

## Treasury Clarifies TARP Compensation Restrictions

**If you have any questions about this Client Alert, please contact:**

Elizabeth T. Farrar  
614.464.5607  
etfarrar@vorys.com

Kimberly J. Schaefer  
513.723.4068  
kjschaefer@vorys.com

Anthony D. Weis  
614.464.5465  
adweis@vorys.com

Alan D. Duffy  
614.464.5424  
adduffy@vorys.com

The Department of the Treasury recently clarified the executive compensation restrictions applicable to companies that received TARP financial assistance. These clarifications are contained in amendments to the Treasury's June 15, 2009 Interim Final Rule and a set of "questions and answers."

The clarifications resolve some of the ambiguities in the original Interim Final Rule. Key points are summarized below.

### **1. Senior executive officers not excluded from TARP limits applicable only to most highly compensated employees**

TARP recipients are prohibited from paying or accruing any bonus compensation to certain employees based on the amount of TARP assistance received. For a TARP recipient that received less than \$250 million in TARP assistance, this prohibition applies to either one or five of its "most highly compensated employees."

The original Interim Final Rule excluded "senior executive officers" from the determination of highly compensated employees. As a result, the bonus limitation would not apply to the most highly compensated employee of a TARP recipient (such

as the chief executive officer) if this employee was also a senior executive officer. This result clearly was not intended under TARP.

The Treasury corrected this oversight by clarifying that, for purposes of applying the bonus prohibition, a TARP recipient should not exclude its senior executive officers from the determination of its most highly compensated employees unless the bonus prohibition otherwise applies to the senior executive officers (*i.e.*, for TARP recipients who received in excess of \$250 million in TARP financial assistance).

### **2. Identity of 20 next most highly compensated employees not required to be disclosed on Form 10-K**

The principal executive officer and principal financial officer of each TARP recipient are required to provide an annual certification of compliance with TARP as an exhibit to Form 10-K.

The original Interim Final Rule required that the TARP recipient disclose the identity of its senior executive officers and 20 next most highly compensated employees, identified by name and title and ranked in descending order of compensation, as part of this certification.

The Treasury reversed course on this issue and no longer requires that TARP recipients disclose the identity of its 20 next most highly compensated employees on the certification filed with Form 10-K. TARP recipients, however, remain obligated to provide this information directly to the Treasury and their principal regulator.

### **3. Period of time to conduct compensation risk assessments extended**

The compensation committee of each TARP recipient is required to conduct risk assessments of the TARP recipient's compensation plans at least every six months. The original Interim Final Rule was unclear as to the deadline for conducting these risk assessments in 2009.

The Treasury has clarified that, for most TARP recipients, the first risk assessment must be conducted at least every six months for the period beginning on September 14, 2009. As a result, TARP recipients potentially have until March 14, 2010 to conduct their risk assessments.

However, because the TARP recipients are required to include certifications of compliance for 2009 on Form 10-K and the compensation committee is required to describe the results of its risk assessments as part of the annual proxy statement, we recommend that TARP recipients conduct these risk assessments by no later than early 2010 unless they anticipate repaying the TARP financial assistance in the first quarter of 2010.

---

IRS CIRCULAR 230 DISCLOSURE: In order to ensure compliance with requirements imposed by the U.S. Internal Revenue Service, we inform you that any federal tax information contained in this communication (including any attachments) is not intended or written to be used, and it cannot be used, by any taxpayer for the purpose of (i) avoiding penalties that may be imposed under the U.S. Internal Revenue Code; or (ii) promoting, marketing, or recommending to another person, any transaction or other matter addressed herein.

*This client alert is for general information purposes and should not be regarded as legal advice.*