

February 20, 2009

2009 American Recovery and Reinvestment Act: Expanded Restrictions on Executive Compensation for TARP Recipients

On February 17, 2009, President Obama signed the American Recovery and Reinvestment Act of 2009 (the "Recovery Act"). The Recovery Act expands restrictions on executive compensation for recipients of Troubled Asset Relief Program ("TARP") funds.

As noted in our [client alert](#) dated February 5, 2009, President Obama's administration had recently expanded the restrictions on executive compensation for TARP recipients. The administration's restrictions applied primarily to financial institutions seeking "exceptional assistance" and generally applied only to future grants of TARP funds.

The Recovery Act expands these restrictions and applies them to financial institutions that have already received TARP funds. This client alert describes the highlights of these expanded restrictions.

Highlights of the Expanded Restrictions

Bonuses, Retention and Incentive Compensation Generally. TARP recipients generally may not pay bonuses, retention awards and incentive compensation until the financial institution satisfies its obligations under TARP ("TARP Period"). Exemptions exist for long-term restricted stock and certain pre-existing employment contracts (see below). The covered executives subject to this restriction depend upon the amount of TARP assistance received.

Amount of TARP Assistance	Covered Executives
Less than \$25 million	Most highly-paid employee
\$25 million < \$250 million	Five most highly-paid employees
\$250 million < \$500 million	Senior Executive Officers ("SEOs") and next 10 most highly-paid employees
\$500 million or more	SEOs and next 20 most highly-paid employees

If the amount of TARP assistance is at least \$25 million, the Treasury Department may increase the number of highly-paid employees subject to this restriction. SEOs include the top five most highly-paid officers.

Long-Term Restricted Stock. TARP recipients may provide long-term restricted stock as long as:

- the covered executive does not fully vest in the restricted stock during the TARP Period;
- the value of the restricted stock does not exceed one-third of the covered executive's "total amount of annual compensation;" and
- the restricted stock complies with such other restrictions as the Treasury Department may impose.

Pre-Existing Employment Contracts. The restrictions on payment of bonuses and incentive compensation do not apply to amounts paid pursuant to a written employment contract entered into on or before February 11, 2009.

Incentive Compensation for Risk Taking and Earnings Manipulation. TARP recipients are prohibited from paying incentive compensation for "unnecessary and excessive risks" and earnings manipulations.

Golden Parachutes. TARP recipients are prohibited from paying golden parachute payments to the CEOs and any of the next five most highly-paid employees. There is no exception for pre-existing employment contracts.

Clawbacks. TARP recipients must clawback bonus, retention and incentive compensation for the CEOs and the next 20 most highly-paid employees.

Luxury Expenditures. The board of directors of each TARP recipient must establish a policy on luxury or excessive expenditures, including entertainment or events, office and facility renovations, company-owned aircraft and other transportation and similar activities or events.

"Say on Pay." TARP recipients must provide shareholders with a non-binding advisory "say on pay" vote on executive pay.

IRC Section 162(m) Deduction Limit. TARP recipients are prohibited from deducting more than \$500,000 in annual compensation for the CEO, the CFO, and the three next most highly-paid officers under Internal Revenue Code Section 162(m).

Compensation Committee Governance. The board of directors of each TARP recipient must establish a compensation committee to review compensation plans. The compensation committee must consist entirely of independent directors. This restriction does not apply to private companies that receive less than \$25 million in TARP assistance.

CEO and CFO Certifications. The CEO and CFO must certify compliance with the requirements noted above. For public companies, certification must be made to the SEC. For private companies, certification must be made to the Treasury Department.

Treasury Department Review of Bonus Payments. The Treasury Department is directed to review bonuses to the CEOs and next 20 most highly-paid employees paid before February 18, 2009. If the Treasury Department finds the bonuses were not justified, it will negotiate with the TARP recipient and/or executive to obtain reimbursement of the bonus.

TARP Fund Repayment. TARP recipients may repay TARP funds without replacing the repaid amount with other funds and without a waiting period. If the amounts are repaid, the restrictions on executive compensation described above generally would cease to apply.

Our client alerts are for general informational purposes and should not be regarded as legal advice. If you would like additional information or have any questions, please contact:

Authors

Marjorie M. Glover
+1 (212) 408-1016
mglover@chadbourne.com

Rachel M. Kurth
+1 (212) 408-5185
rkurth@chadbourne.com

Contact for More Information

William G. Cavanagh
+1 (212) 408-5388
wcavanagh@chadbourne.com

David Gallai
+1 (212) 408-1033
dgallai@chadbourne.com

Marjorie M. Glover
+1 (212) 408-1016
mglover@chadbourne.com

Lauren D. Kelly
+1 (212) 408-5520
lkelly@chadbourne.com

Rachel M. Kurth
+1 (212) 408-5185
rkurth@chadbourne.com

Edward P. Smith
+1 (212) 408-5371
esmith@chadbourne.com

www.chadbourne.com

New York Washington Los Angeles Houston Mexico City
London (a multinational partnership) Moscow St. Petersburg
Warsaw Kyiv Almaty Dubai Beijing

CHADBOURNE
& PARKE LLP