

TARP Task Force

June 19, 2009

Treasury Releases Rule on TARP Executive Compensation and Corporate Governance

On June 10, the United States Department of the Treasury (“UST”) released an interim final rule (“Rule”) providing much-anticipated guidance on the compensation and governance standards applicable to companies (“TARP Recipients”) that have received financial assistance under the Troubled Asset Relief Program (“TARP”),¹ and introducing a few additional concepts such as the newly created “Office of the Special Master for TARP Executive Compensation” referred to in the public press as the “Pay Czar.” The Special Master will serve at the pleasure of the Secretary of the Treasury (“Secretary”) and will oversee TARP Recipients’ executive compensation practices and have interpretive authority with respect to EESA and the Rule. The Rule provides some helpful guidance as to how a TARP Recipient may use restricted stock and restricted stock unit (or phantom equity) awards as incentive compensation for senior executives. It also outlines a stringent prohibition on tax gross-up arrangements and imposes additional responsibilities on compensation committees and further disclosure requirements regarding perquisites and compensation consultants.

Action Items

TARP Recipients, and in some cases their boards and compensation committees, will want to begin addressing promptly many of the Rule’s requirements, including the following:

- Reviewing the design of executive compensation programs, including the shift from traditional bonus programs to restricted stock and phantom equity arrangements permitted by the Rule
- Evaluating the need for waivers or amendments of prohibited benefits to employees outside of the senior executive officer group, and developing a communication plan to address employee concerns
- Drafting the luxury expenditure policy that TARP Recipients will be required to adopt and disclose by September 13, 2009
- Scheduling additional compensation committee meetings and setting agenda to ensure an opportunity to satisfy the Rule’s requirements

For more information, contact one of the members of Katten’s TARP Task Force listed below:

Eric Adams, Co-Chair

212.940.6783 / eric.adams@kattenlaw.com

Shannon Skinner Anglin

312.902.5409 / shannon.anglin@kattenlaw.com

Terra K. Atkinson

704.344.3194 / terra.atkinson@kattenlaw.com

David J. Bryant

312.902.5380 / david.bryant@kattenlaw.com

Rachel B. Coan

212.940.8527 / rachel.coan@kattenlaw.com

David R. Dlugie

312.902.5274 / david.dlugie@kattenlaw.com

Steven Eckhaus

212.940.8860 / steven.eckhaus@kattenlaw.com

Hays Ellisen, Co-Chair

212.940.6669 / hays.ellisen@kattenlaw.com

Mark I. Fisher

212.940.8877 / mark.fisher@kattenlaw.com

Andrew L. Jagoda

212.940.8520 / andrew.jagoda@kattenlaw.com

Reid A. Mandel

312.902.5246 / reid.mandel@kattenlaw.com

Robinson Markel

212.940.8989 / robinson.markel@kattenlaw.com

Jeffrey R. Patt

312.902.5604 / jeffrey.patt@kattenlaw.com

Nat Shapo

312.902.5273 / nat.shapo@kattenlaw.com

Marc M. Tract

212.940.8760 / marc.tract@kattenlaw.com

Jeffrey M. Werthan

202.625.3569 / jeff.werthan@kattenlaw.com

Robert J. Wild

312.902.5567 / robert.wild@kattenlaw.com

Frank Zarb

202.625.3613 / frank.zarb@kattenlaw.com

¹ See 31 CFR Part 30 (available at <http://edocket.access.gpo.gov/2009/pdf/E9-13868.pdf>). The Troubled Asset Relief Program was created pursuant to the Emergency Economic Stabilization Act of 2008 (EESA). The executive compensation and corporate governance requirements originally established under Section 111 of EESA were later amended in February 2009 by the American Recovery and Reinvestment Act of 2009 (ARRA). In this advisory, references to EESA include the ARRA amendments.

- Revisiting compensation committee and governance committee charters, as well as codes of conduct and similar corporate guidelines
- Gathering information regarding use of compensation consultants over the past couple of years in preparation for required compensation disclosure once the current fiscal year ends
- Reviewing existing agreements, plans and policies for prohibited tax gross-up rights
- Compiling documents and information regarding compensation paid to employees since the beginning of the TARP period in preparation for potential requests from the Special Master for purposes of its review of prior payments to employees
- Developing a records retention system to fulfill the certification substantiation requirement

Background

Many forms of executive compensation, such as annual and long-term bonuses, stock options, retention awards and severance payments, were prohibited for certain officers and highly compensated employees under EESA when it was amended by the ARRA on February 17, 2009.² These significant changes to EESA compelled many TARP Recipients to reevaluate their executive compensation structures in large part because the only forms of compensation clearly permitted by EESA were base salary and restricted stock awards (subject to annual limits of one-third of compensation and undefined vesting restrictions until the TARP Recipient repaid its TARP obligations).

With the issuance of the Rule, UST has accomplished two primary objectives by addressing: (1) the extent to which various incentive and severance payments are prohibited by EESA and (2) the numerous governance and procedural requirements that apply to the compensation committee, the chief executive officer and the chief financial officer of TARP Recipients.³

Effective Date

The Rule is effective as of June 15, 2009, not retroactively.

The Rule's effective date is June 15, 2009, and does not, as some were concerned, apply to TARP Recipients retroactively as of the date that EESA was enacted. Additional provisions of the Rule address the effective date with respect to certain bonus payments paid or accrued by employees of TARP Recipients prior to June 15.

Scope

The Rule may apply to some affiliates of TARP Recipients.

Following ARRA's amendment of EESA, there was concern that the executive compensation restrictions might apply to other participants in TARP-related programs, not just those who participated in the Capital Purchase Program. The Rule confirms that TARP Recipients include those companies that sold preferred stock to UST through the Capital Purchase Program or that may sell convertible shares to UST through the Capital Assistance Program. However, the Rule also clarifies that borrowers of loans from the Federal Reserve Bank of New York under the Term Asset-Backed Loan Facility ("TALF") will not be TARP Recipients, and parties involved in the Public-Private Investment Program, depending on the structure of

² For more information about these amendments, please see our previous advisory, which is available at <http://www.kattenlaw.com/stimulus-act-expands-executive-compensation-restrictions-for-tarp-recipients-02-26-2009/>.

³ Because the Rule cross-references certain federal securities law requirements, it refers to the chief executive officer as the "PEO," or principal executive officer, and the chief financial officer as the "PFO," or principal financial officer.

the transaction, might not be TARP Recipients. At the same time, the Rule expands the application of these compensation restrictions and governance requirements to apply to any entity that owns at least 50% of a TARP Recipient, or any entity of which a TARP Recipient owns at least 50%. Thus, the Rule has the potential to impact large private equity investment holders and others holding a significant ownership interest.

Bonus Prohibition

- Payment of bonuses, retention awards and incentive compensation to covered executives is generally prohibited.
- Limited restricted stock or restricted stock unit grants are permitted.
- Compensation paid pursuant to some grandfathered agreements is also allowed.

EESA generally prohibits a TARP Recipient from paying or accruing any bonus, retention award or incentive compensation (“Bonus”) during the period a TARP Recipient has an outstanding TARP obligation (“TARP Period”) to a specified number of highly compensated employees determined by reference to the amount of TARP funds received. However, EESA permits restricted stock grants and payments made pursuant to agreements entered into prior to February 11, 2009. The Rule provides additional insight on these limitations and its exceptions, which are highlighted below.

Bonus, Retention Award and Incentive Compensation Definitions

The broad scope of the Rule encompasses many arrangements that are not typically thought of as a Bonus and, thus, restricts TARP Recipients from designing alternative structures that satisfy the objective of paying incentive compensation. For example, a special contribution, a benefit increase or other benefit enhancements (e.g., crediting additional years of service) under a deferred compensation plan may constitute a Bonus, regardless of when payment will be made under such plan. Moreover, the Rule provides that non-exempt equity awards (i.e., awards other than permissible restricted stock and restricted stock unit awards) constitute a Bonus, and a signing bonus or a make-whole arrangement contingent on a new employee completing a specified length of service with the TARP Recipient is also a Bonus.

On the other hand, the Rule specifies certain forms of payment that are excluded from this limitation. For instance, commissions for sales or investment management services provided to an unrelated party will not constitute a Bonus if certain requirements are met. In addition, benefits accrued under a deferred compensation plan will generally not constitute a Bonus, although caution should be exercised if benefit enhancements constitute part of the accrued benefit during the TARP Period.

Anti-Abuse Provisions

Prior to issuance of the Rule, TARP Recipients debated whether substantially increasing base salary in lieu of a bonus payment, delaying the payment of a bonus until after the TARP Period ends, forgiving debt or granting retroactive service credit after the TARP Period ends would be permitted under the Bonus prohibition. The Rule attempts to settle this debate and clarifies that such actions would or may, based on the facts and circumstances, be impermissible. Given this anti-abuse provision, TARP Recipients should carefully consider compensation structures that could be recharacterized as Bonus payments. TARP Recipients may consider seeking an advisory opinion from the Special Master under such circumstances, although this might not be a realistic approach in the short term.

Restricted Stock and Restricted Stock Unit Exception

With respect to equity-based incentive compensation, the Rule does two important things. First, the Rule permits the grant of restricted stock units (“RSUs”) (also known as phantom equity) in addition to allowing the issuance of restricted stock. RSUs may be settled in either cash or stock and, thus, the Rule offers a TARP Recipient an opportunity to have a cash-based incentive program that would neither deplete shares reserved for its equity compensation plan nor involve the same level

of dilution as restricted stock. To comply with the Rule, RSU awards must be designed to track either the TARP Recipient's stock or a specific division within the TARP Recipient.⁴

Second, the Rule clarifies that restricted stock or RSUs may become transferable (or payable, in the case of RSUs) on a pro rata basis tied to the rate at which TARP funds are repaid to UST (in 25% increments). Thus, 25% of the shares may become transferable (or payable, in the case of RSUs) for each 25% of the TARP funds repaid to UST, such that the award becomes 100% transferable (or payable) once 100% of the TARP funds are repaid. Additionally, an individual must forfeit the shares (or RSUs) if he or she ceases to provide services before the second anniversary of the grant date for a reason other than death, disability or a change in control. TARP Recipients may structure such arrangements to vest sooner (subject to the second anniversary limitation) than the rate at which they may become transferable (or payable, in the case of RSUs) and, to the extent that tax withholding obligations arise due to a more rapid vesting schedule, shares may be sold in order to allow the individual to pay his or her tax obligation. UST's interpretation of this exception should be welcome news for TARP Recipients, because it offers some flexibility in structuring equity-based incentives that are payable in cash.

Grandfathered Agreement Exception

The Rule attempts to clarify EESA's exception to the Bonus prohibition for contractual obligations under agreements existing prior to February 11, 2009. The Rule provides that any amendment to such an agreement after February 11, 2009, which materially enhances the benefits under the agreement (e.g., accelerated vesting), will negate the agreement's grandfathered status under this exception. Amendments that decrease benefits or impose additional requirements will not negate the agreement's grandfathered status.

Golden Parachute Payments

- Payments to a covered executive for termination or change in control are prohibited.
- A Golden Parachute Payment cannot be deferred until TARP funds are repaid.
- Only payments for services performed or benefits accrued are allowed.

During the TARP Period, the Rule prohibits any "Golden Parachute Payment" to any senior executive officer ("SEO") and any of the next five most highly compensated employees. The Rule defines a "Golden Parachute Payment" as any payment (including accelerated vesting) as a result of either the departure of the employee from the company or a change in control of the company, other than payments from a tax-qualified retirement plan, payments made on account of an employee's death or disability, or payments required under an applicable state or foreign statute.

Permissible Payments

Certain types of payments that otherwise would be Golden Parachute Payments are specifically permitted under the Rule. For example, the Rule permits TARP Recipients to make payments for services performed or for benefits accrued prior to the applicable departure or change in control. The Rule requires that the determination of whether a payment is for services performed or benefits accrued be based on all the applicable facts and circumstances. In addition, the Rule also permits payments to be made pursuant to certain benefit plans and deferred compensation plans, but only if specific conditions are met—including that the plan was in effect at least one year prior to the departure of the employee, any benefit increases made during the year prior to such departure are ignored, and the benefit is payable to the extent vested upon departure or change in control. Interestingly, the Rule does not specifically address whether payment for a non-compete is excluded and, thus, appears to leave such payments subject to a facts and circumstances determination as to whether they are for services rendered.

⁴ Such "tracking stock" arrangements can be complex to design, and any award of RSUs should take into consideration relevant accounting and tax concerns, including Section 409A of the Internal Revenue Code, which governs payments of deferred compensation.

Anti-Abuse Provision

Perhaps most importantly, the Rule treats all Golden Parachute Payments as paid at the time of the occurrence of the applicable departure or change in control. As a result, a promise to pay an amount once the TARP Recipient is no longer subject to the TARP restrictions would be prohibited by the Rule as a Golden Parachute Payment. This does not preclude a TARP Recipient from entering into agreements that require Golden Parachute Payments, but if the TARP Recipient remains subject to TARP at the time of the applicable departure or change in control, those payments cannot be made under the Rule (even after TARP funds have been fully repaid).

Expanded Scope

The Rule is more expansive than EESA or previous guidance in two respects. First, the Rule expands the definition of a Golden Parachute Payment to include a payment made in connection with a change in control. Second, the Rule clarifies that making Golden Parachute Payments after the TARP Recipient emerges from TARP is prohibited. The ban on Golden Parachute Payments may result in an increased use of restrictive covenants (e.g., non-competes) in lieu of separation payments to departing employees covered by the prohibition, assuming that the facts and circumstances support a legitimate concern that the restrictive covenants are needed. In addition, it is possible that affected employees may use litigation as a means of obtaining post-separation payments.

New Requirements

- **PERQUISITES:** Any perquisite in excess of \$25,000 must be disclosed and justified annually.
- **COMPENSATION CONSULTANTS:** Detailed information for the past three years must be reported annually.
- **TAX GROSS-UP PAYMENTS:** Tax gross-ups are prohibited.

EESA authorized the Secretary to implement additional standards not specified in the statute the Rule. Accordingly, the Rule imposes the following three new requirements:

Perquisite Disclosure

A TARP Recipient must disclose annually each perquisite whose total value in the fiscal year exceeds \$25,000 for any employee who is subject to the Bonus prohibition described above. This disclosure must be made in narrative form to UST and the TARP Recipient's primary federal regulator within 120 days after the end of the TARP Recipient's fiscal year, and must state the amount and nature of the perquisites and the identity of the recipient, as well as justification for such perquisites. This requirement is broader than the perquisite disclosure requirement applicable to public companies under the executive compensation proxy disclosure rules of the U.S. Securities and Exchange Commission ("SEC").

Compensation Consultant Disclosure

Also within 120 days after a TARP Recipient's fiscal year-end, its compensation committee must disclose to UST and the TARP Recipient's primary regulatory agency a narrative description regarding its use of compensation consultants. Specifically, this narrative must identify any compensation consultant retained by the TARP Recipient, its board of directors or its compensation committee, as well as detailed information regarding the services provided by that consultant and any of its affiliates over the past three years. For example, the Rule indicates that the narrative disclosure would include a list of entities used for benchmarking compensation, a justification for using those entities and the lowest percentile level proposed for compensation. Again, this requirement is broader than the compensation consultant disclosure requirements applicable to public companies under the SEC's proxy disclosure rules.

Tax Gross-Up Prohibition

The Rule prohibits a TARP Recipient from providing a tax gross-up (i.e., an additional payment to an employee designed to pay some or all of the income taxes payable on a compensation payment, including any income tax on the additional

payment for taxes) to one of its CEOs or the 20 next most highly compensated employees, even if such payment will be made after the TARP Period. Payments to equalize the tax treatment of expatriate employees are exempted from this prohibition. A change in control excise tax gross-up should not be implicated by this new Rule provision, as such underlying change in control payments are disallowed by the Golden Parachute Payment prohibition described above. Accordingly, while this Rule change should not present a significant change in compensation practices for most TARP Recipients, compensation arrangements and policies should be examined to ensure that there are no current promises for such a benefit (e.g., gross-ups for financial planning services or Section 409A deferred compensation arrangements).

Luxury Expenditure Policy

TARP Recipients are required to adopt and disclose a policy designed to eliminate excessive and luxury expenditures by September 13, 2009.

EESA mandates that each TARP Recipient adopt a policy regarding “excessive or luxury expenditures” (“Luxury Policy”), but offers little elaboration on how to satisfy this requirement. The Rule defines the Luxury Policy to mean written standards applicable to the TARP Recipient and its employees that are designed to eliminate excessive and luxury expenditures. Additionally, the Luxury Policy must (1) identify types of expenditures that are prohibited or require pre-approval; (2) explain any pre-approval process; (3) require the TARP Recipient’s chief executive officer or chief financial officer to certify that any required pre-approval was properly obtained; and (4) mandate accountability of policy adherence and internal reporting of policy violations.

Prompt Action Needed

Each TARP Recipient must post its Luxury Policy on its website and provide a copy of it to UST and its primary regulatory agency. The Rule requires that any TARP Recipient (as of June 15, 2009) adopt its Luxury Policy and comply with the foregoing disclosure requirements on or before September 13, 2009. In creating the Luxury Policy, public companies may find it helpful to draw on their experiences drafting an ethics policy for purposes of complying with the Sarbanes-Oxley Act. Like the Luxury Policy, a general schema was established by the federal government and each applicable company then had to craft its own individual policy. For many companies, this may require calling special meetings of their compensation committees and governance committees, as well as the board of directors, in the next couple of months. Therefore, TARP Recipients should begin working with counsel and board members to ensure this requirement is met in a timely and efficient manner.

Bonus Recovery Or “Clawback”

The Rule requires bonus and incentive compensation clawback based on materially inaccurate financial statements, unless unreasonable to do so.

The Rule provides for the clawback of bonuses and incentive compensation paid to certain employees during the TARP Period similar to that under EESA. The clawback applies to bonus or incentive compensation paid to an CEO or any of the next 20 most highly compensated employees during the TARP Period if such payment was based on materially inaccurate financial statements or materially inaccurate performance metrics.

Clawback Exercise

The Rule specifies that the TARP Recipient must exercise its clawback rights unless the TARP Recipient can demonstrate that it is unreasonable to do so. Exercise of the clawback may be unreasonable if the expense to recover any excess payment would exceed the amount to be recovered. If any inaccuracy implicating the clawback arises, a TARP Recipient, in consultation with counsel, may want to conduct a cost-benefit analysis regarding the feasibility of enforcing the clawback.

Compensation Committee–Risk Assessment & Responsibilities

Compensation committees must:

- evaluate executive compensation every six months to ensure no encouragement of unnecessary risk or manipulation of earnings; and
- annually certify and describe their semiannual compensation risk analysis.

The Rule tasks the compensation committee of each TARP Recipient (which must be formed in most cases if it does not already exist) with evaluating the risks posed by its compensation arrangements. The Rule outlines many procedural steps that compensation committees must take, including the following:

- At least every six months—discuss, evaluate and review: (1) with the senior risk officers, the CEO compensation plans to ensure they do not encourage CEOs to take unnecessary and excessive risks (both short term and long term) that threaten the value of the TARP Recipient; (2) with senior risk officers, the employee compensation plans in light of risks posed to the TARP Recipient by such plans and how to limit such risks; and (3) employee compensation plans to ensure they do not encourage the manipulation of reported earnings to enhance the compensation of any of the TARP Recipient’s employees.
- At least once per fiscal year—provide: (1) a narrative description of how the compensation committee satisfied its compliance review and action steps that were necessary to ensure that the applicable compensation arrangements are consistent with EESA and the Rule (e.g., how plans do not encourage risks or manipulation, how any risks or potential for manipulation have been limited); and (2) certification that it has undertaken all of the required reviews and steps to support its disclosures of the same. A model certification statement is provided under the Rule. Publicly held companies generally make such disclosure and certification in the proxy statement and to UST, but those that are smaller reporting companies or are not publicly held provide the certification to their primary regulator and to UST.

The Rule does not provide much additional guidance with respect to the risk analysis that is mandated by EESA. Essentially, compensation committees are responsible for identifying risks to the TARP Recipient by way of diminishing value or manipulating earnings with the assistance of the senior risk officers. Then, the compensation committee must limit or eliminate (as determined appropriate) any features of the TARP Recipient’s compensation arrangements that would encourage such risk-taking or manipulation.

Many questions raised under EESA remain unanswered, such as (1) who should serve as the senior risk officers; (2) what types of arrangements are inherently suspect by UST as being “risky” or having the potential to encourage manipulated earnings reports; and (3) what steps a compensation committee should take to protect itself and the TARP Recipient in the event unforeseen opportunities for risky behavior are exploited or manipulation occurs. Nevertheless, the common theme that emerges from the Rule is that compensation committees should strive to create performance-based compensation programs that (1) enhance the long-term value of the TARP Recipient with the least potential for short-term manipulation or gain; and (2) constitute a significant portion of the senior executives’ and key employees’ total compensation.

PEO and PFO Certification

- Principal executive and financial officers must annually certify compliance with the Rule.
- TARP Recipients must retain substantiating records of annual certification for six years.

In addition to the certification that the compensation committee must provide, the principal executive officer and the principal financial officer must provide certification in the company’s annual report (Form 10-K) and to UST (privately held companies also have a certification requirement, and the certification must be filed with the primary regulatory agency and UST) that the TARP Recipient has complied with the compensation and governance requirements imposed under EESA. The Rule provides model forms of such certification. Also, the TARP Recipient must preserve records substantiating any

certification for a period of six years after the certification is made, and any false or fraudulent statement made in any such certification could lead to criminal penalties under federal law.

Shareholder Say On Pay

The SEC will promulgate rules regarding the annual, non-binding shareholder vote on TARP Recipients' executive compensation.

The Rule maintains the requirement for TARP Recipients to permit a nonbinding shareholder resolution on CEO compensation (i.e., a "say on pay") paid to the CEO during the TARP Period. The Rule defers further guidance on this say on pay requirement to the SEC.

Special Master

- New Special Master (or "Pay Czar") will review compensation paid by TARP Recipients prior to February 17, 2009.
- TARP Recipients can apply to Special Master for advisory opinions regarding the permissibility of certain compensation.

The Special Master has authority to apply EESA and the Rule to a particular set of facts and circumstances to determine whether applicable requirements have been satisfied. Accordingly, the Special Master is charged with reviewing bonuses, retention awards and other compensation arrangements paid prior to February 17, 2009, and negotiating, if appropriate, for reimbursements to the federal government with respect to such compensation.

Principles to Apply in Review of Compensation

The Rule provides subjective compensation principles to guide the Special Master's review of compensation arrangements, such as consistency with sound compensation practices for TARP Recipients, and advancement of the overall purposes of EESA, including maximization of overall returns to U.S. taxpayers and prevention of disruptions to financial markets. The Rule provides a variety of additional criteria for the Special Master to consider in reviewing compensation arrangements, including the following:

- The arrangement should avoid unnecessary or excessive risks that could threaten the value of the TARP Recipient, and incentive payments should be paid over a "time horizon" that takes into account the applicable "risk horizon" to help ensure that the incentive actually contributes to the long-term performance intended to be rewarded.
- The compensation structure and, if applicable, the amount payable, should reflect the need for the TARP Recipient to remain competitive, including to retain and recruit talented employees who will contribute to the TARP Recipient's future success and help ensure the TARP Recipient's ability to repay its obligations to UST.
- Overall compensation elements (e.g., salary, annual incentives, long-term incentives, retirement benefits, perks) should be appropriately allocated to specific employees, with a larger allocation expected for long-term and performance-based compensation with respect to executive and senior-level employees.
- Performance-based compensation should be based upon tailored metrics over a relevant performance period, and the goals should be "real" (i.e., based upon measurable, enforceable performance criteria with an adequate incentive to perform, and payment of incentives should be tied to actual achievement of such goals so that awards are not paid if specified goals are not met).
- Compensation structure and payments should be consistent with, and not excessive as compared to, "peer companies" (i.e., competitor companies or similarly situated, financially distressed companies, if applicable) based upon compensation arrangements of similarly situated persons at similar entities.

- Each compensation arrangement should reflect the “value” (e.g., revenue generation, expertise, risk management and overall corporate compliance, corporate leadership) that the individual provides to the TARP Recipient, as well as such individual’s potential role in the TARP Recipient’s change in financial health or competitive position, if any.

The Special Master has broad discretion in determining the relative weight to allocate to any given principle, and with respect to previously granted rights, the Special Master is to consider the facts and circumstances “at the time the compensation was granted, earned, or paid, as appropriate.” The principles above likely provide valuable insight on the direction UST is heading with respect to its desired executive compensation reforms applicable to non-TARP Recipients, which were announced on the same day the Rule was released. Companies should anticipate such themes to be reflected in future UST, SEC and other Obama administration initiatives on this front, as well as from other parties advocating for compensation reform.

Advisory Opinions and Approval of Compensation

TARP Recipients and their employees are allowed to seek an advisory opinion from the Special Master as to whether a compensation structure is, will or may result in payments that are inconsistent with the purposes of EESA, TARP and the principles outlined above. However, the Special Master is not required to issue an advisory opinion in any such case, and issuance of an adverse opinion gives the Special Master authority to seek to negotiate with the TARP Recipient and the applicable employee for appropriate reimbursements to the TARP Recipient or the federal government. In addition, the Special Master may issue an advisory opinion on its own accord to advise TARP Recipients as to whether certain compensation structures are deemed to satisfy the standards of EESA and the Rule. Finally, TARP Recipients receiving “exceptional financial assistance”⁵ are subject to having their compensation arrangements approved by the Special Master.

Katten’s TARP Task Force

Katten Muchin Rosenman LLP’s multidisciplinary TARP Task Force advises clients on the Troubled Asset Relief Program created under the Emergency Economic Stabilization Act of 2008, including related corporate governance issues and the structuring and compliance of executive compensation arrangements. Katten’s TARP Task Force also counsels clients on obtaining TALF loans to purchase asset-backed securities and commercial mortgage-backed securities, and on issuing and underwriting TALF-eligible securities. Additionally, Katten’s TARP Task Force advises clients with respect to all aspects of other TARP-related programs such as (i) the Public-Private Investment Program in which the government will finance purchases of legacy loans and securities by private sector institutions, (ii) the Capital Purchase Program, whereby UST is making investments in certain publicly traded and privately held financial institutions, (iii) the Capital Assistance Program that is providing additional capital in the form of purchase of convertible securities to financial institutions which have been subject to a stress-test, and (iv) the Making Home Affordable plan that is intended to prevent avoidable residential foreclosures.

⁵ “Exceptional financial assistance” means financial assistance provided under the Programs for Systemically Significant Failing Institutions, the Targeted Investment Program, the Automotive Industry Financing Program and any new program designated by the Secretary as providing exceptional financial assistance. The institutions currently receiving exceptional financial assistance are AIG, Bank of America, Citigroup, Chrysler and General Motors.

Katten

www.kattenlaw.com

Katten Muchin Rosenman LLP

CHARLOTTE CHICAGO IRVING LONDON LOS ANGELES NEW YORK PALO ALTO WASHINGTON, DC

Published as a source of information only. The material contained herein is not to be construed as legal advice or opinion.

©2009 Katten Muchin Rosenman LLP. All rights reserved.

Circular 230 Disclosure: Pursuant to regulations governing practice before the Internal Revenue Service, any tax advice contained herein is not intended or written to be used and cannot be used by a taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. Katten Muchin Rosenman LLP is an Illinois limited liability partnership including professional corporations that has elected to be governed by the Illinois Uniform Partnership Act (1997). London affiliate: Katten Muchin Rosenman Cornish LLP.

6/19/09