

August 14, 2009

SUBMITTED ELECTRONICALLY

Executive Compensation Comments
Office of Financial Institutions Policy
Room 1428
Department of the Treasury
1500 Pennsylvania Avenue, NW.
Washington, DC 20220

Ladies and Gentlemen:

The law firm of Bryan Cave LLP appreciates the opportunity to submit the following comments on the topics addressed in the interim final rule on TARP Standards for Compensation and Corporate Governance (the "Interim Rules"). Bryan Cave LLP is a leading business and litigation firm with more than 1,100 attorneys and 19 offices worldwide. We also represent over 400 community banks, public and private, located in the Southeast and throughout the United States, including fifteen recipients of TARP Capital Purchase Program funds. Our Financial Institutions group regularly advises clients on a variety of issues, including bank and corporate regulatory issues, mergers and acquisitions, de novo formation, bankruptcy, employee benefits and executive compensation.

The following comments of Bryan Cave LLP are in response to the Treasury's invitation for comments on the Interim Rules. We have not commented on every component of the Interim Rules, but rather limited our comments to those issues where we thought our expertise and experience would be most valuable.

31 CFR §30.1 Definitions

Commission compensation. We respectfully request that the definition of commission compensation be expanded to include programs entered into after February 17, 2009. The definition, as currently limited, would prevent a TARP recipient who did not previously pay any employees on a commission basis from switching to a commission-based compensation approach for either new or existing employees, even if that is consistent with the practice in the industry. This could put TARP recipients on an uneven footing with other financial institutions when competing for the same talent because a TARP recipient would not be allowed to pay the employee based on his or her production, and would instead likely have to offer a

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significant fixed salary, which could be detrimental to the TARP recipient and the motivation of the employee. To the extent the Treasury is concerned that such programs might be abused by TARP recipients, we believe the requirement under 31 CFR §30.4 to prohibit employee compensation plans that encourage excessive risk or manipulation of earnings will serve as an appropriate check on the potential abuse for any such programs.

Furthermore, the existing commission compensation definition may effectively present TARP recipients from entering in to new lines of business, such as mortgage originations, investment management, or insurance, where commission compensation represents the industry norm. Unless a TARP recipient was engaged in such practices as of February 17, 2009, and therefore had existing commission compensation program, the Interim Rules appear to eliminate the ability of the TARP recipient to enter such lines of business. This concern would also be addressed by expanding the definition of commission compensation to include programs entered into after February 17, 2009.

Golden parachute payments. We respectfully request that the definition of “golden parachute payments” be revised to conform with the definition adopted by Congress in the American Recovery and Reinvestment Act of 2009. Specifically, we believe that the restrictions on golden parachute payments should be limited to payments for departures from the TARP recipient, and not for payments due solely as a result of a change in control of the TARP recipient, which are commonly referred to as “single-trigger” payments. Unlike “golden parachute payments” as defined by the American Recovery and Reinvestment Act of 2009, single-trigger change in control payments do not require that employment be terminated. Rather, single-trigger change in control payments serve to facilitate the alignment of management’s interests with the shareholders to maximize shareholder return, while also facilitating the retention of key management, which is particularly important in turbulent times. Accordingly, we believe single-trigger change in control payments should be subject to the Interim Rules’ limitations on retention awards (and the exceptions thereto), but should not be treated as golden parachute payments (and therefore not subject to a blanket prohibition).

Most highly compensated employee. We respectfully request that the definition of “most highly compensated employee” be modified in two respects. First, the current definition excludes Senior Executive Officers (SEOs) from consideration as the most highly compensated employee. While this concept makes sense for restrictions that apply to the CEOs and a set of most highly compensated employees, certain compensation restrictions for smaller TARP recipients only apply to the most highly compensated employee. By excluding CEOs from the set of employees that may be considered most highly compensated, the Interim Rules create a situation in which the sixth most highly compensated individual is subject to the compensation restrictions, while the top five are not, simply because they are CEOs. We suggest that the exclusion of the CEOs be removed from the definition of most highly compensated employees. The existing Interim Rules generally use the concept of “next most highly compensated employees” which we believe would already prevent the double-counting of CEOs without further modification.

Second, we recommend that the definition of “most highly compensated employee” be amended to provide that no individual must be identified as a most highly compensated employee if the employee’s total annual compensation (as calculated under Item 403(a)(3) of Regulation S-K under the Federal securities laws) does not exceed \$100,000. For many smaller TARP recipients, the employees included in the executive compensation restrictions under the regulations include non-officer employees, such as tellers and customer service representatives. Applying restrictions to their compensation, or requiring the bank seek repayment of a small bonus payment due to materially inaccurate financial statements is unnecessary to achieve the goals of the executive compensation restriction and unduly burdensome on the institutions. By applying the same \$100,000 cap currently recognized by the SEC and Treasury for SEO’s, a more level playing field is achieved for smaller community banks.

Primary regulatory agency. The Interim Rules’ definition of “primary regulatory agency” is vague, especially in light of the definition of TARP recipient that includes subsidiaries, many of whom may be subject to primary supervision of different Federal regulatory agencies. The second sentence of the regulation implies that different rules apply for state-chartered banks, none of whom would have securities registered with the SEC as a matter of law, as opposed to holding companies, national banks or thrifts. We suggest revising to eliminate the second sentence and to use the phrase “primary Federal banking regulator” rather than “Federal regulatory agency” in the remaining sentences. Alternatively, the term “primary regulatory agency” could be defined as the Federal regulatory agency identified by the Treasury for each TARP recipient, with the Treasury providing individual notices to each TARP recipient as to where notices are required.

Senior executive officers. We recommend that the Interim Rules’ definition of “senior executive officer or SEO” be amended in several ways, some of which we believe are merely technical corrections, while others would represent substantive modifications.

We will first address the technical corrections. First, the reference to “Instruction 1 to Item 402(a)(3) of Regulation S-K”¹ should be modified to refer only to Item 402(a)(3) of Regulation S-K, as the definition of “named executive officer” is contained in the item itself, and not the instruction.

Second, we suggest that the phrase “who is an employee of the TARP Recipient” should be replaced with a separate sentence that excludes from the definition of SEO “anyone who was no longer employed as of the first day of the relevant fiscal year of the TARP recipient unless it is reasonably anticipated that the executive will return to employment with the TARP recipient during such fiscal year.” This modification conforms the treatment of SEOs with the most highly compensated

¹ In paragraph (2) of the definition of SEO’s, reference is made to Item 402(a)(3)(1), a section that does not exist in Regulation S-K. Presumably this was intended to refer to Instruction 1 of Item 402(a)(3). We recommend other modifications to this paragraph, but if not accepted, we believe these references should be revised to refer either specifically to Item 402(a)(3) or simply Item 402.

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employees, and also addresses the SEC's treatment of former executive officers in a manner that appears consistent with Treasury's goals for the Interim Rules.

Third, we suggest the second sentence of paragraph (2) of the definition be deleted. The current sentence requires a smaller reporting company to have at least five CEOs, unless the smaller reporting company does not have five "employees" whose total compensation does not exceed \$100,000. This standard is higher than the standard placed on either larger public companies or private TARP recipients, who only need to identify the named executive officers as defined by the SEC regulations, which contemplate that an entity, especially smaller community bank holding companies, may have less than five executive officers, and therefore will not have five CEOs. While the first sentence would appear to be sufficient to capture the intent of the regulation (that smaller reporting companies cannot take advantage of the SEC's smaller reporting company standards for named executive officers), if the Treasury wants to clarify this statement, a revised second sentence could simply read "Smaller reporting companies are not entitled to rely on the definition of "named executive officer" contained in Item 402(m)(2) of Regulation S-K under the Federal securities laws.

Substantively, we recommend that Treasury reconsider the prohibition on use of the smaller reporting company definition of "named executive officer." As the SEC has recognized through the use of the smaller reporting company standards, the executive compensation arrangements of small business issuers typically are less complex than those of other public companies and that satisfying disclosure requirements designed to capture more complicated compensation arrangements may impose new, unwarranted burdens on small reporting companies. The Interim Final Rules further burden small reporting company TARP recipients by requiring them to calculate two sets of named executive officers: one to comply with SEC regulations, and a separate set to comply with the TARP recipient executive compensation rules. Accordingly, we suggest modifying paragraph (2) of the definition to provide that a "A TARP recipient that is a smaller reporting company may rely on the definition of "named executive officer" contained in Item 402(m)(2) of Regulation S-K under the Federal securities laws." We further suggest modifying paragraph (3) to permit private institutions to identify their CEOs in accordance with rules analogous to the rules "in paragraph (1) or (2) of this definition."

31 CFR §30.11 Prohibition on Tax Gross-ups

We note that the Interim Rules include several executive compensation restrictions that go beyond the restrictions required by the Emergency Economic Stabilization Act of 2008, as amended by the American Recovery and Reinvestment Act of 2009. We urge Treasury to consider removing all of these restrictions as going beyond the standards contemplated by either Congress or TARP recipients, especially those recipients that accepted TARP funds following the enactment of the American Recovery and Reinvestment Act of 2009.

In particular, we respectfully suggest that the complete prohibition on gross-ups is burdensome and disruptive to smaller reporting companies. In light of the existing ban on golden parachute payments, tax gross-ups for smaller reporting companies are likely to be tied to be both de minimis in amount

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and tied to perquisites, such as club memberships or company vehicles, that have both business and personal benefit, and that already require disclosure under the Interim Rules. Accordingly, we suggest that Treasury modify the Interim Rules to either: (a) exclude gross-ups that total less than \$10,000 for each employee, or (b) exclude gross-ups that the employee has a legally binding right to receive under a valid employment contract as of June 15, 2009.

31 CFR §30.13 Say on Pay

In discussions with Treasury officials, we have been informed that Treasury does not believe that private companies are subject to the requirement to provide a non-binding shareholder resolution on executive compensation. This is consistent with the exclusion of the non-binding shareholder resolution certification under 31 CFR 30.15 for private companies. However, neither the Treasury nor SEC regulations make this exclusion explicit. Accordingly, we respectfully request that Treasury add paragraph (b) to this section to specifically address the application of this section to private TARP recipients.

31 CFR §30.17 Effective Date

Based on the text of the adopting release, we understand that Treasury intends for this section to be read so that TARP Recipients who executed a Securities Purchase Agreement with Treasury prior to June 15, 2009 remain subject to any non-inconsistent provisions contained in their contract, including the obligation under Section 4.8 of the Securities Purchase Agreement to “comply in all respects with Section 111(b) of the EESA as implemented by any guidance or regulation thereunder that has been issued and is in effect as of the Closing Date.”

Accordingly, we understand that it is Treasury’s interpretation that 31 CFR §30.10 as provided in the interim rules published in the Federal Register on October 20, 2008 continues to apply to institutions whose “Closing Date” was prior to June 15, 2009, and therefore has agreed not to take a deduction for federal income taxes for remuneration that would not be deductible if 26 U.S.C. 162(m)(5) were to apply to the financial institution. The Treasury’s adopting release further notes that the “Treasury anticipates requiring this condition in any future agreements to provide TARP assistance,” indicating that Treasury intends for the restrictions contained in the October 20, 2008 version of 31 CFR §30.10 to continue to apply. However, as of June 15, 2009, the October 20, 2008 version of 31 CFR §30.10 has been amended by the Interim Rules to apply solely to the limitations on bonus payments.

This would appear to raise two issues. First, the omission of the requirement from the current Interim Regulations simply increases the burden placed on all TARP recipients to determine the applicable restrictions. We believe it is inappropriate to leave open whether guidance issued in the form of federal regulations that have been subsequently amended continues to apply. Under §31 CFR §30.17(a) of the Interim Rules, the new federal regulations only supersede the prior guidance to the extent that guidance is inconsistent, without specifying which portions of the guidance continue to apply, despite having been removed from the Code of Federal Regulations.

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Second, based on TARP transactions that we have observed since June 15, 2009, it appears that Treasury has not required compliance with the October version of 31 CFR §30.10 in agreements with Closing Dates subsequent to June 15, 2009.² The Treasury has created a disparity between the original recipients and subsequent recipients. We recommend that both of these issues be resolved by explicitly acknowledging that TARP Recipients need only comply with the provisions of 26 U.S.C. 162(m)(5) in the event that the institution is an “applicable employer” in that section.

Conclusion

Bryan Cave LLP appreciates the opportunity to provide these comments on the Interim Rules for your consideration. We encourage the Treasury to quickly issue amended regulations to address many of the ambiguities addressed above.

Sincerely,



Robert D. Klingler

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² Section 4.8 of the Securities Purchase Agreement continues to read the same, but its application leads to a significantly different result as the October 20, 2008 version of 31 CFR §30.10 was no longer “in effect as of the Closing Date” for TARP transactions that closed subsequent to June 15, 2009.