3. Executive Compensation Revisions of EESA for TARP Recipients

The Act in § 7001 expands the restrictions on compensation for executives of companies receiving assistance under the Troubled Asset Relief Program ("TARP") under § 111 the Emergency Economic Stabilization Act of 2008 ("EESA"), including the following:

$500,00 Limit for Top 5 Executives. The $500,000 limit on deductible compensation under Code §162(m)(5) on the top five senior executive officers, which under EESA was only for certain TARP recipients (those with TARP assets in excess of $300 million, although in operation Treasury broadened its application), is now expanded to all TARP recipients. ARRA § 7001 amending EESA § 111(b)(1).

Bonuses and Incentive Compensation to Top 25 Employees Only Allowed for Certain Restricted Stock. Bonuses, retention payments or incentive compensation cannot be paid to the top five senior executive officers and up to 20 other most highly compensated employees (depending on level of TARP assistance), except for long-term restricted stock of up to one-third of total annual compensation, provided such restricted stock does not vest until all TARP obligations are repaid. ARRA § 7001 amending EESA § 111(b)(3)(D).

Clawback of Bonuses and Incentive Compensation of Top 25 Employees Where Payments Due to Materially Inaccurate Financial Statements. The top 25 most highly compensated employees of a TARP recipient are subject to a recovery (clawback) of bonuses, retention payments or incentive compensation if these payments have been made based on materially inaccurate financial statements. ARRA § 7001 amending EESA § 111(b)(3)(B).

No Severance to Top 10 Employees. No severance of any kind (not just golden parachutes) may be paid to the top 10 executives if terminated from companies receiving TARP assistance, except for payments for services performed or benefits accrued. ARRA § 7001 amending EESA §§ 111(a)(2) & 111(b)(3)(C).

Independent Compensation Committee. A TARP recipient must establish a compensation committee composed entirely of independent board directors, meeting at least twice a year to evaluate employee compensation plans in light of risk posed to the TARP recipients from such plans. ARRA § 7009 amending EESA § 111(c).

Say on Pay. TARP recipients' annual proxies must have a separate vote on the executives' compensation (say on pay), but the vote outcome will not override action of the Board and will not subject the Board to additional fiduciary duties. ARRA § 7001 amending EESA § 111(e).