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DEPARTMENT OF THE TREASURY

31 CFR Part 30

RIN 1505-AC09

TARP Standards for Compensation and Corporate Governance; Correction

AGENCY: Domestic Finance, Treasury.

ACTION: Correcting amendments.

SUMMARY: This document contains corrections to an interim final rule that was published in the **Federal Register** on Monday, June 15, 2009. The rule relates to certain standards for compensation and corporate governance applicable to financial institutions receiving funds under the Troubled Asset Relief Program (TARP).

DATES: Effective date: **[insert date of publication in the Federal Register]**

FOR FURTHER INFORMATION CONTACT: Office of Domestic Finance, Treasury
(202) 927-6618 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On June 15, 2009, Treasury published an interim final rule (74 FR 28394) entitled TARP Standards for Compensation and Corporate Governance. The interim final rule implemented certain provisions of section 111 of the Emergency Economic Stabilization Act of 2008, as amended (12 U.S.C. 5221) (EESA), which directs Treasury to establish executive compensation and corporate governance standards for entities receiving financial assistance under the TARP. This document makes several technical amendments to that interim final rule.

Need for Correction

As published, the interim final rule contains errors that may prove to be misleading and are in need of correction. Section 30.1 of the interim final rule contained definitions applicable for purposes of the interim final rule. The definition of “most highly compensated employee” had provided that, for purposes of identifying a most highly compensated employee, senior executive officers (SEOs) were excluded. If this definition were applied literally with respect to Sections 30.10(b)(1)(i) and (ii), the definition would have the effect of exempting SEOs from the bonus limitations applicable to certain most highly compensated employees. Such a result would be contrary to the intent of the regulation and the language of EESA. Accordingly, this provision is corrected to provide that 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). So, for instance, if a provision is applicable only to the most highly compensated employee of the TARP recipient, the most highly compensated employee of the TARP recipient is subject to the provision regardless of whether the employee is also a SEO. In contrast, if a provision is applicable to the SEOs and a certain number of the most highly compensated employees of the TARP recipient, the SEOs (because they are already subject to the provision) are excluded for purposes of determining the most highly compensated employees that are also subject to the provision.

Section 30.2 of the interim final rule provides that the requirements of section 111(c) (generally relating to the establishment and maintenance of an independent compensation committee and that committee's review of employee compensation plans, as well as the establishment of a company-wide excessive and luxury expenditures policy) apply through the last day of the TARP period for recipients with an obligation, and through the last day of the recipient's fiscal year including the sunset date (which is 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)) for recipients that never had an obligation. However, the interim final rule erroneously stated that the requirements apply through the later of these dates. Because only one of these dates is potentially applicable to any specific TARP recipient, the "later of" language is inoperative, but may render the provision confusing. Accordingly, Section 30.2 is revised to more clearly state the applicable time periods.

Section 30.13 of the interim final rule, relating to the requirement to permit a shareholder vote to approve certain executive compensation, is clarified to provide that TARP recipients must comply with the rules and regulations promulgated by the Securities and Exchange Commission (SEC) with respect to that requirement, but only to the extent the rules and regulations are applicable to the TARP recipient. Accordingly, a TARP recipient that is not subject to those rules because, for example, the TARP recipient is not required to register any securities with the SEC, is not required to permit such a vote.

Section 30.15 of the interim final rule, relating to certain certifications that the principal executive officer and the principal financial officer must provide, is revised to provide that the certification must state that the TARP recipient has provided the

Treasury Department 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. Accordingly, a list of the names of the SEOs and the twenty next most highly compensated employees is not required to be provided in the certification, but may be provided separately. Section 30.15 is also corrected so that the model certification language reflects the deadlines set forth elsewhere in the regulation, and to correct certain cross-references.

Procedural Matters

The June 15, 2009 interim final rule was promulgated pursuant to EESA, as amended, which provides for authority and facilities that the Secretary of the Treasury can use immediately to restore liquidity and stability to the financial system of the United States. Because of exigencies in the financial markets and to encourage entities to choose or continue to participate in the TARP, Treasury issued the interim final rule without prior notice and comment and without a delayed effective date pursuant to 5 U.S.C. 553(b)(B) and (d)(3). Treasury invited interested members of the public to submit comments on the rule and will carefully consider all comments in developing a final rule. The comment period for the interim final rule closed on August 14, 2009.

This document makes technical amendments to the Code of Federal Regulations that do not otherwise impose or amend any requirements. Accordingly, Treasury finds that it would be contrary to the public interest, pursuant to 5 U.S.C. 553(b)(B), to delay the issuance of these technical amendments pending an opportunity for public comment and good cause exists to dispense with this requirement. For the same reasons, pursuant to 5 U.S.C. 553(d)(3), Treasury has determined that there is good cause for the amendments to become effective immediately upon publication.

This document is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866, entitled Regulatory Planning and Review.

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant impact on a substantial number of small entities. Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act do not apply.

List of Subjects in 31 CFR Part 30

Executive compensation, Troubled assets.

Accordingly, 31 CFR Part 30 is corrected by making the following correcting amendments:

PART 30—TARP Standards for Compensation and Corporate Governance

1. The authority citation for part 30 continues to read as follows:

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

2. In §30.1, revise paragraph (1) of the definition of “most highly compensated employee” to read as follows:

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

* * * * *

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 CEOs and one or more of the most highly compensated employees of the TARP recipient, CEOs 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.

* * * * *

3. In §30.2, revise the second sentence to read as follows:

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

* * * 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. * * *

4. Revise §30.13 to read as follows:

§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.

5. In §30.15, revise the first sentence of paragraph (a)(5), Appendix A, paragraphs (i), (ii), (iii), (ix), (xi) and (xv) and Appendix B, paragraphs (ii), (iii), (ix), (xi) and (xv) to read as follows:

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

* * * * *

(a) * * *

(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. * * *

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Appendix A to §30.15—Model Certification for First Fiscal Year Certification

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(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;

* * * * *

(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;

* * * * *

(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);

* * * * *

(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-SEO's 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[.]

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Appendix B to §30.15—Model Certification for Years Following First Fiscal Year
Certification

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(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 CEO compensation plans that could lead CEOs 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;

* * * * *

(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 CEO, or an executive officer with a similar level of responsibility were properly approved;

* * * * *

(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);

* * * * *

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

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Dated: November 30, 2009

Herbert M. Allison, Jr.
Assistant Secretary for Financial Stability