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Example 1. Employee A is a SEO of a TARP recipient. Employee A is entitled to a payment of three times his annual compensation upon an involuntary termination of employment or voluntary termination of employment for good reason, but such amount is not payable unless and until the TARP period expires with respect to TARP recipient. Employee A terminates employment during the TARP period. Because, for purposes of the prohibition on golden parachute payments, the payment is made at the time of departure, Employee A may not obtain the right to the payment upon the termination of employment.

Example 2. Employee B involuntarily terminated employment on July 1, 2008, at which time Employee B was a SEO of a financial institution. Employee B's employment agreement provided that if Employee B were involuntarily terminated or voluntarily terminated employment for good reason, Employee B would be entitled to a series of five equal annual payments. After the first payment, but before any subsequent payment, the entity became a TARP recipient. Because, for purposes of the prohibition on golden parachute payments, all of the five payments are deemed to have occurred at termination of employment and because, in this case, termination of employment occurred before the beginning of the applicable TARP period, the payment of the four remaining payments due under the agreement will not violate the requirements of this section.

§30.10 Q-10: What actions are necessary for a TARP recipient to comply with section 111(b)(3)(D) of EESA (the limitations on bonus payments)?

(a) *General rule.* To comply with section 111(b)(3)(D) of EESA, pursuant to the schedule under paragraph (b) of this section and subject to the exclusions under paragraph (e) of this section, a TARP recipient must prohibit the payment or accrual of any bonus payment during the TARP period to or by the employees identified pursuant to paragraph (b) of this section.

(b)(1) *Schedule.* The prohibition required under paragraph (a) of this section applies as follows to:

(i) The most highly compensated employee of any TARP recipient receiving less than \$25,000,000 in financial assistance;

(ii) At least the five most highly compensated employees of any TARP recipient receiving \$25,000,000 but less than \$250,000,000 in financial assistance;

(iii) The SEOs and at least the ten next most highly compensated employees of any TARP recipient receiving \$250,000,000 but less than \$500,000,000 in financial assistance; and

(iv) The SEOs and at least the twenty next most highly compensated employees of any TARP recipient receiving \$500,000,000 or more in financial assistance.

(2) *Changes in level of financial assistance.* The determination of which schedule in paragraph (b) of this section is applicable to a TARP recipient during the TARP period is determined by the gross amount of all financial assistance provided to the TARP recipient, valued at the time the financial assistance was received. Whether a TARP recipient's financial assistance has increased during a fiscal year to the point in the schedule under paragraph (b) of this section that the SEOs or a greater number of the most highly compensated employees will be subject to the requirements under paragraph (a) of this section is determined as of the last day of the TARP recipient's fiscal year, and the increase in coverage is effective for the subsequent fiscal year.

(3) *Application to first year of financial assistance.* For employers who become TARP recipients after June 15, 2009, the bonus payment limitation provision under this paragraph (b) does not apply to bonus payments paid or accrued by TARP recipients or their employees before the first date of the TARP period. Certain bonus payments may relate to a service period beginning before and ending after the first date of the TARP period. In these circumstances, the employee will not be treated as having accrued the bonus payment on or after the first date of the TARP period if the bonus payment is reduced to reflect at least the portion of the service period that occurs on or after the first date of the TARP period. However, if the employee is a SEO or most highly compensated employee at the time the amount would otherwise be paid, the bonus payment amount as reduced in accordance with the previous sentence still may not be paid until such time as bonus payments to that employee are permitted.

(c) *Accrual.* (1) *General rule.* Whether an employee has accrued a bonus payment is determined based on the facts and circumstances. An accrual may include the granting of service credit (whether toward the calculation of the benefit or any vesting requirement) or credit for the compensation received (or that otherwise would have been received) during the period the employee was subject to the restriction under paragraph (a) of this section. For application of this rule to the fiscal year including June 15, 2009, see § 30.17 (Q-17).

(2) *Payments or accruals after the employee is no longer a SEO or most highly compensated employee.* If after the employee is no longer a SEO or most highly compensated employee, the employee is paid a bonus payment or provided a legally binding right to a bonus payment that is based upon services performed or compensation received during the period the employee was a SEO or most highly compensated employee, the employee will be treated as having accrued such bonus payment during the period the employee was a SEO or most highly compensated employee. For example, if the employee is retroactively granted service credit under an incentive plan (whether for vesting or benefit calculation purposes) for the period in which the employee was a SEO or most highly compensated employee, the employee will be treated as having accrued that benefit during the period the employee was a SEO or most highly compensated employee.

(3) *Multi-year service periods.* Certain bonus payments may relate to a multi-year service period, during some portion of which the employee is a SEO or most highly compensated employee subject to paragraph (a) of this section, and during some portion of which the employee is not. In these circumstances, the employee will not be treated as having accrued the bonus payment during the period the employee was a SEO or most highly compensated employee if the bonus payment is at least reduced to reflect the portion of the service period that the employee was a SEO or most highly compensated employee. If the employee is a SEO or most highly compensated employee at the time the net bonus payment amount after such re-

duction would otherwise be paid, the amount still may not be paid until such time as bonus payments to that employee are permitted.

(d) *Examples.* The following examples illustrate the rules of paragraphs (a) through (c) of this section:

Example 1. Employee A is a SEO of a TARP recipient in 2010, but not in 2011. The TARP recipient maintains an annual bonus program, generally paying bonus payments in March of the following year. Employee A may not be paid a bonus payment in 2010 (for services performed in 2009 or any other year). In addition, Employee A may not be paid a bonus payment in 2011 to the extent such bonus payment is based on services performed in 2010.

Example 2. Same facts as in *Example 1*, provided further that Employee A receives a salary increase for 2011. The salary increase equals the same percentage as similarly situated executive officers, with an additional percentage increase which, over the course of twelve months, equals the bonus that would have been payable to Employee A in 2011 (for services performed in 2010), except for application of paragraph (a) of this section. Under these facts and circumstances, the additional percentage increase will be treated as a bonus payment accrued in 2010 and Employee A may not be paid this bonus payment.

Example 3. Same facts as in *Example 1*, provided further that on March 1, 2011, Employee A is granted a stock option under the TARP recipient stock incentive plan with a value approximately equal to the bonus that would have been payable to Employee A in 2011 (for services performed in 2010), except for application of paragraph (a) of this section. Other similarly situated employee not covered by the bonus limitation for 2010 do not receive such a grant. Under these facts and circumstances, the stock option grant will be treated as a bonus payment accrued in 2010 and will not be permitted to be paid to Employee A.

Example 4. Employee B is not a SEO or a most highly compensated employee of a TARP recipient during 2009. On July 1, 2009, Employee B is granted the right to a bonus payment of \$50,000 if Employee B is employed by the TARP recipient through July 1, 2011 (two years). Employee B is a SEO of a TARP recipient during 2010, but is not a SEO or a most highly compensated employee of the TARP recipient during 2011. Employee B is employed by the TARP recipient on July 1, 2011. Thus, Employee B was a SEO or most highly compensated employee during one-half of the two-year required service period. Provided that Employee B is paid not more than half of the otherwise payable bonus payment, or \$25,000, Employee B will not be treated as having accrued a bonus payment

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while Employee B was a SEO or a most highly compensated employee.

(e) *Exclusions*—(1) *Long-term restricted stock*—(i) *General rule*. The TARP recipient is permitted to award long-term restricted stock to the employees whose compensation is limited according to the schedule under paragraph (b) of this section, provided that the value of this grant may not exceed one third of the employee's annual compensation as determined for that fiscal year (that is, not using the look-back method for the prior year). For purposes of this paragraph, in determining an employee's annual compensation, all equity-based compensation granted in fiscal years ending after June 15, 2009 will only be included in the calculation in the year in which it is granted at its total fair market value on the grant date, and all equity-based compensation granted in fiscal years ending prior to June 15, 2009 will not be included in the calculation of annual compensation for any subsequent fiscal year. For purposes of this paragraph, in determining the value of the long-term restricted stock grant, the long-term restricted stock granted in accordance with this paragraph will only be included in the calculation in the year in which the restricted stock is granted at its total fair market value on the grant date.

(ii) *Example*.

During 2008, Employee A receives compensation of \$1 million salary and a \$1,200,000 long-term restricted stock grant subject to a three-year vesting period. During 2009, Employee A received compensation of \$1 million salary and no grant of long-term restricted stock. During 2010, Employee A receives compensation of \$600,000 salary and a \$300,000 long-term restricted stock grant subject to a three-year vesting period. Under the general SEC compensation disclosure rules used to define annual compensation in § 30.1 (Q-1) of this part, the compensation related to the long-term restricted stock grants would be allocated over the vesting period. Assume for this purpose, that for 2010, \$400,000 of the 2008 long-term restricted stock grant is allocated as compensation, and \$100,000 of the 2010 long-term restricted stock grant is allocated as compensation, so that the total annual compensation is \$1,100,000 (\$600,000 salary + \$400,000 + \$100,000). However, for purposes of determining Employee A's annual compensation to apply the limit on the value of the long-term restricted stock that may be

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granted to Employee A in 2010, the entire \$300,000 value of the 2010 grant is included but the \$400,000 value attributed to the 2008 grant is excluded. Accordingly, Employee A's adjusted annual compensation is \$900,000 (\$1,100,000 - \$100,000 + \$300,000 - \$400,000). In addition, the entire fair market value of the 2010 long-term restricted stock grant is included for purposes of determining whether the limit has been exceeded. Because the \$300,000 adjusted value of the long-term restricted stock grant does not exceed one-third of the \$900,000 adjusted annual compensation, the grant complies with paragraph (e)(1)(i).

(2) *Legally binding right under valid employment contracts*—(i) *General rule*.

The prohibition under paragraph (a) of this section does not apply to bonus payments required to be paid under a valid employment contract if the employee had a legally binding right under the contract to a bonus payment as of February 11, 2009. For purposes of determining whether an employee had a legally binding right to a bonus payment, see 26 CFR 1.409A-1(b)(i). In addition, the bonus payment must be made in accordance with the terms of the contract as of February 11, 2009 (which may include application of an elective deferral election under a qualified retirement plan or a nonqualified deferred compensation plan), such that any subsequent amendment to the contract to increase the amount payable, accelerate any vesting conditions, or otherwise materially enhance the benefit available to the employee under the contract will result in the bonus payment being treated as not made under the employment contract executed on or before February 11, 2009. However, amendment of a valid employment contract executed on or before February 11, 2009 under which an employee has a legally binding right to a bonus payment to reduce the amount of the bonus payment or to enhance or include service-based or performance-based vesting requirements or holding period requirements will not result in this treatment. The amended employment contract would still be deemed a valid employment contract and the employee would still be treated as having a legally binding right to the bonus payment under the original employment contract. The TARP recipient

and the employees of the TARP recipient should be cognizant of the restrictions under section 409A of the Internal Revenue Code (26 U.S.C. 409A) in the case of an amendment described in the preceding sentence.

(ii) *Examples.* The following examples illustrate the provisions of this paragraph (2).

Example 1. TARP recipient sponsors a written restricted stock unit plan. Under the plan, restricted stock units are traditionally granted each July 1, and are subject to a three-year vesting requirement. Employee A, a SEO of TARP recipient, received grants on July 1, 2007, July 1, 2008, and July 1, 2009. The July 1, 2007 and July 1, 2008 grants are excluded from the limitation on payments, because although the awards were subject to a continuing service vesting requirement, Employee A retained a legally binding right to the restricted stock units as of February 11, 2009. However, regardless of the fact that the restricted stock unit program was in existence on February 11, 2009, Employee A did not retain a legally binding right to a restricted stock unit for 2009 as of February 11, 2009, but rather obtained the legally binding right only when the restricted stock unit was granted on July 1, 2009. Accordingly, the July 1, 2009 grant is subject to the limitation and is not permitted to be accrued or paid (unless such grant complies with the exception for certain grants of long-term restricted stock).

Example 2. TARP recipient sponsors an annual bonus program documented in a written plan. Under the bonus program, the board of directors retains the discretion to eliminate or reduce the bonus of any employee in the bonus pool. Employees B and C, both SEOs, are in the bonus pool for 2008. On January 15, 2009, the compensation committee determines the bonuses to which the employees of the division in which Employee B works are entitled, and awards Employee B a \$10,000 bonus payable on June 1. Employee B has a legally binding right to the bonus as of February 11, 2009 and payment of the bonus is not subject to the limitation. However, as of February 11, 2009, the board of directors has not met to determine which employees of the division in which Employee C works will be entitled to a bonus or the amount of such bonus. Accordingly, Employee C did not have a legally binding right to a bonus as of February 11, 2009 and may be subject to the bonus payment limitation.

Example 3. TARP recipient sponsors a written stock option plan under which stock options may be granted to SEOs designated by the compensation committee. Designations and grants typically occur at a meeting in August of every year, and no meeting occurred in 2009 before August. Regardless of

the existence of the general plan, no SEO had a legally binding right to a stock option grant for 2009 as of February 11, 2009 because no grants had been made under the plan. Accordingly, any 2009 grant will be subject to the limitation and is not permitted to be made.

Example 4. Employee D is an SEO of a TARP recipient. Under Employee D's written employment agreement executed before February 11, 2009, Employee D is entitled to the total of whatever bonuses are made available to Employee E and Employee F. As of February 11, 2009, Employee E had a legally binding right to a \$100,000 bonus. Employees E and F are never at any time SEOs or highly compensated employees subject to the limitation. As of February 11, 2009, Employee F had no legally binding right to a bonus, but was eligible to participate in a bonus pool and was ultimately awarded a bonus of \$50,000. As of February 11, 2009, Employee D had a legally binding right to a \$100,000 bonus, so that bonus is not subject to the limitation. However, as of February 11, 2009, Employee D did not have a legally binding right to the additional \$50,000 bonus, so that bonus is subject to the bonus payment limitation and, if not paid before June 15, 2009 is not permitted to be paid.

(f) *Application to private TARP recipients.* The rules set forth in this section are also applicable to TARP recipients that do not have securities registered with the SEC pursuant to the Federal securities laws.

§ 30.11 Q-11: Are TARP recipients required to meet any other standards under the executive compensation and corporate governance standards in section 111 of EESA?

(a) *Approval of compensation payments to, and compensation structures for, certain employees of TARP recipients receiving exceptional financial assistance.* For any period during which a TARP recipient is designated as a TARP recipient that has received exceptional financial assistance, the TARP recipient must obtain the approval by the Special Master of all compensation payments to, and compensation structures for, SEOs and most highly compensated employees subject to paragraph (b) of § 30.10 (Q-10). TARP recipients that receive exceptional financial assistance must also receive approval