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3-26-2009

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# Executive Compensation Restrictions Under the American Recovery and Reinvestment Act of 2009

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***The new stimulus act carries far-reaching consequences for executive compensation design, implementation and public disclosure.***

If you have found it difficult to follow the bouncing ball in terms of the restrictions on executive compensation for institutions receiving federal assistance, you are not alone. There have been at least three sets of official guidance, some of which slice and dice the rules depending on the nature or level of government funding. Even now, after President Obama signed into law the American Recovery and Reinvestment Act of 2009 (ARRA), we await Treasury Department regulations to flesh out the details. Much of the guidance Treasury issued as interim final regulations will need to be revised.

From an historical perspective, it is perhaps helpful to review the evolution of the executive compensation and corporate governance restrictions, beginning with the Emergency Economic Stabilization Act of 2008 (EESA) signed into law by President Bush in October 2008. EESA authorized the Treasury Department to spend up to $700 billion to restore liquidity and stability to the U.S. economy by purchasing troubled assets from financial institutions under a so-called Troubled Asset Relief Program (TARP). EESA originally defined two general categories of TARP participants:

Direct purchase participants—financial institutions from which Treasury makes only direct purchases of troubled assets where no bidding process or market prices are available, and in which Treasury takes a "meaningful" equity or debt position in the institution.

***Keywords:*** *executive compensation; American Recovery and Reinvestment Act of 2009; Troubled Asset Relief Program; incentive pay*

DOI: 10.1177/0886368709334321



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Auction purchase participants—financial institutions from which Treasury makes auction purchases of troubled assets, and the aggregate auction purchase and any direct purchases from the institution exceed $300 million.

## Initial Guidance

On October 14, 2008, Treasury announced the development of three TARP programs under EESA, which fall under these two main categories:

First, was a Capital Purchase Program, in which financial institutions can voluntarily participate in the TARP on a direct-purchase basis. Under this program, Treasury has been using its authority under Section 101(a) of EESA to purchase nonvoting senior preferred stock in qualifying U.S.-controlled banking organizations and receive warrants to purchase common stock.

Second, was a Troubled Asset Auction Program, under which Treasury may purchase troubled mortgage-related assets through an auction format. To date, Treasury has not used this format to purchase troubled assets.

Third, was a Program for Systemically Significant Failing Institutions to potentially provide direct assistance to certain failing firms on terms negotiated on a case-by-case basis. AIG has entered the TARP under this program.

Financial institutions participating in any of these three programs were required to adopt specified executive compensation standards, which varied based on the program.

Treasury announced another program, the Targeted Investment Program, on January 2, 2009. Terms applicable to a participant in this program will be negotiated on a case-by-case basis and will include "rigorous" executive compensation restrictions. Citigroup and Bank of America have entered the TARP under this program.

## Significant Change in Course

On February 4, 2009, the Treasury Department issued a press release containing numerous changes to the rules regulating the executive compensation arrangements of financial institutions receiving government assistance ("February Treasury Guidelines"). The February Treasury Guidelines abandoned the dichotomy based on direct purchases and auction purchases, but created a different division of financial institutions for purposes of the compensation rules: Those participating in "generally available capital access programs" such as the Capital Purchase Program; and those needing "exceptional assistance" that individually negotiate agreements with Treasury, such as AIG, Bank of America, Citigroup and presumably including any institution participating in a Program for Systemically Significant Failing Institutions.

The signature feature of the February Treasury Guidelines was a $500,000 annual cap on compensation paid to senior executive officers, other than long-term restricted stock that could not vest or be sold before Treasury's investment is repaid in full. This was to be a mandatory restriction for institutions receiving exceptional assistance on or after February 4, 2009. An institution participating in a generally available capital access program would be allowed to "opt out" of this compensation cap by disclosing its executive compensation program and, if requested, submitting to a nonbinding shareholder vote on such program.

The February Treasury Guidelines further limited severance payments to certain officers and expanded the number of officers subject to clawback rules. The February Treasury Guidelines also added the notion of a board policy on luxury expenditures, CEO compliance certification and nonbinding shareholder voting on executive compensation (so-called "say-on-pay" requirements).

## Most Recent Word

On February 17, 2009, the rules changed once again—this time with President Obama's signing of the ARRA, which amended the executive compensation provisions of EESA, further expanding, and largely replacing, the compensation and corporate governance restrictions under the interim TARP regulations and the February Treasury Guidelines.

The ARRA executive compensation regime is notable in two respects.

First, its coverage makes no distinction based on the nature of an institution's TARP participation—the revised rules eliminate the distinction between "direct-purchase" and "auction-purchase" participants and, on their face, apply equally to those receiving "exceptional assistance" and to those participating in generally available capital access programs. Thus, the ARRA executive compensation coverage is more uniform among all TARP recipients and in this sense, at least, is easier to understand.

Second, the ARRA executive compensation limits apply to all institutions that will receive *or have*

**EXHIBIT 1**
**Executive Compensation Restrictions**

| Rule or Restriction | TARP I (October 2008) | | Treasury Guidelines (February 4, 2009) | | ARRA (February 17, 2009) |
|---|---|---|---|---|---|
| | Capital Purchase Program (CPP) | Systemically Significant Failing Institutions (PSSFI) | Generally Available Capital Access Program | Exceptional Assistance | Any institution that has or will receive TARP funds |
| Risk assessment | SEO compensation must not encourage unnecessary and excessive risks that threaten the value of the institution | Same as for CPP | Same as for CPP under TARP I | Same as for CPP under TARP I | Same as for CPP under TARP I<br>Also, prohibition on any compensation plan that would encourage manipulation of the reported earnings to enhance the compensation of any employees |
| Deduction limit | Participants must agree to $500,000 limit under §162(m)(5) | Same as for CPP | $500,000 limit applies pursuant to §162(m)(5) | $500,000 limit applies pursuant to §162(m)(5) | $500,000 limit applies pursuant to §162(m)(5) |
| Annual compensation limit | n/a | n/a | $500,000 plus restricted stock or similar long-term incentive arrangements that vest when Treasury is repaid (UNLESS opt out with SEO compensation disclosure and, if requested, a nonbinding say-on-pay shareholder resolution) | $500,000 plus restricted stock or similar long-term incentive arrangements that vest when Treasury is repaid | No payment or accrual of any bonus, retention award or incentive compensation while a TARP recipient, except restricted stock that does not fully vest until Treasury is repaid and is valued at not more than one-third of the officer's annual compensation for the year of grant. The number of execs affected by this limit (1 to 25) is based on dollar amount of TARP funding<br>Grandfather for valid agreements existing as of 11 February, 2009 |
| Severance payments | SEOs: not more than 3 × average taxable compensation over last 5 years<br>Limit applies only to involuntary termination or termination in an insolvency context | $0 for SEOs<br>Limit applies only to involuntary termination or termination in an insolvency context | SEOs: not more than 1 × average taxable compensation over last 5 years<br>Limit apparently applies only to involuntary termination or termination in an insolvency context | $0 for SEOs and next 5 most highly compensated employees (HCEs)<br>Next 25 HCEs: not more than 1 × annual compensation<br>Limit apparently applies only to involuntary termination or termination in an insolvency context | $0 for SEOs and next 5 HCEs (other than payments for services performed or benefits accrued)<br>Limit applies to termination of employment for any reason—i.e., not limited to involuntary termination or termination in an insolvency context |

*(continued)*

**EXHIBIT 1 (continued)**

| Rule or Restriction | TARP I (October 2008) | | Treasury Guidelines (February 4, 2009) | | ARRA (February 17, 2009) |
|---|---|---|---|---|---|
| Clawbacks | SEOs must repay any bonus or incentive compensation if based on materially inaccurate financial statements or any other materially inaccurate performance metric criteria | Same as for CPP | Same as for CPP under TARP I but extends to next 20 HCEs if they knowingly engaged in providing inaccurate financial information or performance metrics used to calculate their own compensation | Same as for CPP under TARP I but extends to next 20 HCEs if they knowingly engaged in providing inaccurate financial information or performance metrics used to calculate their own incentive pay | SEOs and next 20 HCEs must repay any bonus, retention award or incentive compensation if based on statements of earnings, revenues, gains or other criteria that are later found to be materially inaccurate<br>May have to negotiate to recoup bonuses or other compensation paid in 2008 or early 2009 to SEOs and next 20 HCEs if deemed inconsistent with TARP |
| Policy on luxury items | n/a | n/a | Board must adopt and post on website a company-wide policy on certain luxury expenditures | Board must adopt and post on website a company-wide policy on certain luxury expenditures | Board must adopt company-wide policy on excessive or luxury expenditures, including entertainment or events, office and facility renovations, aviation and other transportation services or others that are not reasonable business expenditures |
| Certifications | Compensation Committee must certify compliance with risk assessment rules | Same as for CPP | CEO must certify compliance with all TARP executive compensation rules | CEO must certify compliance with all TARP executive compensation rules | CEO and CFO must certify to SEC or Treasury compliance with all TARP executive rules<br>Compensation Committee must meet semiannually to evaluate compensation plans in light of TARP requirements and risk assessment |
| Say-on-pay | n/a | n/a | Can waive compensation cap by having say-on-pay vote on executive compensation structure and rationale | Required say-on-pay vote on executive compensation structure and rationale | Required annual nonbinding say-on-pay vote. SEC to promulgate rules |

*already received* TARP funds. In acknowledgement of the retroactive nature of these amendments, ARRA permits institutions that have already received TARP funds to repay them immediately without replacement from other sources and without any waiting period. The institution is to consult with the appropriate banking regulatory agency before returning funds. Once Treasury has been repaid in full the executive compensation limitations would cease to apply.

This "free out" is helpful for companies that now find the terms of the TARP program unacceptable; of course, it is not really free, as companies who received funds have incurred transactions costs and some funds have already been expended. Moreover, in today's climate, it may be awkward to opt out of the TARP program on the basis that the new executive compensation restrictions are too limiting, even if the ultimate effect of the limitations is to make it difficult for the institution to retain and attract a quality management team.

## Evolution of the Rules

Exhibit 1 summarizes the executive compensation restrictions under the various regimes to date, but only those under the final column (ARRA) are certainly applicable at this point. We await Treasury and SEC regulations to provide more detail and reconcile prior guidance.

## A Closer Look at the ARRA Provisions

ARRA rewrites Section 111 of EESA, which was the original basis of the TARP standards. Generally, each company that has received or will receive financial assistance under TARP (a "TARP recipient") is subject, during the period that any obligation arising from the assistance remains outstanding, but excluding any period in which Treasury holds only warrants to buy common stock (the "TARP Restriction Period"), to (i) standards to be established by the Secretary of the Treasury under ARRA and (ii) the annual $500,000 deduction limit on compensation for each senior executive officer under section 162(m)(5) of the Internal Revenue Code.

For purposes of the new limits, "senior executive officer" (SEO) is defined in a similar manner as previously, and means the CEO, CFO and next three most highly paid officers whose compensation is required to be disclosed in the annual proxy statement (and nonpublic company counterparts).

ARRA provides that the Secretary is to " . . . require each TARP recipient to meet appropriate standards for executive compensation and corporate governance" including the following specific standards.

### Prohibition on Bonuses, Retention Awards and Incentive Compensation

TARP recipients may not pay or accrue any bonus, retention award or incentive compensation during TARP Restricted Period, except that this prohibition does not apply to a payment of long-term restricted stock by the TARP recipient provided that the award:

- does not fully vest during the TARP Restricted Period;
- has a value that is not greater than one-third of the total amount of annual compensation of the employee receiving the stock; and
- is subject to such other terms and conditions as the Secretary of the Treasury determines to be in the public interest.

The number of persons to whom this prohibition applies depends on the amount of financial assistance the TARP recipient has received. If the amount of the financial assistance received is:

- less than $25 million, the prohibition applies only to the TARP recipient's most highly compensated employee;
- $25 million or greater but less than $250 million, the prohibition applies to at least the five most highly compensated employees (or such higher number as the Secretary of the Treasury determines to be in the public interest with respect to the TARP recipient);
- is at least $250 million but less than $500 million, the prohibition applies to the SEOs and at least the 10 next most highly compensated employees (or such higher number as the Secretary of the Treasury determines to be in the public interest with respect to the TARP recipient);
- $500 million or more, the prohibition applies to the SEOs and at least the 20 next most highly compensated employees (or such higher number as the Secretary of the Treasury determines to be in the public interest with respect to the TARP recipient).

This prohibition does not apply to any bonus payment required to be paid pursuant to any written employment agreement executed on or before February 11, 2009, as such valid employment contracts are determined by the Secretary of the Treasury. This is the controversial "loophole" inserted in ARRA at the 11th hour, which allowed the $165 million in AIG bonuses to be paid.

Treasury regulations are needed to give full meaning to this important provision, such as a more precise definition of what is included in the terms "bonus, retention award or incentive compensation" and "written employment contract" and what it means to "fully vest." Another basic question that is unclear from the statute is whether the "total amount of annual compensation" that is the benchmark for determining the maximum amount of restricted stock means total compensation including the restricted stock (which yields a higher maximum) or total compensation other than the restricted stock.

### Prohibition on Severance Payments

TARP recipients may not make any golden parachute payment to an SEO or any of the next five most highly compensated employees during the TARP Restricted Period. A "golden parachute payment" is defined to mean "any payment to a senior executive officer for departure from a company for any reason except for payments for services performed or benefits accrued." Unlike the rule that applied under the Capital Purchase Program guidance, this restriction applies to any severance payments, not those payable only due to involuntary termination or in the context of an insolvency situation. In addition, the "three times base compensation" safe harbor under the Capital Purchase Program rule no longer applies.

Treasury guidance is needed here as well. For example, a literal reading of the statute could lead to the result that a TARP recipient could not pay benefits due to death or termination as a result of disability if such events occur during the TARP Restricted Period.

### Prohibition on Compensation That Encourages Unnecessary and Excessive Risks

During the TARP Restriction Period, TARP recipients must prohibit compensation that provides incentives for SEOs to take unnecessary and excessive risks that threaten the value of the institution.

### Clawbacks

TARP recipients must provide for the return of any bonus, retention award or incentive compensation paid to an SEO and any of the next 20 most highly compensated employees based on statements of earnings, revenues, gains or other criteria that are later found to be materially inaccurate. This is a slightly higher standard than was in the original EESA provisions in that the material inaccuracy need only be "found" and not "proven"—which implied that some sort of legal determination was formerly required. Also, there is no time limit on enforcement of the clawback. For example, if a bonus earned during the TARP Restriction Period is later found to be based on materially inaccurate criteria, the bonus is subject to the clawback even if the discovery is made well after the TARP Restriction Period.

### No Incentive to Manipulate Earnings

A TARP recipient may not have any compensation plan that would encourage manipulation of the reported earnings of the TARP recipient to enhance the compensation of any of its employees.

### Compensation Committee Consisting Solely of Independent Directors

The TARP recipient must establish a board compensation committee consisting solely of independent directors to review employee compensation plans. This committee must meet as least semiannually to discuss and evaluate the TARP recipient's employee compensation plans in light of an assessment of any risk posed to the TARP recipient from such plans. For privately held TARP recipients that received no more than $25 million in financial assistance, these requirements are to be carried out by the board of directors.

In addition to the standards to be established by the Treasury Secretary, including those listed above, the following requirements also apply under ARRA:

### CEO and CFO Compliance Certification

The CEO and CFO of the TARP recipient must certify to the SEC (or to the Secretary of the Treasury for nonreporting companies) that the institution has complied the TARP requirements.

### Company-Wide Policy on Excessive or Luxury Expenditures

The board of directors must adopt a company-wide policy regarding “excessive or luxury expenditures” that are identified by the Secretary of the Treasury, including such things as expenditures relating to entertainment and events, office and facility renovations, aviation and other transportation services, and other activities or events that are not reasonable expenditures for staff development, reasonable performance incentives or other similar measures conducted in the normal course of the TARP recipient’s business operations.

### Say-on-Pay Vote

Any proxy statement, consent or authorization for an annual or other meeting of the shareholders of any TARP recipient during the TARP Restriction Period shall permit a separate shareholder vote to approve the compensation of executives, as disclosed pursuant to the compensation disclosure rules of the SEC, including the compensation discussion and analysis, the compensation tables and any related material. The shareholder vote will not be binding on the TARP recipient’s board of directors, and is not to be construed as overruling any decision by the board, creating or implying any additional fiduciary duty by the board, or restricting or limiting shareholders from making other proposals for inclusion in proxy materials.

### Review of Prior Payments

In addition to the general retroactive effective date, Treasury is directed to review the bonuses, retention awards and other compensation of the SEOs and the next 20 most highly compensated employees of any TARP recipient that received financial assistance before February 17, 2009, to determine whether any such payments were inconsistent with the purposes of ARRA or the TARP or were otherwise contrary to the public interest. If the Secretary determines that any of these payments were not appropriate, the Secretary is required to seek to negotiate with the TARP recipient and the affected employee for appropriate reimbursements to the Federal government.

## What Comes Next

Though ARRA is clear in the broad scope of what is and will be required, much of the detail is left to be supplied by additional Treasury and SEC regulations. There is confusion among the banking industry about whether the ARRA rules are applicable immediately or will apply only when applicable regulations are available. Immediate compliance is difficult because many of the key terms lack clarity and definition.

In a letter dated February 18, 2009 to the Secretary of the Treasury, the American Bankers Association cites a host of ambiguities in the law, as noted by its members in the first business day after ARRA was enacted. This uncertainty is causing operational disruptions ranging from delayed filing of the 2009 proxy statement (not knowing what must be included), to nonpayment of earned 2008 bonuses (to include say-on-pay proposals), to delayed 10-K filings (not knowing how the potentially retroactive impact of compensation restrictions will affect the institution’s income statement). The confusion as to the effective date stems from the wording of ARRA which says that TARP recipients shall be subject to “the standards established by the Secretary” that shall include certain listed standards, without much detail on the listed standards.

## The Broader Effect of the TARP Provisions

Executive compensation has been the public eye for a long time—most notably in the days following the Enron experience and the adoption of Sarbanes-Oxley. The current economic crisis has galvanized that attention from every American—from President Obama to Joe the Plumber.

Although the compensation restrictions contained in ARRA apply only to financial institutions that receive financial assistance from the Federal government, there can be no doubt that they will come to have far broader applicability—whether by specific legislative action in the months to come or just in the way compensation committees think about compensation programs and how they will bear up to public and shareholder scrutiny.

As a precursor of what is to follow, the Treasury Department has already announced a long-term examination of executive compensation, with implications beyond the financial sector. The Secretary of the Treasury will host a conference with shareholder advocates, major public pension and institutional investor leaders, policy makers, executives, academics and others on executive pay reform at financial institutions.

Treasury will seek testimony, comment and white papers on model executive pay initiatives in the cause of establishing best practices and guidelines on executive compensation arrangement at financial institutions—not limited to those receiving financial assistance.

Aspects of the TARP restrictions that are likely to spill over into the broader corporate community, include the following:

### An emphasis on Risk Assessment in the Context of Incentive Compensation Arrangements

Certainly risk assessment is one of the cornerstones of the TARP regulations. In the context of financial institutions and large auto manufacturers, which are of course the only ones at this point participating in the government assistance programs, the notion of risk management is somewhat different than would be the case in an ordinary business corporation. Large financial institutions, such as Wall Street banks, are obviously systemically important to global financial markets, as are the large auto makers whose health is systemically important to the national economy due to their extensive connectedness with dealers, suppliers and many related industries. That is the reason, after all, they are they are the first to warrant the investment of public funds.

Some amount of risk taking is necessary to a successful enterprise. There is always an element of risk in any business endeavor—such as new product development and entering into new markets. The goal of a compensation system should be to identify the risk environment and risk tolerance of the company and design incentives that encourage activities that operate within that range.

It is likely that most companies will be taking a fresh look risk assessment under their incentive plans this year and addressing that topic in their 2009 proxy statements. There are a number of things that can be done to ameliorate the effects of risk taking that inevitably underlies any incentive compensation program. Two of these are clawback provisions and stock retention policies, as discussed below.

### Clawbacks

Clawbacks, or compensation recovery provisions, are a "front and center" feature of the TARP program and are likely to become more prevalent in the broader corporate community. Many companies that already have clawback policies tend to follow the more narrow clawback restrictions contained in Section 304 of the Sarbanes-Oxley Act, which apply only to designated senior officers and are predicated on misconduct that results in a restatement of financials. We can expect to see more clawback policies overall and ones that are more akin to the TARP clawback provisions, which apply to a broader group of employees and cover not only material inaccuracies relating to financial reporting but also material inaccuracies relating to other performance metrics used to award bonuses and incentive compensation.

### Stock Ownership and Retention Policies

Many companies already have stock ownership guidelines for their executives and directors that require them to accumulate and hold a certain amount of company stock. This is intended to keep these leaders focused on the interests and fortunes of the company's shareholders. But stock ownership guidelines go only part of the way in terms of making sure managers keep meaningful skin in the game to be truly aligned with shareholder interests. This is particularly true with executives who have accumulated many times their salaries in stock value over the years, or where there is anemic enforcement of stock ownership guidelines. Stock retention requirements are the other part of the equation.

Stock retention is recognized as a strong compensation component in the TARP regulations in the sense that top executives of TARP recipients are allowed to receive long-term restricted stock awards that do not fully vest until after the Treasury has been repaid in full. This retention causes the executives to stay focused on the long-term health of the institution, which is consistent with the interests of its shareholders, including Treasury while it serves in that role. We can expect to see corporate retention policies that require executives to hold a certain percentage of their equity awards until retirement or in some cases beyond retirement.

Like ownership guidelines, stock retention policies are only effective if they are followed. The best policies have appropriate consequences for noncompliance, from forfeiture of profits to ineligibility to receive additional equity awards.

### A Closer Look at Severance Pay

The TARP regulations impose an absolute prohibition on severance pay to the top 10 officers of a TARP recipient during the TARP Restriction Period. Many companies will be taking a closer look at their severance pay arrangements and re-examining the rationale for such arrangements and the amounts. Because of certain well-publicized exits in the last few years, shareholders are growing increasingly sensitive to severance arrangements that seem to be pay-for-failure.

### Say-on-Pay

The notion of giving shareholders a nonbinding vote on a company's compensation philosophy and implementation as expressed in its compensation discussion and analysis (CD&A), proxy tables and related materials (so-called "say-on-pay") is a train that has left the station. Few who follow the trends in executive compensation doubt that this will be legislatively mandated for 2010.

### Public Discussion of the Effects of the Economic Downturn

We are certainly operating in a "perfect storm" environment this proxy season. It is hard to see how any company could justify not addressing the economic downturn in this year's CD&A. Shareholders and the SEC will be looking for specific discussion about how the economic environment has affected the business operations and financial performance of the company, and how that in turn has been reflected in executive pay, both as to pay decisions and outcomes for 2008 and program adjustments for 2009. An executive summary at the beginning of the CD&A is an ideal place to address these issues straight on.

Some companies will be able to say that they have performed well, in spite of the economic challenges. But for companies that have fared less well, it is important to illustrate that the company's pay-for-performance philosophy is being applied in earnest—by describing how officer compensation was adversely affected by the company's sub-par results and/or decline in stock price. The summary should also address how the compensation committee took steps to appropriately adjust management compensation for 2009 based on the 2008 results and the special challenges of the company's current business environment. These course adjustments may include such things as freezing or reducing salaries for 2009; changes in the annual bonus plan for 2009 (such as selection of different performance criteria, changing performance goals, adjusting payout curves for performance achievement, allowing mid-year assessment and greater use of discretionary awards to accommodate the uncertainties that lie ahead in this volatile economic environment); and similar changes to long-term plans, such as adjustments to performance metrics or reductions in performance periods.

### Changes to Section 162(m)

EESA added new TARP provisions to the deduction limits imposed under section 162(m) of the Internal Revenue Code, imposing a lower cap ($500,000) and eliminating the much-used performance-based compensation exemption. Many experts believe that Section 162(m) has proved to be a failed experiment and may be headed for demise. If the TARP provisions are any indication, that seems to be a pretty good prediction.

## Conclusion

These are turbulent times with respect to executive compensation practices, both in terms of the legal environment and public and shareholder scrutiny. Though the TARP rules discussed here apply only to institutions that receive financial assistance from the Federal government, we can expect to see a significant evolution in the landscape of executive compensation across all business segments.

*Laura G. Thatcher heads Alston & Bird's executive compensation practice. She coauthored the* Compensation Committee Handbook *(John Wiley & Sons, 2008), which serves as a guidebook for executive compensation strategies and practices. Thatcher serves as Chair Elect of the Advisory Board of the Certified Equity Professional Institute (CEPI) of Santa Clara University and serves on the Executive Compensation Task Force of CompensationStandards.com. She is listed in* Best Lawyers in America *and* Georgia Super Lawyers. *A frequent speaker and author on topics relating to executive compensation, Thatcher's articles and interviews appear in numerous national publications.*