

## CORPORATE

James J. Canfield, Chair

315-425-2763

[jcanfield@hbllaw.com](mailto:jcanfield@hbllaw.com)

Jeffrey B. Andrus  
 H. Douglas Barclay  
 William A. Barclay  
 Christopher J. Bonner  
 Eileen A. Casey  
 Roger F. Cominsky  
 Donald S. Day  
 Richard J. Day  
 George S. Deptula  
 Richard Fischbein  
 Lawrence J. Gallick  
 Herbert J. Glose  
 James S. Grossman  
 Robert P. Heary  
 Holly J. Hoehner  
 John A. Jadhon  
 Ronald S. Kareken  
 John Kelepurovski, Jr.  
 Robert J. Lanza  
 Edwin M. Larkin  
 Robert N. Latella  
 Kathryn A. Lisandrelli  
 John P. Lowe, Jr.  
 Oksana M. Ludd  
 Charles C. Martorana  
 Francis X. Matt, III  
 Gerard M. Meehan  
 Emily C. Micale  
 Gary L. Mucci  
 Sandra S. O'Loughlin  
 Laurence B. Oppenheimer  
 Richard J. Paul  
 Joseph P. Pylman  
 Nicholas A. Scarfone  
 Gerald F. Stack  
 Edward J. Trombly  
 Arnold N. Zelman

## Stimulus Act Puts New Limits on Executive Compensation

The American Recovery and Reinvestment Act (the "Stimulus Act") that President Obama signed into law on February 17, 2009 imposes enhanced executive compensation and corporate governance standards on all companies that receive federal funds under the Troubled Asset Relief Program (TARP). These standards generally codify the Treasury Department's guidelines on executive compensation (the "Treasury Guidelines"), but with some important differences described below. For more information about the Treasury Guidelines, please see our legal alert on this subject issued in early February.

### Compensation and Governance Standards.

During the period that a TARP recipient is subject to any TARP obligations (the "TARP Period"), the following requirements will apply:

- (A) *Avoidance of Excessive Risk Exposure.* A TARP recipient must limit compensation arrangements that encourage its executive officers to take unnecessary and excessive risks. This is the same standard set forth in the Treasury Guidelines.
- (B) *Bonus Clawback.* A TARP recipient must "claw back" any bonus, retention award or incentive compensation based on earnings, revenues, gains or other criteria that are later found to be materially inaccurate. In addition to the Senior Executive Officers (SEO) covered by the Treasury Guidelines, this clawback will now apply to the next 20 most highly compensated employees.
- (C) *No Golden Parachutes.* A TARP recipient is prohibited from making any golden parachute payment to any SEO or any of the next 5 most highly-compensated employees during the TARP Period. "Golden parachute" payment is defined under the Stimulus Act as any payment to a covered employee for departure from a company for any reason, except for payments for services performed or benefits accrued.
- (D) *Limitation on Incentive Compensation.* A TARP recipient is prohibited from paying any bonus, retention award or incentive compensation during the TARP Period, except for long-term restricted stock so long as such restricted stock:
  - Does not fully vest during the TARP Period;
  - Has a value no greater than 1/3 of the employee's total annual compensation; and
  - Is subject to any other restrictions that the Secretary of the Treasury may determine is in the public interest.

The number of employees subject to this prohibition on incentive compensation depends on the amount of assistance received by the TARP recipient as follows:

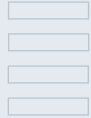
- For companies receiving less than \$25 million, the prohibition applies only to the most highly compensated employee at such companies.

This client alert is not intended to render legal services; the publisher assumes no liability for the reader's use of the information herein. © 2009 Hiscock & Barclay, LLP

Attorney Advertising

(Continued on back)

Hiscock & Barclay is a full service, 210-attorney law firm, with offices throughout the major cities of New York State, as well as in Boston, Washington, D.C. and Toronto. We provide comprehensive legal and business counsel to a diverse client base in 28 specialized practice areas with statewide and regional expertise as well as with national and international capabilities.



- Commercial Litigation
- Construction & Surety
- Corporate
- Creditors' Rights
- Economic & Project Development
- Energy & Utilities
- Environmental
- Financial Institutions & Lending
- Health Care & Human Services
- Immigration
- Indian Law
- Insurance Coverage & Regulation
- Intellectual Property & Technology
- Intellectual Property Litigation
- International Business
- Labor & Employment
- Lobbying & Election Law Compliance
- Media & First Amendment Law
- Municipal & Land Use
- Professional Liability
- Public Finance
- Real Estate
- Real Property Tax & Condemnation
- Regulatory
- Tax
- Telecommunications
- Torts & Products Liability Defense
- Trusts & Estates

- For companies receiving between \$25 million and \$250 million, the prohibition applies to the 5 most highly compensated employees.
- For companies receiving between \$250 million and \$500 million, the prohibition applies to the CEOs and the 10 next most highly compensated employees.
- For companies receiving \$500 million or more, the prohibition applies to the CEOs and the next 20 most highly compensated employees.

The number of covered employees set forth above may be increased if the Secretary determines that it is in the public interest. These limitations on incentive compensation will not apply to bonus payments required to be paid pursuant to a written employment agreement executed on or before February 11, 2009.

- (E) *Prohibition on Earnings Manipulation.* A TARP recipient must prohibit any compensation plan that would encourage manipulation of its reported earnings to enhance the compensation of any of its employees.
- (F) *Compensation Committee Requirements.* A TARP recipient must establish a compensation committee of its board of directors comprised entirely of independent directors for the purpose of reviewing employee compensation plans. However, if a TARP recipient is not publicly traded and has not received more than \$25 million of TARP assistance, the duties of the compensation committee may be carried out by the full board of directors instead.
- (G) *Certification of Compliance.* The CEO and CFO (or their equivalents) of each publicly-traded TARP recipient must provide the Securities and Exchange Commission (SEC), along with its annual filings, a written certification of compliance with the requirements of this section. Non-publicly traded TARP recipients must provide such certification of compliance to the Treasury Secretary.

**Limitation on Luxury Expenditures.** A TARP recipient must implement a company-wide policy regarding excessive expenditures on entertainment or events, office and facility renovations, aviation or other transportation services, or other expenditures outside the normal course of business.

**"Say on Pay" Resolution.** A TARP recipient must submit the senior executive compensation structure and underlying rationale to a non-binding shareholder vote. The SEC issued new guidance on February 26th to help TARP companies understand their say-on-pay obligations under the Stimulus Act. The SEC is required to issue regulations regarding this requirement within a year.

**Review of Prior Payments to Executives.** The Secretary of the Treasury is directed to review the bonuses, retention awards and other compensation paid to the CEOs and the next 20 most highly compensated employees of each TARP recipient before the date of enactment of the Stimulus Act to determine whether any such payments were inconsistent with the purposes of the Stimulus Act, the TARP or were otherwise contrary to the public interest. If the Secretary so determines, the Secretary must negotiate with the TARP recipient and the subject employee for appropriate reimbursement to the federal government.

**No Impediment to Withdrawal by TARP Recipients.** Upon consultation with the appropriate federal banking agency, the Secretary of the Treasury will permit a TARP recipient to repay any assistance previously provided under the TARP, without regard to whether the recipient has replaced such funds, and when such assistance is repaid, the Secretary will liquidate the warrants associated with such assistance at the current market price. ■

*If you require further information regarding the information presented in this Legal Alert and its impact on your organization, please contact any of the members of the Practice Area listed on the front of this Alert.*