of contractual requirements that will need to be coordinated with the requirements of the regulations.

- » **TARP recipients that previously had obligations to Treasury but have fully repaid those obligations.** This category includes participants in CPP and exceptional assistance programs that repurchased all their preferred stock and repaid any other obligations to Treasury. The regulations’ requirements will generally cease after a TARP recipient has fully repaid its obligation to Treasury, even if Treasury continues to hold warrants with respect to equity of the TARP recipient. That said, the TARP recipient will remain subject to any continuing contractual obligations that are not inconsistent with ARRA and the regulations.

Employees Covered by Compensation Limitations

- » Senior executive officers (SEOs)
- » Most highly compensated employees (MHCEs)
- » Covered employees are determined on a controlled group basis

- » **TARP recipients that have never had an obligation to Treasury.** This category includes TARP recipients that have engaged in transactions with Treasury but have not incurred an obligation to Treasury. This category could include a TARP recipient under a future program, where, for example, Treasury directly insures obligations of a company but the company has not triggered an obligation to Treasury by defaulting on the insured obligations. TARP recipients in this category are subject only to the luxury expenses requirement (as described on page 19) and certain aspects of the risk assessment rules (as described on page 14), which apply until the expiration of Treasury's statutory authority under TARP (December 31, 2009, subject to extension by Congress to October 3, 2010).
- » **Participants in government programs that do not involve transactions with Treasury.** This category includes participants in the Term Asset-Backed Securities Loan Facility (TALF), under which a special purpose vehicle (SPV) of the Federal Reserve has guaranteed certain privately-issued asset-backed securities and Treasury has provided backing to the SPV. The compensation restrictions of ARRA and the regulations will not apply to participants in these programs, because the entities receiving backing from the SPVs do not enter into funding or guaranty transactions directly with Treasury.

Treasury had previously indicated that the TARP compensation rules would not apply to managers of public-private investment partnerships under the proposed P-PIP program, provided that the managers did not own a controlling interest in P-PIP. This is also borne out by the regulations, as the regulations apply the compensation requirements on a controlled group basis, which excludes entities that do not hold an interest of at least 50% in a TARP recipient.

The firms covered by the restrictions are addressed in [Q-2](#) of the regulations.

Employees covered. The regulations impose compensation limitations on payments to a TARP recipient's senior executive officers (SEOs) and, in many cases, a broader group of the TARP recipient's most highly compensated employees (MHCEs). Each of these groups is identified by a look-back to the TARP recipient's prior fiscal year.

- » **SEOs.** For a publicly reporting TARP recipient, the regulations provide that its SEOs in any given year are the named executive officers identified in its annual report on Form 10-K or annual proxy statement filed in that year who continue to be employed by the TARP recipient, which includes: all CEOs and

Determining MHCEs

- » Executive status not relevant – may include employees who are not executive officers
- » Based on employee's "total compensation" in the previous fiscal year
- » Total compensation in this context includes qualified commission compensation
- » Static group in each fiscal year – as covered employees leave, new employees are not added to the group during the current fiscal year
- » Changing group from year-to-year due to changes in compensation levels from year-to-year
- » Exception for new entities – their MHCEs are determined based upon a reasonable, good faith determination of projected annual compensation for the next year

all CFOs from the previous year, the next three most highly compensated executive officers in the previous year and up to two additional individuals who would have been among the three most highly compensated executive officers had they been executive officers at the end of the relevant reporting year (this last category would include an executive officer who steps down from an executive role but continues as an employee into the following year, although ARRA itself had limited the definition to the top five most highly compensated executives whose compensation is required to be disclosed under the securities laws). The identification of the three most highly compensated executive officers and, if applicable, the two former officers is based on annual compensation for the last completed fiscal year as determined pursuant to SEC compensation disclosure rules (*i.e.*, total compensation minus any change in pension value and above-market earnings on deferred compensation). Private TARP recipients that do not report compensation must identify their SEOs in accordance with the SEC compensation disclosure rules as if they were public reporting companies.

- » **Most highly compensated employees.** The regulations require each TARP recipient to calculate prior fiscal year compensation in accordance with the SEC compensation disclosure rules for employees, other than SEOs, who were employed as of the first day of the current fiscal year. This will require calculation of accounting expenses for equity compensation awards, the incremental cost of perquisites and other components of "total compensation" that financial institutions have not been previously required to track for their non-executive officer employees. Under the regulations, different restrictions apply to different groups of MHCEs. For example, the prohibition on golden parachutes applies to the SEOs and the next five MHCEs, while the prohibition on the accrual or payment of bonus payments may apply to the SEOs and up to 20 of the next MHCEs, depending on the amount of the TARP recipient's outstanding obligation to Treasury. The MHCEs are determined on a controlled group basis taking into account all of the employees of the TARP recipient and all entities directly or indirectly controlling, controlled by or under common control with the TARP recipient based on a 50% voting power or value ownership test.

- » **Executive status not relevant.** In contrast to the SEC compensation disclosure rules, a MHCE may be an employee who is not an executive officer. As a result, revenue-providing personnel, such as investment bankers, investment managers, traders and others may be subject to compensation restrictions.

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- » *Calculation of compensation to determine SEOs and MHCEs* While the regulations exempt qualified commission compensation from the restriction placed on bonus payments (as described on page 11), commissions are included as part of “total compensation” in determining whether an employee is among the SEO or the MHCE group.

It may be difficult to determine the contribution that certain financial arrangements make to total compensation. Where items such as partnership interests (*e.g.*, profits interests) in investment partnerships or other participation rights in asset or revenue pools are shared with service providers of a TARP recipient, there are questions as to whether these arrangements are part of an employment relationship and, if so, how to value the compensatory element involved. Note that the regulations state that although a member of a partnership, LLC or other similar entity will not generally be treated as an employee of the entity, such an entity cannot be used to avoid or evade the regulations.

- » *SEOs and MHCEs may not be identified until well into a given year.* Because the calculation of various components of total compensation for employees may not be completed until well after the end of a fiscal year, a TARP recipient may not be able to identify its SEOs and MHCEs until some time into the following year. Nonetheless, the regulations make clear that they will apply to the relevant group as of the start of the year. As a result, bonus payment awards in respect of a prior year may need to be qualified pending the determination of the individuals who are subject to the bonus payment limitation in the current year.
- » *MHCEs who terminate employment.* It appears that the departure of an employee during a year in which the employee was among the MHCE group will decrease the size of the group. For example, if the SEOs and the next 20 MHCEs of a TARP recipient are subject to the bonus payment restriction under the regulations during a particular year, but one of the MHCEs terminates employment during that year, it appears that the MHCE group thereafter includes only the remaining 19 MHCEs, with no new members being added to this group for the year in question.
- » *New entities.* For an entity created or organized in the year in which it receives TARP assistance, its MHCEs are determined based upon a reasonable, good faith determination of projected annual compensation for the next year. The regulations do not specify, but it is likely that a similar standard would be used to identify SEOs as well.

Role of the Special Master

- » **Mandatory review and approval of the compensation arrangements of TARP recipients receiving exceptional financial assistance from Treasury**
- » **Interpretation and issuance of advisory opinions on the compensation provisions of ARRA and the regulations as well as any compensation-related contractual requirements of a TARP recipient**
- » **Review of the pre-ARRA compensation of TARP recipients where the Special Master deems it necessary and appropriate**

- » **Potential for cycling.** Treasury has acknowledged the vagaries inherent in an annual test for identifying the MHCEs. The suppression of MHCE compensation under the regulations will likely result in certain employees ceasing to qualify as MHCEs for the following year, whereupon the resulting increase in their compensation will likely return them to MHCE status in the subsequent year. Treasury also recognizes the potential for a TARP recipient to intentionally cycle employees in and out of MHCE status in alternate years in order to maximize employee compensation in the intervening years. Treasury has invited comment on this issue.

The employees covered by the restrictions are addressed in [Q-3](#) of the regulations.

Special Master for TARP Executive Compensation

Office of the Special Master. As has been widely reported, the regulations create a new Office of the Special Master for TARP Executive Compensation within Treasury. The Special Master is appointed by, and serves at the pleasure of, the Secretary of Treasury. Kenneth Feinberg has agreed to serve as the Special Master without compensation.

Role of the Special Master. The Special Master has three central roles:

- » **Mandatory review and approval of the compensation arrangements of TARP recipients receiving exceptional financial assistance from Treasury.** The Special Master must review the compensation arrangements of TARP recipients receiving exceptional financial assistance from Treasury to determine whether these arrangements are inconsistent with TARP or the regulations or are otherwise contrary to the public interest.
- » **Compensation of SEOs and MHCEs subject to the bonus payment limitation.** The Special Master must approve the compensation structures and payments for each SEO and MHCE subject to the bonus payment limitation (as described on page 9). The regulations currently provide that TARP recipients subject to mandatory review must submit their initial requests for approval no later than August 14, 2009. The Special Master is required to issue his determinations within 60 days after the submission is substantially complete. Thereafter, the TARP recipient must submit a request for redetermination if its compensation structures or payments to any SEO or MHCE subject to the bonus payment limitation are materially modified.

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- » *Compensation of employees among the 100 MHCEs not subject to the bonus payment limitation.* The Special Master must approve only the compensation structure, and not amounts payable under the structure, for the executive officers and employees among the 100 MHCEs who are not subject to the bonus payment limitation. The TARP recipient, however, may request advisory opinions for amounts payable under its structure for these employees. The TARP recipient must submit its initial request for approval for these employees no later than October 13, 2009 and, again, the Special Master is required to issue his determinations within 60 days after the submission is substantially complete. The TARP recipient must submit a request for redetermination if its compensation structure for the covered group is materially modified. Under a safe harbor provision, the compensation structure for an employee among the group of 100 MHCEs not subject to the bonus payment limitation will be deemed to meet the requirements and approval or reapproval will not be required if the total compensation to the employee (including, for this purpose, any change in pension value and above-market earnings on deferred compensation, unlike the calculation for determining the SEO and MHCE groups) does not exceed \$500,000, excluding long-term restricted stock.
- » *Review outcomes.* Based on the information submitted, the Special Master has the power to require alteration of compensation structures or payments. In his review, the Special Master can take into account compensation not otherwise subject to mandatory review, such as the grandfathered arrangements described on page 14. The regulations include a procedure for an appeal for reconsideration by the Special Master of an adverse determination. Final decisions by the Special Master have the status of determinations of the Secretary of Treasury.
- » *Confidentiality.* Determinations of the Special Master will be publicly available. Materials submitted to the Special Master are subject to Freedom of Information Act (FOIA) requests. However, the regulations require the Special Master to develop procedures to ensure 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 FOIA. The procedures may include methods for those submitting materials to request redactions and review and request reconsideration of any proposed redactions before such redacted materials are released.

Compensation Principles to Be Applied by the Special Master

- » **Avoidance of unnecessary or excessive risks**
- » **Facilitation of competitiveness and repayment**
- » **Appropriate allocation**
- » **Performance-based compensation**
- » **Comparable compensation to similar entities in similar circumstances**
- » **Value to the employer**

» *Compensation paid during Special Master review.* Compensation paid between June 15, 2009 and the final determination by the Special Master will generally not be overturned by the Special Master if the compensation is paid under a system in place as of June 14, 2009 and complies with the requirements of the regulations generally applicable to companies having obligations to Treasury under TARP.

» *Interpretation and issuance of advisory opinions on the compensation provisions of ARRA and the regulations as well as any compensation-related contractual requirements of a TARP recipient.* Upon the request of any TARP recipient or any affected employee of a TARP recipient, or upon the Special Master's own initiative, the Special Master may issue advisory opinions relating to the compensation of any TARP recipient. If the Special Master issues, or is inclined to issue, a negative advisory opinion, he may pursue negotiations with the affected TARP recipient and its employees to change the relevant compensation arrangement or seek reimbursement of compensation when appropriate.

» *Review of the pre-ARRA compensation of TARP recipients where the Special Master deems it necessary and appropriate.* As prescribed by ARRA, the Special Master has the power to review bonus payments and other compensation paid before February 17, 2009 to determine if the compensation was inconsistent with the rules or purposes of TARP or contrary to the public interest and, if so, to seek the return of appropriate amounts to the TARP recipient.

Interpretation and application of contractual provisions. The Special Master has the power to interpret or apply contractual provisions between Treasury and TARP recipients related to compensation.

Compensation principles. In exercising his powers, the Special Master will consider the following principles:

» *Avoidance of unnecessary or excessive risks.* Compensation structures should avoid incentivizing employees to take unnecessary or excessive risks that could threaten the value of the TARP recipient.

» *Facilitation of competitiveness and repayment.* Compensation structures should be designed to allow the TARP recipient to remain competitive, retain and recruit talented employees and eventually repay TARP obligations.

Bonus Payment Restriction Effective Date

- » The prohibition on paying or accruing bonus payments does not apply to payments made or accrued before June 15, 2009
- » Bonus payments based on service periods that straddle June 15, 2009 may be pro-rated for the portion of the service period before the effective date

- » ***Appropriate allocation.*** Compensation should be allocated between different forms based on the role of the employee and other relevant circumstances. An emphasis should be placed on long-term compensation for executives or other senior employees.
- » ***Performance-based compensation.*** Generally, a significant portion of total compensation should be performance-based, especially for employees with a high level of responsibility.
- » ***Comparable compensation to similar entities.*** Compensation structures and amounts should be similar to those provided to employees of 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.
- » ***Value to the employer.*** Compensation should reflect an employee’s value to the employer, taking into account factors ranging from revenue production to compliance with company policy to the employee’s role in changing the TARP recipient’s financial health or competitive position.

The role of the Special Master is addressed in [Q-11](#) and [Q-16](#) of the regulations.

Bonus Payment Restrictions

Prohibition. Subject to the exceptions described below for “long-term restricted stock” and grandfathered bonus payments, ARRA prohibits a TARP recipient from paying or accruing any bonus payments with respect to specified employees.

Covered employees. The prohibition on paying or accruing bonus payments applies with respect to a TARP recipient’s CEOs and a specified number of MHCEs determined based on the amount of aggregate TARP assistance received by the TARP recipient.

Amount of Financial Assistance	Covered Employees
\$500 million or more	CEOs + 20 MHCEs
≥ \$250 million or < \$500 million	CEOs + 10 MHCEs
≥ \$25 million or < \$250 million	Five MHCEs
Less than \$25 million	One MHCE

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Although ARRA permitted the regulations to extend the bonus payment restriction to a larger number of MHCEs, Treasury did not adopt that approach, deciding instead to require the Special Master to review the compensation arrangements and structures of TARP recipients that receive exceptional assistance (as described on page 6).

The regulations provide that if a TARP recipient increases its financial assistance from Treasury during its fiscal year, it need not cover additional employees until the start of the next fiscal year. However, even if a TARP recipient decreases its outstanding financial assistance during a year (unless the decrease is to zero), the number of covered employees will remain the same for that year.

Effectiveness. The prohibition on paying or accruing bonus payments does not apply to payments made or accrued before June 15, 2009. To the extent that a bonus payment relates to a service period that straddles that date, the payment will not be treated as having accrued on or after June 15, 2009 if the payment is reduced at least to reflect the relative length of the period that occurs after such date. For example, if an employee is granted the right to a \$200,000 bonus paid with respect to service performed during the one-year period commencing on December 15, 2008, the employee may accrue a bonus of \$100,000 without the bonus being treated as having accrued during the period in which the prohibition was in effect. If the employee is a SEO or MHCE at the time that the \$100,000 reduced bonus would otherwise have been paid, the bonus may not be paid until the prohibition is no longer in effect.

Definitions. As summarized below, the regulations define the terms “bonus,” “retention award,” “incentive compensation” and “accrue.” ARRA itself had not defined these terms.

Term/Definition	Includes	Does Not Include
<p>Bonus. Any payment in addition to any amount payable to an employee for services performed by the employee at a regular periodic rate (e.g., hourly, monthly).</p>	<ul style="list-style-type: none"> » Contributions to, or other increases in benefits under, a nonqualified deferred compensation plan » Loan forgiveness 	<ul style="list-style-type: none"> » Salary » Contributions to a qualified retirement plan » Benefits under a broad-based benefit plan » Overtime pay » Expense reimbursements » Qualified commission compensation

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Term/Definition	Includes	Does Not Include
<p><u>Retention Award.</u> Any payment to an employee that:</p> <ul style="list-style-type: none"> » is not payable periodically for services performed at a regular periodic rate; » is contingent on the completion of a period of future service or a specified project or transaction; and » is not based on the performance of the employee or the activities or value of the TARP recipient. 	<ul style="list-style-type: none"> » Signing bonus or “make whole” payment subject to service vesting or repayment upon departure prior to a specified date 	<ul style="list-style-type: none"> » Salary » Contributions to a qualified retirement plan » Benefits under a benefit plan » Payment of a fringe benefit » Overtime pay » Expense reimbursements » Qualified commission compensation » Deferred compensation plan benefits under a plan that has not been materially enhanced for a significant period of time prior to the employee becoming a SEO or MHCE
<p><u>Incentive Compensation.</u> Any payment to an employee that is intended to serve as an incentive for performance over a specified period, regardless of how the performance is measured.</p>	<ul style="list-style-type: none"> » Equity-based compensation that is subject to service or performance vesting (other than salary) 	<ul style="list-style-type: none"> » Salary in the form of equity-based compensation » Qualified commission compensation

For these purposes, commissions may constitute bonus payments, unless they satisfy a number of requirements, such as being earned by an employee consistent with a program in existence for that type of employee as of February 17, 2009 and in a manner where the commission amount is derived by reference to the purchase price or the volume of sales. Commissions related to a specified transaction, such as an IPO or M&A transaction, and fees earned from sales to affiliates, are not qualified commission compensation, and are considered to be bonus payments.

Accrued. In determining whether a bonus payment has accrued, the following principles will apply:

- » *The determination entails a facts and circumstances analysis.* The regulations note that an accrual may include the granting of service credit or credit for compensation received. Presumably, therefore, if a TARP recipient that is unable to pay an employee a bonus in one year because of the prohibition pays the employee in the following year a bonus equal to twice the amount of the bonus that it otherwise would have paid the employee, the bonus would be considered to have impermissibly accrued in the first year.

Exceptions to the Bonus Payment Restriction

- » Long-term restricted stock
- » Bonus payment to which an employee had a legally binding right under a “valid employment contract” as of February 11, 2009

- » **Delaying a bonus payment until after an employee is no longer subject to the prohibition will not cleanse the payment.** For example, if after an employee is no longer a SEO or MHCE, the employee is paid an amount based on services performed during the prohibition period, the amount would be considered to have accrued during the prohibition period.
- » **Multi-year service periods.** If an employee is covered by the prohibition during a portion of a multi-year service period applicable to a bonus payment, the employee will not be treated as having accrued the compensation during the prohibition period if the compensation is reduced at least to reflect the relative length of the prohibition period. It appears that this multi-year service period also applies where a company is a TARP recipient during a portion of the service period and out of TARP during the remainder of the service period.

Exception for long-term restricted stock. ARRA permits a TARP recipient to grant “long-term restricted stock” without violating the prohibition on paying or accruing a bonus payment if it satisfies certain requirements: (i) the value of the grant may not exceed one-third of the amount of the employee’s annual compensation, (ii) no portion of the grant may vest before two years after the grant date and (iii) the grant must be subject to a further restriction on transfer or payment as described below.

- » **Restricted stock or restricted stock units.** The regulations define “long-term restricted stock” broadly to include both restricted stock and restricted stock units. Units may be settled in common stock or cash and may track a specific unit or division within the TARP recipient to which the employee provides services.
- » **Value limitation.** The value of restricted stock or units may not exceed one-third of an employee’s annual compensation for the fiscal year of grant. Note that, although financial institutions typically award bonus payments at the beginning of a fiscal year based on performance in the prior fiscal year, under the regulations, the maximum grant of restricted stock or units is based on total compensation in the year of grant, not total compensation in the year of performance related to the award.

In calculating annual compensation, the total fair market value of equity-based compensation is included in the fiscal year in which the compensation is granted, rather than being amortized over any vesting schedule. For example, if in 2008 an employee receives restricted stock vesting over three years and having a total fair market value of \$900,000, the \$300,000 attributable to the

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portion of the stock that vests in 2009 is not taken into account in calculating the employee's annual compensation for 2009. Similarly, in calculating the maximum value of stock or units that may be granted in a fiscal year, the total fair market value of the stock or units is included in the fiscal year of grant. For example, if in 2009 an employee receives \$1 million in salary, the employee may in 2009 receive restricted stock or units having a total fair market value of up to \$500,000 (*i.e.*, $\$1 \text{ million} + \$500,000 \div 3 = \$500,000$).

- » ***Vesting, transfer and payment.*** None of the restricted stock or units may vest before the second anniversary of the grant date of the stock or units. Accordingly, an employee must forfeit the stock or units if the employee does not perform substantial services for the TARP recipient for at least two years after grant, unless the cessation of services is due to the employee's death or disability or a change in control of the TARP recipient. The regulations do not restrict the rate of vesting after two years. However, the regulations do impose an added restriction requiring that the stock may not become transferable (or, in the case of units, may not be paid) any more quickly than in accordance with the following schedule (except that transferability and payment may accelerate on an M&A transaction, but not apparently for death or disability):

Percentage of Aggregate Assistance Repaid by TARP Recipient	Percentage of Shares or Units That May Become Transferable or Be Paid
25%	up to 25%
50%	up to 50%
75%	up to 75%
100%	up to 100%

The regulations do not provide details as to how the repayment calculation is to be made, for example, where Treasury holds different obligations of a TARP recipient (*e.g.*, debt, preferred stock, common stock) acquired in different transactions (*e.g.*, exchanges).

The regulations provide an exception that allows SEOs and MHCEs to transfer shares of restricted stock to the extent necessary to pay the taxes due as a result of the vesting of the shares according to its normal vesting schedule.

Semi-annual Review of Employee Compensation Plans

- » **Identify and limit features of CEO compensation plans that could lead CEOs to take unnecessary and excessive risks that “threaten the value” of the TARP recipient**
- » **Identify and limit features in all employee compensation plans that unnecessarily pose risks to the TARP recipient**
- » **Identify and eliminate features of all employee compensation plans that could encourage the manipulation of reported earnings to ensure that the plans do not encourage such manipulation to enhance the compensation of employees**

Exception for bonus payments under employment contracts. ARRA permits a TARP recipient to pay or accrue a bonus payment if an employee had a legally binding right to the bonus payment under a “valid employment contract” as of February 11, 2009. A valid employment contract is a written contract that is a “material contract” required to be filed under securities law regulations or that would have been required to be filed as a material contract but for the fact that the contract relates to an employee who is not an executive officer or that the TARP recipient is private. For purposes of the regulations, the term “legally binding right” is given the meaning established in the regulations under Section 409A of the Internal Revenue Code. The examples in the regulations make clear that “employment contract” may be broadly interpreted to include not only employment agreements, but also equity-based compensation plans, awards and bonus programs documented in a written plan.

If the contract is amended to increase the amount payable, accelerate any vesting conditions or otherwise materially enhance the benefit, payments under the contract will not be eligible for the grandfather exception. However, the regulations indicate that if the contract is amended in a manner adverse to the employee or if the employee waives any aspect of the contract, then payments will not be disqualified from this exception.

The bonus payment restrictions are addressed in [Q-10](#) of the regulations.

Risk Assessment and Avoidance of Manipulation

During any period in which a TARP recipient has an outstanding obligation to Treasury, the TARP recipient must establish and maintain a compensation committee of independent directors to review not only executive officer compensation plans, but all employee compensation plans, with the directive to evaluate any risks that they may pose for the TARP recipient and ensure that they do not encourage manipulation of earnings. For companies that do not have securities registered with the SEC and have received \$25 million or less in TARP financial assistance, the full board rather than an independent committee may carry out these duties. This mandate, as it pertains to all employee plans, is a departure from the traditional role of the compensation committee, which historically has limited its review to senior executive compensation programs.

Semi-annual review. 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 and short-term risks) that the TARP recipient faces

that could threaten the value of the TARP recipient. In addition, the compensation committee must take the following steps:

- » ***SEO compensation plans.*** With the TARP recipient’s senior risk officers, identify and limit features of SEO compensation plans that could lead SEOs to take unnecessary and excessive risks that “threaten the value” of the TARP recipient.
- » ***All employee compensation plans – risks.*** With the TARP recipient’s senior risk officers, identify and limit features in all employee compensation plans that unnecessarily pose risks to the TARP recipient.
- » ***All employee compensation plans – manipulation of earnings.*** Identify and eliminate features of all employee compensation plans that could encourage the manipulation of reported earnings to ensure that the plans do not encourage such manipulation to enhance the compensation of employees.

Unacceptable plan features include those that would encourage behavior focused on short-term results as opposed to long-term value creation.

Disclosure and certification. A TARP recipient, whether public or private, is subject to annual disclosure and certification requirements if the TARP recipient had any outstanding obligation to Treasury during any part of the prior fiscal year.

- » ***Disclosure.*** The compensation committee must provide a narrative description identifying each SEO compensation plan and each employee compensation plan reviewed and explaining how the risks described above have been limited or eliminated, as required.
- » ***Certification.*** The compensation committee must certify that it has reviewed, with senior risk officers: (i) the SEO compensation plans to ensure that these plans do not encourage SEOs to take unnecessary and excessive risks; (ii) the employee compensation plans to limit any unnecessary risks that these plans pose to the TARP recipient; and (iii) the employee compensation plans to eliminate any features of these plans that would encourage the manipulation of reported earnings to enhance the compensation of any employee. The regulations provide a [model certification](#).

Treasury Regulations Governing Compensation for TARP Participants

» ***Location of Disclosure and Certification.***

TARP Recipient	Disclosure	Certification
With SEC-registered securities	» Include in the compensation committee report furnished with the annual report on Form 10-K, annual proxy statement or information statement on Schedule 14C	
Without SEC-registered securities	» Regulations are silent on location of disclosure	» Provide to Treasury and to the TARP recipient’s primary regulatory agency

TARP recipients that have never had an obligation to Treasury. TARP recipients that have never had an outstanding obligation are not required to conduct the comprehensive review described above, but instead must undertake a more general review of employee compensation plans to evaluate the risks posed to the TARP recipient by such plans and to identify and limit these risks. For these companies, required disclosure and certification need only reflect such review. This requirement ceases for these TARP recipients as of the sunset date of Treasury’s statutory authority under TARP.

Risk assessment is addressed in [Q-4 to Q-7](#) of the regulations.

Recoupment of Bonus Payments (“Clawbacks”)

A TARP recipient must ensure that any bonus payment made during the TARP period to a SEO or any of the next 20 MHCEs is subject to recovery or “clawback” by the TARP recipient if the bonus payment was based on materially inaccurate financial statements (*e.g.*, statements of earnings) or any other materially inaccurate performance metric criteria. For purposes of the regulations, a bonus payment is considered to be made to an employee when the employee obtains a legally binding right to the payment, which means that the bonus payment must be subject to an appropriate recoupment policy as of the time that the bonus payment opportunity is awarded. In addition, if the material inaccuracy is discovered after the TARP period, the bonus payment is still subject to the clawback.

- » ***Clawback is mandatory.*** The TARP recipient is required to exercise its clawback rights unless it demonstrates that it is unreasonable to do so (*e.g.*, enforcement costs would exceed recovered amounts).
- » ***Facts and circumstances test.*** The facts and circumstances determine whether financial statements or performance metric criteria are materially inaccurate.

Treasury Regulations Governing Compensation for TARP Participants

- » ***Per se exception to facts and circumstances test.*** Financial statements or performance metric criteria are per se materially inaccurate for any employee who knowingly engages in providing inaccurate information relating to the financial statements or performance metrics or knowingly fails to timely correct inaccurate information.

Key differences between clawbacks under SOX and ARRA

	Sarbanes-Oxley (SOX)	ARRA
Subject Companies	Public companies	TARP recipients
Subject Individuals	CEO and CFO	SEOs and next 20 MHCEs
Trigger	Accounting restatement due to material noncompliance by the issuer, as a result of misconduct, with any financial reporting requirement under U.S. securities laws	Payment based on materially inaccurate financial statements or other materially inaccurate performance metric criteria (earnings, revenues, gains or other criteria); no restatement required
Fault by Subject Individuals	No fault required by subjected individuals, but requires issuer misconduct	No fault required
Awards Affected	Bonus, incentive-based or equity-based compensation and profits realized from the sale of stock	Bonus, incentive compensation or retention awards
Look-Back Period	During 12-month period following first public issuance or filing with the SEC containing financial reporting triggering clawback	During TARP period (as described on page 2)
Enforcement Agent	SEC, in its discretion (no private right of action)	Mandatory enforcement by TARP recipient unless unreasonable to do so; not explicitly stated in the regulations, but question as to whether also Treasury/Special Master

Clawbacks are addressed in [Q-8](#) of the regulations.

Golden Parachute Payment Restriction

Prohibition. ARRA prohibits a TARP recipient from making any “golden parachute payment,” which is defined as any payment (other than for services performed or benefits accrued) to any of its SEOs or the next five MHCEs upon any termination of employment. The regulations expand the prohibition to preclude golden parachute payments upon a change in control, regardless of

Not Golden Parachute Payments

- » Payments for services performed or benefits accrued
- » Payments under a qualified pension or retirement plan
- » Payments upon death or disability
- » Severance or similar payments required by state or foreign law
- » Bonus payments under pre-February 11, 2009 contracts

whether the employee's employment terminates. The regulations eliminate the safe harbor for golden parachute payments equal to three times the CEO's base amount of compensation, which were previously permitted under the contractual limits agreed to between Treasury and TARP recipients under CPP.

Timing. A golden parachute payment is treated as paid at the time of the departure or change in control, if triggered by the departure or change in control, even if paid later. Thus, severance arrangements cannot be structured so that a covered employee of a TARP recipient would receive payments after the TARP period ends that are in connection with his or her departure or a change in control during the TARP period. Conversely, payments to an employee who terminated employment prior to the beginning of the TARP period are not prohibited, even if payments continue to be made after its beginning.

What is not a covered golden parachute. The following payments are not prohibited golden parachute payments:

- » Payments for services performed or benefits accrued
 - » Whether a payment is for services performed or benefits accrued is determined based on a facts and circumstances analysis. If a TARP recipient would make the payment or accrue the benefit regardless of whether the employee departed or a change in control occurred, the payment or benefit would not be a golden parachute payment.
 - » The fact that a payment or award is subject to holdback, forfeiture or clawback for enforcement of restrictive covenants imposed on the employee (*e.g.*, a non-compete) should not affect the conclusion as to whether the payment or award has been accrued and earned. This is evidenced by the regulations' statement that potential forfeiture for termination for cause does not void the exemption. Further, this reading is consistent with Treasury's position under Section 409A of the Internal Revenue Code.
 - » A payment under a benefit or deferred compensation plan is treated as a payment for services performed or benefits accrued if, among other requirements:
 - The plan was in effect for at least one year prior to the employee's departure;
 - The employee has a vested right to the benefit at the time of the departure or change in control; and

- Benefits under the plan are accrued only for current or prior service rendered.
- » Payments under a qualified pension or retirement plan
- » Payments upon death or disability
- » Severance or similar payments required by state or foreign law
- » Bonus payments under pre-February 11, 2009 contracts

Golden parachute payments are addressed in [Q-9](#) of the regulations.

Tax Gross-Up Prohibition

The regulations prohibit a TARP recipient from paying to any of its SEOs or next 20 MHCes gross-ups or other reimbursements for the payment of taxes, including rights to future gross-up payments for periods that extend beyond the TARP period. This prohibition does not cover payments under tax equalization arrangements, which provide payments to compensate an employee for taxes imposed by a foreign jurisdiction on the employee's compensation above the taxes that would be paid domestically.

The tax gross-up prohibition is addressed in [Q-11](#) of the regulations.

Luxury Expense Policy

The regulations require the board of directors of a TARP recipient to establish a written policy prohibiting, or requiring prior approval of, excessive and luxury expenditures. The TARP recipient must maintain the policy through the TARP period. By the later of September 14, 2009 or the closing of an agreement with Treasury, the board of a TARP recipient must:

- » Adopt a luxury expenditure policy;
- » Provide it to Treasury and the TARP recipient's primary regulatory agency; and
- » Post the text on the TARP recipient's Web site.

Any amendments to the policy must be provided to Treasury and the TARP recipient's primary regulatory agency within 90 days after adoption and must be posted on the TARP recipient's Web site.

Treasury Regulations Governing Compensation for TARP Participants

Included expenditures. Examples of how activities or events paid for or reimbursed by the TARP recipient may be classified:

Included	Not Included
<ul style="list-style-type: none">» Entertainment or events» Office and facility renovations» Aviation or other transportation services	<ul style="list-style-type: none">» Reasonable expenditures for staff development» Reasonable performance incentives» Other similar reasonable measures conducted in the normal course of the TARP recipient's business

Policy components. Luxury expenditure policies should be designed to eliminate excessive and luxury expenditures. At a minimum, the policy must:

- » Identify the types of prohibited expenditures, possibly including a threshold expenditure amount per item, activity or employee;
- » Identify the types of expenditures that require prior approval, including any threshold expenditure amounts;
- » Provide reasonable approval procedures for expenditures requiring prior approval;
- » Require CEO and CFO certification of approval for expenditures requiring prior approval from any SEO, similar executive officer or the board;
- » Require prompt internal reporting of violations; and
- » Mandate accountability for adherence to the policy.

TARP recipients that have never had an obligation to Treasury. As described on page 3, although TARP recipients that have never had an obligation are not subject to most requirements of the regulations, they are subject to the luxury expense provisions of the regulations. This requirement ceases for these TARP recipients as of the sunset date of Treasury's statutory authority under TARP.

The luxury expense policy requirement is addressed in [Q-12](#) of the regulations.

Perquisite Disclosure

The regulations require that TARP recipients annually disclose perquisites or other personal benefits with a total value greater than \$25,000 for each SEO and MHCE subject to the bonus payment limitation (as described on page 9), which must

Areas of Enhanced Disclosure Requirements

- » **Compensation committee risk assessment and avoidance of manipulation of reporting earnings**
- » **Perquisites**
- » **Compensation consultants**

include a discussion of the amount, nature, recipients of and justifications for the perquisites.

This requirement goes beyond current SEC regulations, which require public companies to identify each perquisite provided to the named executive officers if the total value of perquisites is \$10,000 or more for an executive, but require only a specific perquisite and the incremental cost of the perquisite to be itemized if the perquisite exceeds the greater of \$25,000 or 10% of the total value of all the perquisites provided to an executive.

The perquisite disclosure requirement is addressed in [Q-11](#) of the regulations.

Compensation Consultant Disclosure

The regulations also impose broader disclosure obligations regarding compensation consultants than those under existing federal securities laws by requiring a TARP recipient's compensation committee to disclose annually whether the TARP recipient, its board or its compensation committee has engaged a compensation consultant. The compensation committee must disclose all services provided by the consultant or any of its affiliates for the past three years, including the use of any benchmarking or comparisons employed by the consultant to analyze comparative compensation schemes. If the TARP recipient is not required to maintain a compensation committee, the board must provide the disclosure.

The compensation consultant requirement is addressed in [Q-11](#) of the regulations.

Say on Pay

While the regulations make clear that the other compensation requirements of ARRA described in this memorandum are effective only for periods after the regulations became effective on June 15, 2009, the ARRA "say on pay" requirement was deemed effective as of the enactment of ARRA on February 17, 2009. Accordingly, TARP recipients with outstanding obligations to Treasury have already been complying with the say on pay requirement.

The regulations require that TARP recipients must, in any proxy, consent or authorization for an annual or other meeting of shareholders, provide for a separate shareholder non-binding vote to approve the executive officer compensation that has been disclosed as required under the SEC's compensation disclosure rules. A TARP recipient must comply with any rules, regulations or guidance issued by the SEC on say on pay. Davis Polk has separately prepared a client memorandum

entitled [“Say on Pay” Now a Reality for TARP Participants](#), dated February 25, 2009, regarding the SEC’s guidance on say on pay.

Recently, the Obama administration announced its intention to require all U.S. public companies to provide for a say on pay vote. Davis Polk has separately prepared a client memorandum entitled [Obama Administration to Push for Legislation Mandating Say on Pay and Additional Independence Standards for Compensation Committee for All U.S. Public Companies](#), dated June 11, 2009, regarding this announcement.

The say on pay requirement is addressed in [Q-13](#) of the regulations.

CEO and CFO Certification

The CEO and CFO of a TARP recipient must provide certifications of compliance within 90 days after the completion of the TARP recipient’s fiscal year, any portion of which was a TARP period. The regulations provide two sample certification forms, one for the [initial fiscal year](#) in which the TARP recipient participates in the TARP program and one for [later years](#). SEC-registered TARP recipients must provide their certifications as exhibits to their Forms 10-K. A private TARP recipient must provide its certifications to Treasury and its primary regulatory agency.

In all years, the CEO or CFO must certify that the following items are true:

- » The compensation committee: (i) met at least every six months with senior risk officers to evaluate CEO and employee compensation plans and potential risks; (ii) identified and limited features of the plans that might encourage excessive and unnecessary risk-taking; and (iii) reviewed each employee compensation plan, identifying and eliminating features that might encourage manipulation of reported earnings.
- » The compensation committee will certify as to the above reviews and provide a narrative description as to how it limited or eliminated, as applicable, the features in the CEO and employee compensation plans that might expose the TARP recipient to risks or encourage manipulation of reported earnings.
- » The TARP recipient has complied with all regulations regarding bonus payment limitations, clawback provisions, golden parachute payments, tax gross-ups, luxury expenditure policies, perquisite disclosure and disclosure of compensation consultants, and has complied with any additional compensation requirements set forth in any agreement between the TARP recipient and Treasury.

- » If the TARP recipient has securities registered with the SEC, it will permit a non-binding say on pay vote, in accordance with any guidance, rules, or regulations promulgated by the SEC.
- » The employees named in the certification are the SEOs or MHCEs, ranked in order of compensation amount, for the current fiscal year based on their compensation during the prior fiscal year.
- » If the TARP recipient received exceptional financial assistance and is subject to approval by the Special Master of its compensation structures or amounts, it has received or is in the process of receiving that approval.

CEO and CFO certification is addressed in [Q-15](#) of the regulations.

Compensation Deduction Limit

TARP recipients under certain programs (including CPP) have made contractual commitments to Treasury to observe the \$500,000 deduction limitation set forth in Section 162(m)(5) of the Internal Revenue Code with respect to the compensation paid to specified senior executive officers. This limit references tax code provisions that were adopted as part of the original TARP legislation and is not affected by the regulations. These contractual commitments continue in effect, as they are not inconsistent with any requirements of the regulations. Note that this non-deductibility requirement is typically phrased in a manner that covers a potentially different senior executive officer group than is covered by the restrictions under the regulations.

TARP Recipients That Have Fully Repaid Their Obligations

The regulations' restrictions generally cease to apply to a TARP recipient after the TARP recipient has fully repaid its obligations to Treasury. However, the rules in this regard are not entirely clear. For example, while ARRA and the regulations make clear that the restrictions will not apply if Treasury continues to hold only warrants of the TARP recipient, the regulations state at least once that restrictions will apply if Treasury holds common stock of the TARP recipient. This is presumably meant to continue the restrictions in situations where Treasury has agreed to convert or exchange preferred stock or debt obligations of a TARP recipient for common stock and not where Treasury has acquired common stock by exercising warrants after a TARP recipient has repaid its obligations.

Treasury Regulations Governing Compensation for TARP Participants

The summary below attempts to interpret the rules as to the sunset of the compensation requirements for TARP recipients that have completed repayment of their outstanding TARP obligations. TARP recipients exiting TARP may want to consider whether, going forward, and to what extent as a matter of good governance, they want to adopt measures of their own design reflective of certain of the principles embedded in the regulations.

As discussed on page 2, in the parlance of the regulations, when a TARP recipient has fully repaid its TARP obligations (even if Treasury continues to hold warrants of the TARP recipient), the TARP recipient will be deemed to have ended its “TARP period.”

- » ***Special Master approval of compensation for TARP recipients that are awarded exceptional assistance.*** The requirement of Special Master review and approval of the compensation arrangements of TARP recipients receiving exceptional assistance will cease immediately at the end of the TARP period.
- » ***Bonus payment prohibition.*** Bonus payments relating solely to periods following a TARP recipient’s TARP period are not subject to any restrictions under the regulations. However, as described on page 10, bonus payments relating to service periods that include periods prior to the end of the TARP period will be subject to proration to avoid the payment or accrual of bonus amounts relating to the TARP period.
- » ***Risk assessment and avoidance of manipulation.*** Requirements relating to periodic assessment of risk and avoidance of manipulation cease to apply after the end of a TARP recipient’s TARP period, but the TARP recipient will still be required to certify at year-end that these requirements were met for the portion of the last fiscal year before the end of the TARP period.
- » ***Recoupment.*** The recoupment provisions generally apply to any bonus payment granted or promised during the TARP period, even if the bonus payment is not paid or settled until after the TARP period has ended.
- » ***Golden parachutes.*** A golden parachute is treated as paid at the time of an employee’s termination of employment with a TARP recipient. Therefore, if a covered employee departs before the TARP period has ended, the employee may not become entitled to any golden parachute amounts even if amounts are not payable or paid until after the TARP period has ended.

Treasury Regulations Governing Compensation for TARP Participants

- » ***Perquisite and compensation consultant disclosure.*** After repayment of its TARP obligations, a TARP recipient or its compensation committee, as applicable, will still be required to make the perquisite and compensation consultant disclosures under the regulations with respect to the portion of the last fiscal year before the end of the TARP period.
- » ***Gross-up prohibition.*** The regulations' prohibition on tax gross-ups to employees in the covered group includes a prohibition against providing a right to a gross-up after the TARP period has ended in respect of taxable income during the TARP period.
- » ***Luxury policy.*** The requirement to maintain a luxury expense policy and follow procedures for expense reviews ceases to apply as of the end of the TARP period.
- » ***Say on Pay.*** The requirement for a say on pay vote will cease to apply for any applicable shareholder meeting held after the TARP period has ended. However, if a proxy statement was mailed during the TARP period and includes a say on pay proposal, but the respective meeting takes place after the TARP period, the vote will presumably go forward. Further, as mentioned on page 22, say on pay votes may soon be required for all public companies under other rules.
- » ***Annual compensation deduction limit.*** The annual \$500,000 deduction limit applicable to the compensation of specified senior executive officers of entities participating in CPP and certain other programs is imposed under contractual commitments between the participants and Treasury and therefore is not subject to the sunset provisions of the regulations.
- » ***Compensation committee certifications.*** As noted above, the compensation committee will need to make year-end certifications as to its compliance with the risk assessment, avoidance of manipulation and compensation consultant disclosure requirements with respect to the portion of the last fiscal year before the end of the TARP period.
- » ***CEO and CFO certifications.*** The CEO and CFO will be required to make a year-end certification as to the TARP recipient's compliance with the applicable requirements of the regulations for the portion of the last fiscal year before the end of the TARP period.

M&A Transactions

- » **An acquirer in an M&A transaction will not become subject to the compensation rules under ARRA solely as a result of the acquisition of a TARP recipient**
- » **However, in a transaction where the primary purpose is to evade ARRA's compensation rules, the acquirer will be treated as a TARP recipient immediately upon such an acquisition**

Corporate Transactions

The regulations provide that, regardless of the form of the transaction, an acquirer in an M&A transaction will not become subject to ARRA's compensation rules solely as a result of the acquisition of a TARP recipient. Thus, employees of an acquirer that is not a TARP recipient, including target employees who were SEOs or MHCEs immediately prior to the transaction, will not generally be subject to TARP restrictions.

Transactions intended to evade TARP. The acquirer in a transaction where the primary purpose is to evade ARRA's compensation rules will be treated as a TARP recipient immediately upon such acquisition.

- » ***Redetermination of SEOs and MHCEs.*** Immediately upon such a transaction, the SEOs and MHCEs of the post-acquisition entity are redetermined based upon the post-acquisition employees' compensation for the immediately preceding fiscal year of the pre-acquisition target or pre-acquisition acquirer, as applicable.
- » ***Asset acquisition.*** In the case of an asset acquisition whose primary purpose is to evade the TARP compensation rules, the acquiring entity will be treated as a direct recipient of TARP assistance for purposes of determining whether related entities are treated as TARP recipients.

The consequences of corporate transactions are addressed in [Q-14](#) of the regulations.

Effectiveness and Conflicts

The regulations were published in the Federal Register on June 15, 2009 and were effective upon publication. To the extent there are any inconsistencies, the regulations supersede any previous guidance applicable to a TARP recipient, including contractual provisions, as of June 15, 2009.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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Compliance Timeline

The following are key obligations under the regulations with fixed deadlines. The timeline does not reflect any contractual obligations that TARP recipients may have.

Compliance Date*	Requirement
» August 14, 2009 <i>(for TARP recipients receiving exceptional financial assistance)</i>	» Submit initial request for approval of compensation structures for and payments to each SEO and MHCE subject to the bonus payment limitation
» September 14, 2009	» Establish a compensation committee if a committee is not already in place and, apparently, conduct the initial required semi-annual risk assessment
» September 14, 2009	» Adopt and publish a luxury expense policy
» October 13, 2009 <i>(for TARP recipients receiving exceptional financial assistance)</i>	» Submit initial request for approval of compensation structures for executive officers and employees among the 100 MHCEs not subject to the bonus payment limitations
Annual Requirements	
» 90 days after TARP recipient's fiscal year-end	» Provide CEO/CFO certifications
» 120 days after TARP recipient's fiscal year-end	» Provide perquisite disclosure
» 120 days after TARP recipient's fiscal year-end	» Provide compensation consultant disclosure
» In each annual meeting proxy statement	» Include say on pay proposal » Include compensation committee risk assessment disclosure and certification
» For a period of not less than six years after the date of each CEO/CFO certification	» Preserve appropriate documentation and records to substantiate the relevant CEO/CFO certification

* *Timeline assumes that TARP recipient was participating in TARP prior to June 15, 2009.*



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 Internal Revenue Service, 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 compensation rules described above, please feel free to call your Davis Polk contact.

This memorandum is a summary that we believe may be of interest to you for general information. It is not a full analysis of the matters presented and should not be relied upon as legal advice.