2015

Q– 16: What is the Office of the Special Master for TARP Executive Compensation, and what are its powers, duties and responsibilities?" Code of Federal Regulations, title 31

U. S. Department of the Treasury

are not entitled to a payment or are aware that a payment is higher than the payment to which they are entitled are not considered to have contributed to the overpayment if they promptly contact the Benefits Administrator and question the correctness of the payment and take no further action in reliance of the overpayment.

(2) Any contact made with the Benefits Administrator concerning the overpayment within 60 days of receipt (if the overpayment is a recurring payment, contact must be made within 60 days of the initial payment) will satisfy the prompt notification requirement.

(c) *Reasonable person standard.* The Department will use a reasonable person standard to determine whether an individual should have known that a statement was incorrect or that material facts in the individual's possession should have been disclosed. The reasonable person standard will take into account the objective factors set forth is paragraph (a)(3) of this section.

§ 29.523 Equity and good conscience.

Recovery is against equity and good conscience when there is substantial evidence that—

(a) It would cause financial hardship to the person from whom it is sought no matter what the amount and length of the proposed installment;

(b) The recipient of the overpayment can show (regardless of his or her financial circumstances) that due to the notice that such payment would be made or because of the incorrect payment he or she either has relinquished a valuable right or has changed positions for the worse; or

(c) Recovery would be unconscionable under the circumstances.

§ 29.524 Financial hardship.

Financial hardship may be deemed to exist when the debtor needs substantially all of his or her current and anticipated income and liquid assets to meet current and anticipated ordinary and necessary living expenses during the projected period of collection. Financial hardship will not be found to exist when the debtor merely establishes that the repayment causes a financial burden, *i.e.*, when it is inconvenient to repay the debt. If there are anticipated changes in income or expenses that would allow for the recovery of the overpayment at a later date, the Department may suspend collection action until a future date.

(a) *Considerations.* Pertinent considerations in determining whether recovery would cause financial hardship include the following:

(1) The debtor's financial ability to pay at the time collection is scheduled to be made, and

(2) Income to other family member(s), if such member's ordinary and necessary living expenses are included in expenses reported by the debtor.

§ 29.525 Ordinary and necessary living expenses.

An individual's ordinary and necessary living expenses include rent, mortgage payments, utilities, maintenance, transportation, food, clothing, insurance (life, health, and accident), taxes, installment payments for which the individual is already liable, medical expenses, support expenses for which the individual is legally responsible, and other miscellaneous expenses that the individual can establish as being ordinary and necessary.

§ 29.526 Waiver precluded.

Waivers will not be offered or granted when—

(1) The overpayment was obtained by fraud, misrepresentation, or by improper negotiation of checks or withdrawal of electronic fund transfer payments after the death of the payee; or

(2) The overpayment was made to an estate and a timely demand for repayment is made prior to the final disbursement by the administrator or executor of the estate.

PART 30—TARP STANDARDS FOR COMPENSATION AND CORPORATE GOVERNANCE

Sec.

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

SOURCE: 74 FR 28405, June 15, 2009, unless otherwise noted.

§ 30.0 Executive compensation and corporate governance.

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

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

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

Annual compensation. (1) *General rule*. The term ''annual compensation'' means, except as otherwise explicitly provided in this part, the dollar value for total compensation for the applicable fiscal year as determined pursuant to Item 402(a) of Regulation S–K under the Federal securities laws (17 CFR 229.402(a)). Accordingly, for this purpose the amounts required to be disclosed pursuant to paragraph (c)(2)(viii) of Item 402(a) of Regulation S–K (actuarial increases in pension plans and above market earnings on deferred compensation) are not required to be included in annual compensation.

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

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

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

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

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

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

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

Commission compensation. (1) *Definition.* The term ''commission compensation'' means:

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

(ii) Compensation or portions of compensation earned by an employee that meet the requirements of paragraph (1)(i) of this definition except that the transaction occurs with a related customer, provided that substantial sales from which commission compensation arises are made, or substantial services from which commission compensation arises are provided, to unrelated customers by the service recipient, the sales and service arrangement and the commission arrangement with respect to the related customer are bona fide, arise from the service recipient's ordinary course of business, and are substantially the same, both in term and in practice, as the terms and practices applicable to unrelated customers to which individually or in the aggregate substantial sales are made or substantial services provided by the service recipient; or

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

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

Example 1. Employee A is an employee of TARP recipient. Among TARP recipient's businesses is the sale of life insurance policies, and TARP recipient buys and sells such policies frequently as part of its ordinary course of business. Employee A's primary duties consist of selling life insurance policies to customers unrelated to the TARP recipient. Under a commission program existing for all TARP Recipient employees selling life insurance policies as of February 17, 2009, Employee A is entitled to receive an amount equal to 75% of the total first year's premium paid by an unrelated customer to whom Employee A has sold a life insurance policy. The payments to Employee A under the program constitute commission compensation.

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

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

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

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

Compensation means all remuneration for employment, including but not limited to salary, commissions, tips, welfare benefits, retirement benefits, fringe benefits and perquisites.

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

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

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

Deferred compensation plan. The term ''deferred compensation plan'' means

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

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

(ii) Segregates or otherwise sets aside assets in a trust which may only be used to pay plan and other benefits, except that the assets of this trust may be available to satisfy claims of the TARP recipient's creditors in the case of insolvency; or

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

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

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

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

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

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

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

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

(1) Entertainment or events;

(2) Office and facility renovations;

(3) Aviation or other transportation services; and

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

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

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

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

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

(4) Require PEO and PFO certification that the approval of any expenditure requiring the prior approval of any SEO, any executive officer of a substantially similar level of responsibility, or the TARP recipient's board of directors (or a committee of such board of directors), was properly obtained with respect to each such expenditure;

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

(6) Mandate accountability for adherence to this policy.

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

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

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

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

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

Example 3. LP C is a limited partnership established for the purpose of participating in the Public Private Investment Program. LP C has a general partner (GP) that makes management decisions on behalf of LP C. A limited liability company controlled by an affiliate of GP (LLC partner) raises $55,000,000 from twenty investors, with each investing equal shares, joins LP C as a limited partner, and invests those funds for a 55% equity interest in LP C. LP C sells a $45,000,000 equity interest to Treasury. LP C, at the direction of the GP, will buy and sell securities as investments and manage those investments. LP C will contract for investment advice from an investment advisor that is an affiliate of GP. LP C has received financial assistance. LLC partner has received financial assistance because it is treated as the same employer as LP C according to the standards set forth in paragraph (1)(ii) of the definition of ''TARP recipient''. The investors in the LLC partner have not received financial assistance because they are not treated as the same employer as LP C according to the standards set forth in paragraph (1)(ii) of the definition of ''TARP recipient''. GP is not an employee of LP C pursuant to the definition of ''employee'' in this rule, and is not treated as the same employer as LP C according to the standards set forth in paragraph (1)(ii) of the definition of ''TARP recipient''. The investment advisor-contractor to LP C has not received financial assistance. Entities that sell securities to or buy securities from LP C have neither sold troubled assets to Treasury nor insured troubled assets through Treasury, and therefore have not received financial assistance.

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

GAAP. The term ''GAAP'' means U.S. generally accepted accounting principles.

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

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

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

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

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

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

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

Example 1. Employee A is a SEO of Entity B at all relevant times. On September 1, 2007, Employee A received a stock appreciation right granting him the right to appreciation on the underlying shares that would vest 25% for every twelve months of continued services. Under the terms of the grant, the stock appreciation right would be immediately exercised and payable upon termination of employment. Entity B becomes a TARP recipient in December 2008. On September 1, 2009, Entity B involuntarily terminates Employee A, at which time Employee A receives a payment equal to the post-September 1, 2007 appreciation on 50% of the shares under the stock appreciation right (the portion of the shares that had vested before the termination of employment). The payment is treated as a payment for services performed and does not constitute a golden parachute payment.

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

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

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

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

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

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

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

(vi) With respect to payments under a deferred compensation plan, the TARP recipient has previously recognized compensation expense and accrued a liability for the benefit payments according to GAAP or segregated or otherwise set aside assets in a trust which may only be used to pay plan benefits, except that the assets of this trust may be available to satisfy claims of the TARP recipient's creditors in the case of insolvency and payments pursuant to the plan are not in excess of the accrued liability computed in accordance with GAAP.

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

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

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

(2) *Salary or other permissible payments paid in property.* The term ''incentive plan'' does not include an arrangement under which an employee receives salary or another permissible payment in property, such as TARP recipient stock, provided that such property is not subject to a substantial risk of forfeiture (as defined in 26 CFR 1.83–3(c)) or other future period of required services, the amount of the payment is determinable as a dollar amount through the date such compensation is earned (for example, an agreement that salary payments will be made in stock equal to the value of the cash payment that would otherwise be due), and the amount of stock or other property accrues at the same time or times as the salary or other permissible payments would otherwise be paid in cash. The term ''incentive plan'' also does not include an arrangement under which an employee receives a restricted stock

unit that is analogous to TARP recipient stock, that otherwise meets the requirements of the previous sentence. For this purpose, a unit is analogous to stock if the unit is based upon stock of the TARP recipient, or is applied as if the applicable entity, division, or other unit were a corporation with one class of stock and the number of units of stock granted is determined based on a fixed percentage of the overall value of this corporation, and the term "TARP recipient stock" with respect to a particular employee recipient means the stock of a corporation (or the entity, division, or other unit the value of which forms the basis for the unit) that is an "eligible issuer of service recipient stock" under 26 CFR 1.409A–1(b)(5)(iii)(E) (applied by analogy to non-corporate entities).

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

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

Example 2. Same facts as *Example 1,* except that pursuant to a valid elective deferral election, Employee elects to defer 20% of each salary payment into a nonqualified deferred compensation plan. At each salary payment date Employee will receive an $8,000 payment in cash, be transferred a number of shares of common stock of TARP recipient equal to $4,000 divided by the fair market value of a share of common stock on the salary payment date, and a $3,000 contribution to an account under a nonqualified deferred compensation plan. The arrangement is for the payment of salary, and is not an incentive plan.

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

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

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

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

(1) The restricted stock or restricted stock units are issued with respect to common stock of the TARP recipient. For this purpose, a restricted stock unit includes a unit that is payable, or may be payable, in cash or stock, provided that the value of the payment is equal to the value of the underlying stock. With respect to a specified division or other unit within a TARP recipient or a TARP recipient that is not a stock corporation, a unit analogous to common stock may be used. For this purpose, a unit is analogous to common stock if applied as if the entity, division, or other unit were a corporation with one class of common stock and the number of units of common stock granted is determined based on a

fixed percentage of the overall value of this corporation. Notwithstanding the foregoing, with respect to a particular employee recipient, the corporation the stock of which is utilized (or the entity, division, or other unit the value of which forms the basis for the unit) must be an ''eligible issuer of service recipient stock'' under 26 CFR 1.409A–1(b)(5)(iii)(E) (applied by analogy to non-corporate entities).

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

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

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

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

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

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

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

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

Most highly compensated employee. (1) *In general.* The terms ''most highly compensated employee'' or ''most highly compensated employees'' mean the employee or employees of the TARP recipient whose annual compensation is determined to be the highest among all employees of the TARP recipient, provided that, solely for purposes of identifying the employees who are subject to any rule applicable to both the SEOs and one or more of the most highly compensated employees of the TARP recipient, SEOs of the TARP recipient are excluded when identifying the most highly compensated employee(s). For this purpose, a former employee who is no longer employed as of the first date of the relevant fiscal year of the TARP recipient is not a most highly compensated employee unless it is reasonably anticipated that such employee will return to employment with the TARP recipient during such fiscal year.

(2) *Application to new entities.* For an entity that is created or organized in the same year that the entity becomes a TARP recipient, a most highly compensated employee for the first year includes the person that the TARP recipient determines will be the most highly compensated employee for the next year based upon a reasonable, good faith determination of the projected annual compensation of such person earned during that year. This

determination must be made as of the later of the date the entity is created or organized or the date the entity becomes a TARP recipient, and must be made only once. However, a person need not yet be an employee to be treated as a most highly compensated employee, if it is reasonably anticipated that the person will become an employee of the TARP recipient during the first year.

Obligation. (1) *Definition.* The term ''obligation'' means a requirement for, or an ability of, a TARP recipient to repay financial assistance received from Treasury, as provided in the terms of the applicable financial instrument and related agreements, through the repayment of a debt obligation or the redemption or repurchase of an equity security, but not including warrants to purchase common stock of the TARP recipient.

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

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

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

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

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

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

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

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

Repayment. The term ''repayment'' means satisfaction of an obligation.

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

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

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

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

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

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

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

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

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

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

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

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

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

Sunset date. The term ''sunset date'' means the date on which the authorities provided under EESA section 101 and 102 terminate, pursuant to EESA section 120, taking into account any extensions pursuant to EESA section 120(b).

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

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

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

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

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

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

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

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

Treasury. The term ''Treasury'' means the U.S. Department of the Treasury.

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

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

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

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

[74 FR 28405, June 15, 2009, as amended at 74 FR 63992, Dec. 7, 2009]

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

This part applies to any TARP recipient, provided that the requirements of sections 111(b) (portions of § 30.4 (Q–4), § 30.5 (Q–5) and § 30.7 (Q–7), as applicable, § 30.6 (Q–6), and § 30.8 (Q–8) through § 30.11 (Q–11), and § 30.15 (Q–15)), and section 111(e) (§ 30.13 (Q–13)) apply only during the period during which any obligation to the Federal government arising from financial assistance provided under the TARP remains outstanding. For a TARP recipient that has had an obligation to the Federal government arising from financial assistance provided under the TARP, and no further financial assistance under the TARP, the requirements of section 111(c) (including portions of § 30.4 (Q–4), § 30.5 (Q–5) and § 30.7 (Q–7), as applicable) and section 111(d) (§ 30.12 (Q–12)) apply through the last day of the period during which that obligation remains outstanding; for a TARP recipient that has never had an obligation to the Federal government arising from financial assistance provided under the TARP, the requirements of section 111(c) (including portions of § 30.4 (Q–4), § 30.5 (Q–5) and § 30.7 (Q–7), as applicable) and section 111(d) (§ 30.12 (Q–12)) apply through the last day of the TARP recipient's fiscal year including the sunset date. For this purpose, an obligation includes the ownership by the Federal government of common stock of a TARP recipient.

[74 FR 28405, June 15, 2009, as amended at 74 FR 63992, Dec. 7, 2009]

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

(a) *Identification.* The SEOs for a year are the ''named executive officers'' who are employees and are identified in the TARP recipient's annual report on Form 10–K or annual meeting proxy statement for that year (reporting the SEOs' compensation for the immediately preceding year). These employees are considered the SEOs throughout that entire year. For purposes of the standards in this part applicable to the most highly compensated employees, the determination of whether an employee is a most highly compensated employee in a current fiscal year looks back to the annual compensation for the last completed fiscal year without regard to whether the compensation is includible in the employee's gross income for Federal income tax purposes.

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

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

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

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

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

(3) Discuss, evaluate, and review at least every six months the employee compensation plans of the TARP recipient to ensure that these plans do not encourage the manipulation of reported earnings of the TARP recipient to enhance the compensation of any of the TARP recipient's employees;

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

(5) Certify the completion of the reviews of the SEO compensation plans

and employee compensation plans required under paragraphs (a)(1), (2), and (3) of this section.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

To comply with the standards established under section 111(b)(3)(B) of EESA, a TARP recipient must ensure that any bonus payment made to a SEO or the next twenty most highly compensated employees during the TARP period is subject to a provision for recovery or ''clawback'' by the TARP recipient if the bonus payment was based on materially inaccurate financial statements (which includes, but is not limited to, statements of earnings, revenues, or gains) or any other materially inaccurate performance metric criteria. Whether a financial statement or performance metric criteria is materially inaccurate depends on all the facts and circumstances. However, for this purpose, a financial statement or performance metric criteria shall be treated as materially inaccurate with respect to any employee who knowingly engaged in providing inaccurate information (including knowingly failing to timely correct inaccurate information) relating to those financial statements or performance metrics. Otherwise, with respect to a performance criteria, whether the inaccurate measurement of the performance or inaccurate application of the performance to the performance criteria is material depends on whether the actual performance or accurate application of the actual performance to the performance criteria is materially different from the performance required under the performance criteria or the inaccurate application of the actual performance to the performance criteria. The TARP recipient must exercise its clawback rights except to the extent it demonstrates that it is unreasonable to do so, such as, for example, if the expense of enforcing the rights would exceed the amount recovered. For the purpose of this section, a bonus payment is deemed to be made to an individual when the individual obtains a legally binding right to that payment.

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

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

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

Example 1. Employee A is a SEO of a TARP recipient. Employee A is entitled to a payment of three times his annual compensation upon an involuntary termination of employment or voluntary termination of employment for good reason, but such amount is not payable unless and until the TARP period expires with respect to TARP recipient. Employee A terminates employment during the TARP period. Because, for purposes of the prohibition on golden parachute payments, the payment is made at the time of departure, Employee A may not obtain the right to the payment upon the termination of employment.

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

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

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

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

(i) The most highly compensated employee of any TARP recipient receiving less than $25,000,000 in financial assistance;

(ii) At least the five most highly compensated employees of any TARP recipient receiving $25,000,000 but less than $250,000,000 in financial assistance;

(iii) The SEOs and at least the ten next most highly compensated employees of any TARP recipient receiving $250,000,000 but less than $500,000,000 in financial assistance; and

(iv) The SEOs and at least the twenty next most highly compensated employees of any TARP recipient receiving $500,000,000 or more in financial assistance.

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

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

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

(2) *Payments or accruals after the employee is no longer a SEO or most highly compensated employee.* If after the employee is no longer a SEO or most highly compensated employee, the employee is paid a bonus payment or provided a legally binding right to a bonus payment that is based upon services performed or compensation received during the period the employee was a SEO or most highly compensated employee, the employee will be treated as having accrued such bonus payment during the period the employee was a SEO or most highly compensated employee. For example, if the employee is retroactively granted service credit under an incentive plan (whether for

vesting or benefit calculation purposes) for the period in which the employee was a SEO or most highly compensated employee, the employee will be treated as having accrued that benefit during the period the employee was a SEO or most highly compensated employee.

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

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

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

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

Example 3. Same facts as in *Example 1*, provided further that on March 1, 2011, Employee A is granted a stock option under the TARP recipient stock incentive plan with a value approximately equal to the bonus that would have been payable to Employee A in 2011 (for services performed in 2010), except for application of paragraph (a) of this section. Other similarly situated employee not covered by the bonus limitation for 2010 do not receive such a grant. Under these facts and circumstances, the stock option grant will be treated as a bonus payment accrued in 2010 and will not be permitted to be paid to Employee A.

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

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

(ii) *Example.*

During 2008, Employee A receives compensation of $1 million salary and a $1,200,000 long-term restricted stock grant subject to a three-year vesting period. During 2009, Employee A received compensation of $1 million salary and no grant of long-term restricted stock. During 2010, Employee A receives compensation of $600,000 salary and a $300,000 long-term restricted stock grant subject to a three-year vesting period. Under the general SEC compensation disclosure rules used to define annual compensation in § 30.1 (Q–1) of this part, the compensation related to the long-term restricted stock grants would be allocated over the vesting period. Assume for this purpose, that for 2010, $400,000 of the 2008 long-term restricted stock grant is allocated as compensation, and $100,000 of the 2010 long-term restricted stock grant is allocated as compensation, so that the total annual compensation is $1,100,000 ($600,000 salary + $400,000 + $100,000). However, for purposes of determining Employee A's annual compensation to apply the limit on the value of the long-term restricted stock that may be granted to Employee A in 2010, the entire $300,000 value of the 2010 grant is included but the $400,000 value attributed to the 2008 grant is excluded. Accordingly, Employee A's adjusted annual compensation is $900,000 ($1,100,000 − $100,000 + $300,000 − $400,000). In addition, the entire fair market value of the 2010 long-term restricted stock grant is included for purposes of determining whether the limit has been exceeded. Because the $300,000 adjusted value of the long-term restricted stock grant does not exceed one-third of the $900,000 adjusted annual compensation, the grant complies with paragraph (e)(1)(i).

(2) *Legally binding right under valid employment contracts*—(i) *General rule.* The prohibition under paragraph (a) of this section does not apply to bonus payments required to be paid under a valid employment contract if the employee had a legally binding right under the contract to a bonus payment as of February 11, 2009. For purposes of determining whether an employee had a legally binding right to a bonus payment, *see* 26 CFR 1.409A–1(b)(i). In addition, the bonus payment must be made in accordance with the terms of the contract as of February 11, 2009 (which may include application of an elective deferral election under a qualified retirement plan or a nonqualified deferred compensation plan), such that any subsequent amendment to the contract to increase the amount payable, accelerate any vesting conditions, or otherwise materially enhance the benefit available to the employee under the contract will result in the bonus payment being treated as not made under the employment contract executed on or before February 11, 2009. However, amendment of a valid employment contract executed on or before February 11, 2009 under which an employee has a legally binding right to a bonus payment to reduce the amount of the bonus payment or to enhance or include service-based or performance-based vesting requirements or holding period requirements will not result in this treatment. The amended employment contract would still be deemed a valid employment contract and the employee would still be treated as having a legally binding right to the bonus payment under the original employment contract. The TARP recipient and the employees of the TARP recipient should be cognizant of the restrictions under section 409A of the Internal Revenue Code (26 U.S.C. 409A) in the case of an amendment described in the preceding sentence.

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

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

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

Example 3. TARP recipient sponsors a written stock option plan under which stock options may be granted to SEOs designated by the compensation committee. Designations and grants typically occur at a meeting in August of every year, and no meeting occurred in 2009 before August. Regardless of the existence of the general plan, no SEO had a legally binding right to a stock option grant for 2009 as of February 11, 2009 because no grants had been made under the plan. Accordingly, any 2009 grant will be subject to the limitation and is not permitted to be made.

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

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

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

(a) *Approval of compensation payments to, and compensation structures for, certain employees of TARP recipients receiving exceptional financial assistance.* For any period during which a TARP recipient is designated as a TARP recipient that has received exceptional financial assistance, the TARP recipient must obtain the approval by the Special Master of all compensation payments to, and compensation structures for, SEOs and most highly compensated employees subject to paragraph (b) of § 30.10 (Q–10). TARP recipients that receive exceptional financial assistance must also receive approval by the Special Master for all compensation structures for other employees who are executive officers (as defined under the Securities and Exchange Act, Rule 3b–7) or one of the 100 most highly compensated employees of a TARP recipient receiving exceptional assistance (or both), who are not subject to the bonus limitations under § 30.10 (Q–10). For this purpose, compensation payments and compensation structures may include awards or other rights to compensation which an employee has already received but not yet been paid or, in some instances, fully accrued. Accordingly, the Special Master has the authority to require that such compensation payments or compensation structures be altered to meet the standards set forth in § 30.16 (Q–16). However, this approval requirement is not applicable to payments that are not subject to paragraph (a) of § 30.10 (Q–10) due to the application of paragraph (e)(2) of § 30.10 (Q–10) or the effective date provisions of § 30.17 (Q–17), though the Special Master will take such payments into account in reviewing the compensation structure and amounts payable, as applicable, that are subject to review. Notwithstanding any of the foregoing, approval is not required with respect to an employee not subject to the bonus payment limitations to the extent that the employee's annual compensation, as modified in § 30.16 (Q–16) to include certain deferred compensation and pension accruals but to disregard any grant of long-term restricted stock, is limited to $500,000 or less, and any further compensation is provided in the form of long-term restricted stock. For details, *see* § 30.16 (Q–16).

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

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

(c) *Compensation consultant disclosure*—(1) *General rule.* The compensation committee of the TARP recipient must provide annually a narrative description of whether the TARP recipient, the board of directors of the TARP recipient, or the compensation committee has engaged a compensation consultant; and all types of services, including non-compensation related services, the compensation consultant or any of its affiliates has provided to the TARP recipient, the board, or the compensation committee during the past three years, including any ''benchmarking'' or comparisons employed to identify certain percentile levels of compensation (for example, entities used for benchmarking and a justification for using these entities and the lowest percentile level proposed for compensation). Such disclosure must be provided within 120 days of the completion of a fiscal year any part of which is a TARP period.

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

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

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

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

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

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

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

[74 FR 63992, Dec. 7, 2009]

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

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

(b) *Anti-abuse rule.* Notwithstanding the provisions of paragraph (a) of this section, if the primary purpose of a transaction involving the acquisition, in any form, of a TARP recipient is to avoid or evade the application of any of the requirements of section 111 of EESA, the acquirer will be treated as a TARP recipient immediately upon such acquisition. In such a case, the SEOs and the most highly compensated employees to whom any of the requirements of section 111 of EESA and this Interim Final Rule apply shall be redetermined as of the date of the acquisition. The redetermined SEOs and most highly compensated employees of the post-acquisition acquirer shall consist of the PEO and PFO of the post-acquisition acquirer, plus the applicable number of next most highly compensated employees determined by aggregating the post-acquisition employees of the acquirer (to include the pre-acquisition employees of the target employed by the acquirer, or anticipated to be employed by the acquirer), and ranking such employees in order of compensation for the immediately preceding fiscal year of the pre-acquisition target or pre-acquisition acquirer, as appropriate. In the case of an asset acquisition, the entity or entities to whom the target's assets are transferred shall be treated as the direct recipient of the financial assistance for purposes of determining which other related entities are treated, in the aggregate, as the TARP recipient under the definition of ''TARP recipient'' in § 30.1 (Q–1).

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

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

(2) *First Fiscal Year Certification.* (i) Within ninety days of the completion of the first annual fiscal year of the TARP recipient any portion of which is a TARP period, the PEO and the PFO of the TARP recipient must provide

certifications similar to the model provided in appendix A to this section.

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

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

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

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

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

(b) *Recordkeeping requirements.* The TARP recipient must preserve appropriate documentation and records to substantiate each certification required under paragraph (a) of this section for a period of not less than six years after the date of the certification, the first two years in an easily accessible place. The TARP recipient must furnish promptly to Treasury legible, true, complete, and current copies of the documentation and records that are required to be preserved under paragraph (b) of this section that are requested by any representative of Treasury.

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

APPENDIX A TO § 30.15—MODEL CERTIFICATION FOR FIRST FISCAL YEAR CERTIFICATION

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

(i) The compensation committee of [identify TARP recipient] has discussed, reviewed, and evaluated with senior risk officers at least every six months during the period beginning on the later of September 14, 2009, or ninety days after the closing date of the agreement between the TARP recipient and Treasury and ending with the last day of the TARP recipient's fiscal year containing that date (the applicable period), the senior executive officer (SEO) compensation plans and the employee compensation plans and the risks these plans pose to [identify TARP recipient];

(ii) The compensation committee of [identify TARP recipient] has identified and limited during the applicable period any features of the SEO compensation plans that could lead SEOs to take unnecessary and excessive risks that could threaten the value of [identify TARP recipient], and during that same applicable period has identified any features of the employee compensation plans that pose risks to [identify TARP recipient] and has limited those features to ensure that [identify TARP recipient] is not unnecessarily exposed to risks;

(iii) The compensation committee has reviewed, at least every six months during the applicable period, the terms of each employee compensation plan and identified any features of the plan that could encourage the manipulation of reported earnings of [identify TARP recipient] to enhance the compensation of an employee, and has limited any such features;

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

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

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

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

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

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

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

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

(ix) The board of directors of [identify TARP recipient] has established an excessive or luxury expenditures policy, as defined in the regulations and guidance established under section 111 of EESA, by the later of September 14, 2009, or ninety days after the closing date of the agreement between the TARP recipient and Treasury; this policy has been provided to Treasury and its primary regulatory agency; [identify TARP recipient] and its employees have complied with this policy during the applicable period; and any expenses that, pursuant to this policy, required approval of the board of directors, a committee of the board of directors, an SEO, or an executive officer with a similar level of responsibility were properly approved;

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

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

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

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

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

(xv) [Identify TARP recipient] has submitted to Treasury a complete and accurate list of the SEOs and the twenty next most highly compensated employees for the current fiscal year and the most recently completed fiscal year, with the non-SEOs ranked in descending order of level of annual compensation, and with the name, title, and employer of each SEO and most highly compensated employee identified; and**[.]**

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

APPENDIX B TO § 30.15—MODEL CERTIFICATION FOR YEARS FOLLOWING FIRST FISCAL YEAR CERTIFICATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(xv) [Identify TARP recipient] has submitted to Treasury a complete and accurate list of the SEOs and the twenty next most highly compensated employees for the current fiscal year, with the non-SEOs ranked in descending order of level of annual compensation, and with the name, title, and employer of each SEO and most highly compensated employee identified; and''.

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

[74 FR 28405, June 15, 2009, as amended at 74 FR 63992, Dec. 7, 2009]

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

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

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

these regulations and any other applicable guidance.

(2) *Review of prior payments to employees.* Section 111(f) of EESA provides that the Secretary shall review bonuses, retention awards, and other compensation paid before February 17, 2009, to employees of each entity receiving TARP assistance before February 17, 2009, to determine whether any such payments were inconsistent with the purposes of section 111 of EESA or TARP, or otherwise contrary to the public interest. Section 111(f) of EESA provides that, if the Secretary makes such a determination, the Secretary shall seek to negotiate with the TARP recipient and the subject employee for appropriate reimbursements to the Federal Government with respect to compensation or bonuses. The Special Master shall have the responsibility for administering these provisions, including the identification of the payments that are inconsistent with the purposes of EESA or TARP, or otherwise contrary to the public interest, and the Special Master shall have responsibility for the negotiation with the TARP recipient and the subject employee for appropriate reimbursements to the Federal Government with respect to compensation or bonuses. The Special Master shall make this determination by application of the principles outlined in paragraph (b) of this section. The Special Master's administration of these provisions may provide for the scope of review by the Special Master of a payment, including a limited review or no review, depending on the payment amount, the type of payment, the overall compensation earned by the employee during the relevant period, a combination thereof, or such other factors as the Special Master may determine, where the Special Master determines that such factors demonstrate that such payments are not, or are highly unlikely to be, inconsistent with the purposes of section 111 of EESA or TARP, or otherwise contrary to the public interest, or that renegotiation of such payments is not in the public interest. The Special Master may request in writing any information from TARP recipients necessary to carry out the review of prior compensation required under section 111(f) of EESA. TARP recipients must submit any requested information to the Special Master within 30 days of the request.

(3) *Approval of certain payments to employees of TARP recipients receiving exceptional financial assistance.* (i) *SEOs and most highly compensated employees.* The Special Master shall determine whether the compensation structure for each SEO or most highly compensated employee of a TARP recipient receiving exceptional assistance, including the amounts payable or potentially payable under such compensation structure, will or may result in payments that are inconsistent with the purposes of section 111 of EESA or TARP, or are otherwise contrary to the public interest. The Special Master shall make such determinations by applying the principles outlined in paragraph (b) of this section, subject to the requirement that the compensation structure and payments satisfy the applicable limitations under § 30.10 (Q–10). This requirement shall apply to any compensation accrued or paid during any period the SEO or most highly compensated employee is subject to the limitations under § 30.10 (Q–10). Initial requests for such approval must be submitted no later than August 14, 2009. The Special Master's administration of these provisions may provide for the Special Master's scope of review, including a limited review or no review, of a portion of a compensation structure or payment depending on the amount of such payments, the type of such payments, the overall compensation earned by the employee during the relevant period, a combination thereof, or such other factors as the Special Master determines, if the Special Master has determined that such factors demonstrate that such payments are not, or are highly unlikely to be, inconsistent with the purposes of section 111 of EESA or TARP, or otherwise contrary to the public interest. The Special Master shall issue a determination within 60 days of the receipt of a substantially complete submission. The TARP recipient must make a further request for approval to the extent the compensation structure for any SEO or most highly compensated employee, including the amounts that are

or may be payable, for any SEO or highly compensated employee is materially modified. In reviewing compensation structures and compensation payments for any period subject to Special Master review, the Special Master may take into account other compensation structures and other compensation earned, accrued or paid, including such compensation and compensation structures that are not subject to the restrictions of Section 111 of EESA pursuant to section 111(b)(3)(D)(iii) (*see* § 30.10(e)(2) (Q–30.10(e)(2) (certain legally binding rights under valid written employment contracts)), and amounts that were accrued or paid prior to June 15, 2009 and are therefore not subject to review by the Special Master.

(ii) *Other executive officers and most highly compensated employees.* With respect to any employee who is either an executive officer (as defined under the Securities and Exchange Act Rule 3b–7) or one of the 100 most highly compensated employees of a TARP recipient receiving exceptional assistance (or both), who is not subject to the bonus limitations under § 30.10 (Q–10), the Special Master shall determine whether the compensation structure for such employees will or may result in payments that are inconsistent with the purposes of section 111 of EESA or TARP, or are otherwise contrary to the public interest. The Special Master shall make such determination through application of the principles outlined in paragraph (b) of this section. With respect to the scope of the required review, the Special Master shall determine only whether the compensation arrangements are adequately structured, and is not required to rule with respect to the amounts that are or may be payable thereunder. However, the TARP recipient may also request an advisory opinion with respect to the amounts that are or may be payable, which the Special Master may provide in his sole discretion. Notwithstanding the foregoing, if the total annual compensation to an employee complies with the rules applicable to an SEO under § 30.10 (Q–10) applied without any limits on the grant of long-term restricted stock, and the annual compensation other than long-term restricted stock does not exceed $500,000 (or for 2009, $500,000 prorated to reflect the remaining portion of 2009 after June 15, 2009), the compensation structure will automatically be deemed to meet the requirements and no prior approval by the Special Master will be required. For purposes of the $500,000 limit, in determining annual compensation, all equity-based compensation granted in fiscal years ending after June 15, 2009 will be included in the calculation only in the year in which they are granted at their total fair market value on the grant date and all equity-based compensation granted in fiscal years ending prior to June 15, 2009 will not be included in the calculation of annual compensation. In addition, solely for purposes of applying the limit (and not for purposes of identifying the most highly compensated employees), the term annual compensation includes amounts required to be disclosed under paragraph (viii) of Item 402(a) of Regulation S–K of the Federal securities laws (change in the actuarial present value of benefits under a pension plan and above-market earnings on deferred compensation). The Special Master's administration of these provisions may provide for limited or no review of a portion of a compensation structure by the Special Master depending on the amount of potential payments, the type of such payments, the overall compensation earned by the employee during the relevant period, a combination thereof, or such other factors as the Special Master determines, where the Special Master has determined that such factors demonstrate that such payments are not, or are highly unlikely to be, inconsistent with the purposes of section 111 of EESA or TARP, or otherwise contrary to the public interest. Initial requests for such approval must be submitted no later than 120 days after publication of the final rule. Separate requests need not be submitted for each individual covered employee, but should be submitted for identified groups of employees subject to the same compensation structures to the extent possible as long as sufficient detail regarding individual compensation awards are provided as necessary to evaluate such employee's compensation structure. The Special Master shall issue a determination within 60 days of the receipt of a substantially complete submission. The TARP recipient must make a further request for approval to the extent the compensation structure, including the amounts that are or may be payable, for any executive officer is materially amended. In reviewing compensation structures for any period subject to Special Master review, the Special Master may take into account other compensation structures and other compensation earned, accrued or paid, including such compensation and compensation structures that are not subject to the restrictions of Section 111 of EESA pursuant to section 111(b)(3)(D)(iii) (*see* §30.10(e)(2) (Q–30.10(e)(2) (certain legally binding rights under valid written employment contracts)), and amounts that were accrued or paid prior to June 15, 2009 and are therefore not subject to review by the Special Master.

(iii) *Period from June 15, 2009 through final determination.* For the period from June 15, 2009 through the date of the Special Master's final determination, the TARP recipient will be treated as complying with this section if, with respect to employees covered by paragraph (a)(3)(i) of this section, the TARP recipient continues to pay compensation to such employees in accordance with the terms of employment as of June 14, 2009 to the extent otherwise permissible under this Interim Final Rule (for example, continued salary payments but not any bonus payments) and if, with respect to employees covered by paragraph (a)(3)(ii) of this section, the TARP recipient continues to pay compensation to such employees under the compensation structure established as of June 14, 2009, and if in addition the TARP recipient promptly complies with any modifications that may be required by the Special Master's final determination. However, the Special Master may take into account the amounts paid to an employee during such period in determining the appropriate compensation amounts and compensation structures, as applicable, for the remainder of the year.

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

(5) *Other designated duties and powers.* The Special Master shall have such other duties and powers related to the application of compensation issues

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

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

(i) *Risk.* The compensation structure should avoid incentives to take unnecessary or excessive risks that could threaten the value of the TARP recipient, including incentives that reward employees for short-term or temporary increases in value, performance, or similar measure that may not ultimately be reflected by an increase in the long-term value of the TARP recipient. Accordingly, incentive payments or similar rewards should be structured to be paid over a time horizon that takes into account the risk horizon so that the payment or reward reflects whether the employee's performance over the particular service period has actually contributed to the long-term value of the TARP recipient.

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

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

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

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

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

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

(c) *Special Master determinations*—(1) *Initial determinations.* The Special Master shall provide an initial determination in writing, within 60 days of the receipt of a substantially complete submission, setting forth the facts and analysis that formed the basis for the determination. The TARP recipient shall have 30 days to request in writing that the Special Master reconsider the initial determination. The request for reconsideration must specify a factual error or relevant new information not previously considered, and must demonstrate that such error or lack of information resulted in a material error in the initial determination. The Special Master must provide a final determination in writing within 30 days, setting forth the facts and analysis that formed the basis for the determination. If a TARP recipient does not request reconsideration within 30 days, the initial determination shall be treated as a final determination.

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

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

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

(2) *Disclosure procedures.* Materials submitted to the Special Master and the initial and final determinations of the Special Master are subject to disclosure under the standards provided in the Freedom of Information Act (FOIA, (5 U.S.C. 552 *et seq.*)). In addition, the final determinations of the Special Master shall be disclosed to the public. The Special Master shall promulgate procedures for ensuring that disclosed materials have been subject to appropriate redaction to protect personal privacy, privileged or confidential commercial or financial information or other appropriate redactions permissible under the FOIA, which may include a procedure for the person or entity making the submission to request redactions and to review and request reconsideration of any proposed redactions before such redacted materials are released.

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

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

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

PART 31—TROUBLED ASSET RELIEF PROGRAM

AUTHORITY: 31 U.S.C. 321; Pub. L. 110–343; 122 Stat. 3765.

SOURCE: 76 FR 61049, Oct. 3, 2011, unless otherwise noted.

§ 31.1 General.

This part sets forth regulations to implement and administer the Emergency Economic Stabilization Act of 2008 (Pub. L. 110–343; 122 Stat. 3765).

Subpart A [Reserved]

Subpart B—Conflicts of Interest

§ 31.200 Purpose and scope.

(a) *Purpose.* This regulation sets forth standards to address and manage or to prohibit conflicts of interest that may arise in connection with the administration and execution of the authorities under the Troubled Asset Relief Program (TARP), established under sections 101 and 102 of the Emergency Economic Stabilization Act of 2008 (EESA).

(b) *Scope.* This regulation addresses actual and potential conflicts of interest, or circumstances that give rise to the appearance of a conflict of interest,