

## Client Alert

## Economic Crisis Response Group

OCTOBER 2008

High Ranking SEC Official Puts U.S. Companies on Notice Regarding Executive Compensation Disclosures .....	1
Executive Compensation Restrictions under TARP .....	1
Non-Participating Entities' Review of Executive Compensation.....	2
SEC's 2009 Review of Public Companies .....	2

### High Ranking SEC Official Puts U.S. Companies on Notice Regarding Executive Compensation Disclosures

---

In light of the current turbulent economic conditions and the SEC's recent rehaul of the executive compensation disclosure rules, it should come as no surprise that executive compensation disclosure by all U.S. public companies, not just the nine large banks that are already participating in the U.S. Treasury Department's capital purchase program, remains in the spotlight and likely will become subject to increased scrutiny by the SEC. According to John White, the Director of the SEC's Division of Corporation Finance, the nine financial institutions that have agreed to sell troubled assets to the U.S. Treasury or participate in the capital repurchase program under the Troubled Asset Relief Program ("TARP") should review carefully their compensation arrangements covering senior executives and adapt them to reflect the recent economic turmoil, market conditions and the objectives of the TARP. While speaking at NASPP's 3rd Annual Proxy Disclosure Conference in New Orleans, Mr. White also urged public companies not participating in TARP to design "meaningful disclosures" regarding executive pay that consider the effects of market turmoil and the principles underlying TARP.

Although Mr. White made it clear that the views he expressed are his own and do not represent the views of the SEC and the staff, his remarks likely will influence the executive compensation decision making process for compensation committees and shape the nature and scope of executive compensation disclosure for TARP participating financial institutions, and possibly non-participating entities, during the upcoming proxy season.

### Executive Compensation Restrictions under TARP

---

The U.S. Treasury Department's regulations implementing TARP require participating companies to prescribe "appropriate standards" for executive compensation and corporate governance. Such standards must include a means by the financial institution to recover any bonus or incentive compensation that the financial institution paid to a senior executive based on materially inaccurate financial reporting, and a prohibition on golden parachute payments. Furthermore, a financial institution that sells more than \$300 million in troubled

assets to the Treasury may not deduct for federal income tax purposes more than \$500,000 in annual compensation for each “covered executive.”

More importantly, TARP requires a participating financial institution’s compensation committee to ensure that incentive compensation arrangements do not encourage executives to take unnecessary risks that may threaten the value of the financial institution. Moreover, for the nine banks participating in TARP, Mr. White noted that they “will need to carefully consider and reflect the new provisions and their ramifications” when drafting their disclosures. In addition, the extent to which a company is complying with the Treasury regulations on executive compensation will have to be disclosed.

### **Non-Participating Entities’ Review of Executive Compensation**

---

Although the new Treasury regulations limiting executive compensation arrangements do not apply to companies that do not participate in TARP, and although the SEC is not focused on the substance of executive compensation determinations but rather on the quality and transparency of executive compensation disclosure, Mr. White suggests that companies that do not participate in TARP consider how performance targets and incentives may encourage executives to take unnecessary and excessive risks to meet such targets. Further, according to Mr. White and consistent with the existing SEC guidance, companies not participating in TARP “should not merely be marking up last year’s disclosure” but rather should take into account the effect of the recent market events on their compensation structure.

These remarks not only reinforce the SEC’s existing “principles-based” view of executive compensation disclosure, but they also may set the stage for the development of certain new or refined “best practices” in the coming year.

### **SEC’s 2009 Review of Public Companies**

---

With these principles in mind, the SEC, in 2009, will review the disclosures of the “very largest financial institutions in the U.S. that are public companies” to determine whether they accurately depict changes in their compensation arrangements. Under Section 408 of the Sarbanes-Oxley Act, the SEC has express statutory authorization to conduct regular and systematic reviews of the periodic filings of public companies, a provision which Mr. White invoked as the basis for the SEC’s 2009 reviews. Overall, the SEC will be examining a company’s disclosures to see if it “meaningfully conveys their compensation story.”

For more information about the new executive compensation restrictions, please see our Client Alert entitled *Executive Compensation Provisions in H.R. 1424 – Emergency Economic Stabilization Act of 2008, and the Tax Extenders and Alternative Minimum Tax Relief Act of 2008* [here](#).

If you have any questions regarding the matters discussed in this Client Alert, please contact any of the attorneys listed below:

**Thomas V. Sjoblom**

202.416.5805 – [tsjoblom@proskauer.com](mailto:tsjoblom@proskauer.com)

**Stephen L. Ratner**

212.969.3290 – [sratner@proskauer.com](mailto:sratner@proskauer.com)

**James P. Gerkis**

212.969.3135 – [jgerkis@proskauer.com](mailto:jgerkis@proskauer.com)

**Andrea S. Rattner**

212.969.3812 – [arattner@proskauer.com](mailto:arattner@proskauer.com)

**Scott J. Carpenter**

202.416.5825 – [scarpenter@proskauer.com](mailto:scarpenter@proskauer.com)

This publication is a service to our clients and friends. It is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice, or render a legal opinion.

BOCA RATON | BOSTON | CHICAGO | HONG KONG | LONDON | LOS ANGELES | NEWARK | NEW ORLEANS | NEW YORK | PARIS | SÃO PAULO | WASHINGTON, D.C.

[www.proskauer.com](http://www.proskauer.com)

© 2008 PROSKAUER ROSE LLP. All Rights Reserved. Attorney Advertising.