

FINANCIAL INSTITUTIONS

Alert

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Department of Treasury Clarifies TARP Standards for Executive Compensation and Corporate Governance

December 11, 2009

Effective December 7, 2009, the Department of the Treasury published corrections to an interim final rule published on June 15, 2009 that implemented certain executive compensation and corporate governance standards for financial institutions participating in the Troubled Asset Relief Program (TARP). The Treasury correction clarified the following provisions of the interim final rule:

- Definition of “*most highly compensated employee*”

The original version of the interim final rule stated that, for purposes of identifying the most highly compensated employees, senior executive officers (SEOs) were to be excluded. The Treasury corrected the definition of the most highly compensated employees to mean the employees whose annual compensation is determined to be the highest among all employees of the TARP recipient. However, if a rule is applicable to both SEOs and the most highly compensated employees (such as the clawback provisions or the golden parachute prohibition), the SEOs are to be excluded in determining the most highly compensated employees because the rule already applies to SEOs.

- Deadline for first risk assessment

The original version of the interim final rule provided that the deadline for 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, would be the “later of” the last day of the TARP period for recipients that participated in the Capital Purchase Program (CPP) under TARP, or the last day of the recipient’s fiscal year including the sunset date for TARP recipients that did not participate in the CPP. Because only one of the dates can apply, the Treasury corrected this definition and removed the inoperative “later of” language.

- Permitting a shareholder vote approving executive compensation

The original version of the interim final rule required TARP recipients to obtain shareholder approval of certain executive compensation. The Treasury corrected this rule to clarify that the shareholder vote requirement is only applicable to TARP recipients that are registered with the SEC.

- Certification by the principal executive and financial officers

The original version of the interim final rule required the principal executive officer and principal financial officer to identify the CEOs and the next 20 most highly compensated employees in the annual certification required to be delivered by these officers. The Treasury has revised this rule to state that the officers only have to certify that they have provided a complete and accurate list of such employees to the Treasury. Additionally, the Treasury modified the language in the annual certifications to clarify that the compensation committee of the TARP recipient must have evaluated with senior risk officers the risks associated with CEO and employee compensation plans at least every six months, beginning on the later of September 14, 2009 or ninety days after the closing date of the agreement between the TARP recipient and the Treasury, and ending on the last day of the TARP recipient's fiscal year containing that date. The first such risk evaluation for most TARP recipients must therefore occur before December 31, 2009.

Bass, Berry & Sims PLC's Financial Institutions Subgroup specializes in advising and assisting financial institutions in their dealings within a complex banking environment. We have represented numerous financial institutions, and their holding companies, in public and private equity and debt offerings, including in participation in the United States Department of the Treasury's Capital Purchase Program; counseled financial institutions in mergers and acquisitions; and advised boards of directors of financial institutions concerning director liability and regulatory issues. From small community banks and thrifts in Tennessee and Kentucky to large publicly held banks and insurance companies and their holding companies, we counsel our financial institution clients on a broad range of federal and state regulatory matters.

If you have any questions regarding the issues addressed in this Financial Institutions Alert please feel free to contact any of your regular contacts in the Corporate and Securities Group or any of the attorneys in our Financial Institutions Subgroup listed below.

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