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Employee Benefits Advisory: Treasury Issues Guidelines Concerning Executive Compensation for Recipients of Federal Assistance

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On February 4, 2009, President Obama announced his Administration's intention to reform executive compensation practices in financial institutions accepting federal assistance. In response to the President's remarks, the U.S. Department of the Treasury issued "guidelines" restricting, among other things, how recipients can compensate certain executives. The guidelines generally treat recipients of "exceptional" assistance differently from those receiving "generally available" assistance. However, they require *all* recipients' CEOs to annually certify compliance with statutory, Treasury and contractual executive compensation restrictions, and also obligate such recipients' compensation committees to explain how their senior executive compensation arrangements do not encourage excessive and unnecessary risk-taking.

Recipients of "Exceptional" Assistance

Financial institutions receiving more assistance than is provided under a widely-available standard program and which requires recipients to execute a bank-specific agreement with the Treasury are those who receive "exceptional" assistance under the guidelines (*e.g.*, American International Group, Bank of America, etc.). The guidelines implement the following (and other) restrictions on such assistance:

- Prohibits recipients from providing senior executives more than $500,000 in compensation, except for restricted stock or similar long-term incentive arrangement;
- Requires that any restricted stock (or similar) arrangement can vest only (i) after the government has been repaid (including any applicable contractual dividend payments), or (ii) after a specified period of time, provided that certain conditions are considered (*e.g.*, degree a company has satisfied repayment obligations, met lending/stability requirements, etc.);
- Requires recipients to submit the senior executive compensation structure and rationale therefor to a "say on pay" non-binding shareholder resolution;
- Requires recipients to implement "clawback" provisions, applicable in specified circumstances, for bonuses and incentive compensation that is awarded to the top 25 senior executives;
- Prohibits recipients from awarding any "golden parachutes" to the top ten senior executives of a company, and bans any severance payment to the next 25 senior executives exceeding one year of compensation; and
- Requires recipients' boards to adopt a policy concerning luxury and excessive expenditures and further requires CEOs to certify such expenditures.

Recipients of Generally Available Assistance

The Treasury announced its intention to issue proposed guidance, subject to public comment, on nearly-identical executive compensation guidelines for recipients of general assistance, including:

- Prohibiting recipients, absent a waiver, from paying senior executives more than $500,000 in annual compensation plus restricted stock;
  - A waiver can be obtained only when a recipient discloses the subject compensation and, if requested, permits a non-binding "say on pay" shareholder resolution
- Requiring recipients to implement "clawback" provisions identical to those applicable to recipients of "exceptional" assistance;
- Capping severance packages for recipients' five top senior executives to one year's compensation; and
- Requiring board approval for luxury/excessive expenditures.

Long-Term Reform

The Treasury suggests that financial institutions review *today* compensation structures for senior executives and other employees to assess whether they contribute to excessive risk-taking. The Treasury also suggests that financial institutions consider adopting "say on pay" resolutions and compensation structures that encourage long-term, as opposed to short-term, value for companies.

For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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