

must provide the certification of the compensation committee (or board of directors, as applicable under § 30.4 (Q-4)) to its primary regulatory agency and to Treasury.

§ 30.8 Q-8: What actions are necessary for a TARP recipient to comply with the standards established under section 111(b)(3)(B) of EESA (the “clawback” provision requirement)?

To comply with the standards established under section 111(b)(3)(B) of EESA, a TARP recipient must ensure that any bonus payment made to a SEO or the next twenty most highly compensated employees during the TARP period is subject to a provision for recovery or “clawback” by the TARP recipient if the bonus payment was based on materially inaccurate financial statements (which includes, but is not limited to, statements of earnings, revenues, or gains) or any other materially inaccurate performance metric criteria. Whether a financial statement or performance metric criteria is materially inaccurate depends on all the facts and circumstances. However, for this purpose, a financial statement or performance metric criteria shall be treated as materially inaccurate with respect to any employee who knowingly engaged in providing inaccurate information (including knowingly failing to timely correct inaccurate information) relating to those financial statements or performance metrics. Otherwise, with respect to a performance criteria, whether the inaccurate measurement of the performance or inaccurate application of the performance to the performance criteria is material depends on whether the actual performance or accurate application of the actual performance to the performance criteria is materially different from the performance required under the performance criteria or the inaccurate application of the actual performance to the performance criteria. The TARP recipient must exercise its clawback rights except to the extent it demonstrates that it is unreasonable to do so, such as, for example, if the expense of enforcing the rights would exceed the amount recovered. For the purpose of this section, a bonus payment is deemed to be

made to an individual when the individual obtains a legally binding right to that payment.

§ 30.9 Q-9: What actions are necessary for a TARP recipient to comply with the standards established under section 111(b)(3)(C) of EESA (the prohibition on golden parachute payments)?

(a) *Prohibition on golden parachute payments.* To comply with the standards established under section 111(b)(3)(C) of EESA, a TARP recipient must prohibit any golden parachute payment to a SEO and any of the next five most highly compensated employees during the TARP period. A golden parachute payment is treated as paid at the time of departure and is equal to the aggregate present value of all payments made for a departure. Thus, a golden parachute payment during the TARP period may include a right to amounts actually payable after the TARP period.

(b) *Examples.* The following examples illustrate the provisions of paragraph (a) of this section:

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