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DEPARTMENT OF THE TREASURY

31 CFR Part 30

RIN 1505-AC09

TARP CAPITAL PURCHASE PROGRAM

AGENCY: Domestic Finance, Treasury.

ACTION: Interim final rule.

SUMMARY: This interim final rule, promulgated pursuant to sections 101(a)(1), 101(c)(5), and 111(b) of the Emergency Economic Stabilization Act of 2008, Division A of Public Law 110-343 (EESA), provides further guidance on the executive compensation provisions applicable to participants in the Troubled Asset Relief Program (TARP) Capital Purchase Program (CPP). The Department of the Treasury published an interim final rule in 31 CFR Part 30 on October 20, 2008 (October Interim Final Rule) providing guidance on section 111(b) of EESA, which requires financial institutions from which the Treasury is purchasing troubled assets through direct purchases to meet appropriate standards for executive compensation and corporate governance. This interim final rule provides one technical amendment and two clarifications to the October Interim Final Rule and provides reporting and recordkeeping requirements regarding the

executive compensation requirements in the October Interim Final Rule and this interim final rule.

DATES: Effective Date: These regulations are effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Comment due date: **[INSERT DATE THAT IS THIRTY DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: The Treasury requests comments on the topics addressed in this interim final rule. Comments may be submitted to the Treasury by any of the following methods: Submit electronic comments through the federal government e-rulemaking portal, www.regulations.gov or by email to executivecompensationcomments@do.treas.gov or send paper comments in triplicate to Executive Compensation Comments, Office of Financial Institutions Policy, Room 1418, Department of the Treasury, 1500 Pennsylvania Avenue, NW, Washington, DC 20220.

In general, the Treasury will post all comments to www.regulations.gov without change, including any business or personal information provided such as names, addresses, e-mail addresses, or telephone numbers. The Treasury will also make such comments available for public inspection and copying in the Treasury's Library, Room 1428, Main Department Building, 1500 Pennsylvania Avenue, NW, Washington, DC 20220, on official business days between the hours of 10:00 a.m. and 5:00 p.m. Eastern Time. You can make an appointment to inspect comments by telephoning (202) 622-0990. All comments, including attachments and other supporting materials, received are part of the public record and subject to public disclosure. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: For further information regarding this interim rule contact the Office of Domestic Finance, the Treasury, at (202) 927-6618.

SUPPLEMENTARY INFORMATION:

I. Background.

In general, section 111(b) of the Emergency Economic Stabilization Act of 2008, Div. A of Pub. Law No. 110-343 (EESA) requires financial institutions from which the Treasury is purchasing troubled assets through direct purchases to meet appropriate standards for executive compensation and corporate governance. On October 20, 2008 (73 FR 62205), the Department of the Treasury (Treasury) published an interim final rule (October Interim Final Rule) in 31 CFR Part 30, promulgated pursuant to sections 101(a), 101(c)(5), and 111(b) of EESA, providing guidance on the executive compensation provisions applicable to participants in the Troubled Asset Relief Program (TARP) Capital Purchase Program (CPP).

Section 111(b)(2)(A) of EESA requires “limits on compensation that exclude incentives for senior executive officers of a financial institution to take unnecessary and excessive risks that threaten the value of the financial institution during the period that the Secretary holds an equity or debt position in the financial institution.” With respect to section 111(b)(2)(A) of EESA for purposes of participation in the CPP, the October Interim Final Rule requires the financial institution’s compensation committee to identify the features in the financial institution’s senior executive officer (SEO) incentive compensation arrangements that could lead SEOs to take unnecessary and excessive risks that could threaten the value of the financial institution. The October Interim Final Rule requires that the compensation committee review the SEO incentive compensation

arrangements with the financial institution's senior risk officers, or other personnel acting in a similar capacity, to ensure that SEOs are not encouraged to take such risks. The October Interim Final Rule requires such review promptly, and in no case more than 90 days, after the purchase under the CPP.

The October Interim Final Rule also requires that the compensation committee meet at least annually with the financial institution's senior risk officers to discuss and review the relationship between the financial institution's risk management policies and practices and the SEO incentive compensation arrangements.

In addition, the October Interim Final Rule requires the compensation committee to certify that it has completed the reviews of the SEO incentive compensation arrangements as outlined above. The October Interim Final Rule also provides that financial institutions with securities registered with the Securities and Exchange Commission (SEC) pursuant to the federal securities laws should provide these certifications in the Compensation Discussion and Analysis required pursuant to Item 402(b) of Regulation S-K under the federal securities laws (17 CFR 229.402). Those financial institutions that do not have securities registered with the SEC pursuant to the federal securities laws are required to provide the certifications to their primary regulatory agency.

Section 111(b)(2)(B) of EESA requires "a provision for the recovery by the financial institution of any bonus or incentive compensation paid to a senior executive officer based on statements of earnings, gains, or other criteria that are later proven to be materially inaccurate." With respect to section 111(b)(2)(B) of EESA for purposes of participation in the CPP, the October Interim Final Rule provides that the SEO bonus and

incentive compensation paid during the period that the Treasury holds an equity or debt position acquired under the CPP must be subject to recovery or “clawback” by the financial institution if the payments were based on materially inaccurate financial statements and any other materially inaccurate performance metric criteria.

Section 111(b)(2)(C) of EESA requires “a prohibition on the financial institution making any golden parachute payment to its senior executive officer during the period that the Secretary holds an equity or debt position in the financial institution.” With respect to section 111(b)(2)(C) of EESA for purposes of participation in the CPP, the October Interim Final Rule prohibits a financial institution from making any golden parachute payment to a SEO during the period the Treasury holds an equity or debt position acquired under the CPP. A golden parachute payment means any payment in the nature of compensation to (or for the benefit of) a SEO made on account of an applicable severance from employment to the extent the aggregate present value of such payments equals or exceeds an amount equal to three times the SEO’s base amount.

The October Interim Final Rule sets forth an additional standard for executive compensation and corporate governance under section 111(b)(1) of EESA. Under this standard, the financial institution must agree, as a condition to participate in the CPP, that no deduction will be claimed for remuneration for federal income tax purposes in excess of \$500,000 for each SEO that would not be deductible if section 162(m)(5) of the Internal Revenue Code applied to the financial institution.

II. This Interim Rule.

This interim final rule provides further guidance on the executive compensation and corporate governance provisions of section 111(b) of EESA with respect to the CPP.

Specifically, this interim final rule provides a technical amendment and two clarifications to the October Interim Final Rule and provides reporting and recordkeeping requirements regarding the executive compensation requirements in the October Interim Final Rule and this interim final rule. They are written in question and answer format.

This interim final rule amends § 30.5(b) of the October Interim Final Rule to require that the certifications required under the October Interim Final Rule of the compensation committee of a financial institution whose securities are registered with the SEC under the federal securities laws be provided in the Compensation Committee Report required pursuant to Item 407(e) of Regulation S-K under the federal securities laws (17 CFR 229.407). The October Interim Final Rule had required that these certifications be provided in the Compensation Discussion and Analysis required pursuant to Item 402 of Regulation S-K under the federal securities laws (17 CFR 229.402). Two comments on the October Interim Final Rule suggested that these certifications be provided in the Compensation Committee Report rather than the Compensation Discussion and Analysis. The Treasury believes this amendment is appropriate because the compensation committee prepares the Compensation Committee Report and is making the required certifications. Management of the financial institution prepares the Compensation Discussion and Analysis, which does not directly address the operations and functions of the compensation committee.

This interim final rule clarifies § 30.6, which requires that CEO bonus and incentive compensation paid during the period that the Treasury holds an equity or debt position acquired under the CPP be subject to recovery or “clawback” by the financial institution if the payments were based on materially inaccurate financial statements and

any other materially inaccurate performance metric criteria. One comment on the October Interim Final Rule sought clarification on the application of this provision to SEO bonus and incentive compensation earned, but not paid, during the Treasury holding period. The Treasury believes that it is appropriate that any bonus and incentive compensation earned during the Treasury holding period should be subject to clawback and this interim final rule clarifies that bonus and incentive compensation is considered paid to a SEO during the Treasury holding period when the SEO obtains a legally binding right to that payment during the Treasury holding period.

This interim final rule clarifies § 30.7, which compares the clawback provision under section 111(b)(2)(B) of EESA with the clawback provision in section 304 of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley) (Pub. Law No. 107-204). This interim final rule clarifies that the comparison to the Sarbanes-Oxley provision includes both the statutory provision under EESA as well as the regulations issued under this statutory provision in the October Interim Final Rule.

In addition, this interim final rule establishes a compliance reporting regime relating to the executive compensation requirements set forth in the October Interim Final Rule and this interim final rule. Under this interim final rule, the principal executive officer of the financial institution must provide the following certifications to the Chief Compliance Officer (CCO) of the TARP, with copies to the applicable transfer agent under the CPP. First, within 120 days of the closing date of the Securities Purchase Agreement between the financial institution and the Treasury, the principal executive officer of the financial institution is required to certify that the compensation committee of the financial institution has reviewed the SEO incentive compensation arrangements

with the senior risk officers of the financial institution to ensure that the SEO incentive compensation arrangements do not encourage the SEOs to take unnecessary and excessive risks that could threaten the value of the financial institution.

Second, within 135 days of the completion of each fiscal year during any part of which the financial institution has participated in the CPP, the principal executive officer of the financial institution is required to certify that the compensation committee has met at least once during the prior fiscal year with the senior risk officers of the financial institution to discuss and review the relationship between the risk management policies and practices of the financial institution and the SEO incentive compensation arrangements; the compensation committee has certified to this review; the financial institution has required that SEO bonus and incentive compensation be subject to recovery or “clawback” by the financial institution if the payments were based on materially inaccurate financial statements or any other materially inaccurate performance metric criteria; the financial institution has prohibited any golden parachute payment to a SEO; the financial institution has instituted procedures to limit the deduction for remuneration for federal income tax purposes to \$500,000 for each SEO for the most recently ended fiscal year as if section 162(m)(5) of the Internal Revenue Code applied to the financial institution; and certain named individuals are the SEOs for the current fiscal year based on the compensation of such individuals during the prior fiscal year.

Third, in addition to the certification required in the paragraph above, within 135 days of the completion of each annual fiscal year of the financial institution after the first fiscal year during any part of which the financial institution has participated in the CPP, the principal executive officer of the financial institution is required to certify that the

financial institution in fact has limited the deduction for remuneration for federal income tax purposes to \$500,000 for each SEO for the fiscal year prior to the most recently ended fiscal year as if section 162(m)(5) of the Internal Revenue Code applied to the financial institution.

If the principal executive officer is unable to provide any of these certifications in a timely manner, the principal executive officer is required to provide the CCO an explanation of the reason such certification has not been provided.

This interim final rule also provides that the financial institution is required to preserve appropriate documentation and records to substantiate each certification for no less than six years after the date of the certification, the first two years in an easily accessible place. This interim final rule provides that the financial institution is required to furnish promptly to the CCO such documentation and records as requested by the representative of the CCO.

This interim final rule also affirms that any individual or entity making or providing false information or certifications to the Treasury relating to a purchase under section 111 of EESA or required under the October Interim Final Rule or this interim final rule is subject to the criminal penalties under title 18 of the U.S. Code or other provision of federal criminal law.

This interim final rule amends and supplements the provisions of the October Interim Final Rule. As such, this rule applies to all financial institutions participating in the CPP.

III. Procedural Requirements.

Justification for Interim Rulemaking

This interim final rule is promulgated pursuant to EESA, the purpose of which is to immediately provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States. Specifically, this interim final rule implements certain provisions of section 111 of EESA, which sets forth executive compensation standards for financial institutions that sell troubled assets to the Treasury under EESA. The statute provides that the Secretary may issue guidance and regulations to carry out these provisions and that such guidance and regulations may be effective upon issuance.

Financial institutions must have timely and reliable information with respect to the applicable executive compensation and corporate governance rules that apply under EESA programs. Accordingly, because EESA authorizes section 111 guidance to be immediately effective and because of exigencies in the financial markets, the Treasury finds that it would be contrary to the public interest, pursuant to 5 U.S.C. 553(b)(B), to delay the issuance of this interim final rule pending an opportunity for public comment, and good cause exists to dispense with this requirement. For the same reasons, pursuant to 5 U.S.C. 553(d)(3), the Treasury has determined that there is good cause for the interim final rule to become effective immediately upon publication. While this regulation is effective immediately upon publication, the Treasury is inviting public comment on the regulation during a 30-day period and will consider all comments in developing a final rule.

Regulatory Planning and Review

The interim final rule does not meet the criteria for a “significant regulatory action” as defined in Executive Order 12866. Therefore, the regulatory review procedures contained therein do not apply.

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required, this interim final rule is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C chapter 6).

Paperwork Reduction Act

The information collection contained in this interim final rule has been reviewed and approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. chapter 35) and assigned OMB control number 1505-0211. Under the Paperwork Reduction Act, an agency may not conduct or sponsor, and an individual is not required to respond to, a collection of information unless it displays a valid OMB control number. Comments on the collection of information should be sent to the Desk Officer for the Department of Treasury, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503 (or by e-mail to oir-submission@omb.eop.gov) with a copy to Executive Compensation Comments, Office of Financial Institutions Policy, Room 1418, Department of the Treasury, 1500 Pennsylvania Avenue, NW, Washington, DC 20220.

List of Subjects in 31 CFR Part 30

Executive compensation, Troubled assets.

For the reasons set out in the preamble, Title 31 of the CFR is amended as follows:

PART 30 – TARP CAPITAL PURCHASE PROGRAM

1. The authority citation for Part 30 continues to read as follows:
Authority: Section 111(b) of the Emergency Economic Stabilization Act of 2008, Div. A of Pub. L. 110-343; 122 Stat 3765.

2. Revise § 30.5(b) to read as follows:

§ 30.5 Q-5: How should the financial institution comply with the certification requirements under Q-3 of this section?

* * * * *

(b) Location. For financial institutions with securities registered with the SEC pursuant to the federal securities laws, the compensation committee, or a committee acting in a similar capacity, should provide the certifications in the Compensation Committee Report required pursuant to Item 407(e) of Regulation S-K under the federal securities laws (17 CFR 229.407).

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3. Revise § 30.6, by adding the following sentence at the end of the paragraph to read as follows:

§ 30.6 Q-6: What actions are necessary for a financial institution participating in the CPP to comply with section 111(b)(2)(B) of EESA?

* * * . For this purpose, bonus and incentive compensation is paid to a SEO when the SEO obtains a legally binding right to that payment if the legally binding right occurs during any period that the Treasury holds an equity or debt position under the CPP.

4. Revise the section heading of §30.7 to read as follows:

§ 30.7 Q-7: How do the standards and regulations under section 111(b)(2)(B) of EESA differ from section 304 of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley) (Pub. Law No. 107-204)?

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5. Add § 30.12 to read as follows:

§ 30.12 Q-12: What actions are necessary for a financial institution participating in the CPP to comply with the executive compensation reporting and recordkeeping requirements?

(a) Reporting Requirements. (1) General. The PEO (or person acting in a similar capacity) of the financial institution participating in the CPP is required to provide to the Chief Compliance Officer (CCO) of TARP, the following certifications with respect to the compliance of the financial institution with section 111(b) of EESA as implemented under this part. The PEO of the financial institution is also required to provide copies of these certifications to the transfer agent under the CPP. To the extent that the PEO (or person acting in a similar capacity) of the financial institution is unable to provide any of these certifications in a timely manner, the PEO is required to provide the CCO an explanation of the reason such certification has not been provided. These certifications are in addition to the compensation committee certifications required by § 30.3 (Q-3).

(2) 120 Day Certification. Within 120 days of the closing date of the agreement between the financial institution and the Treasury under the CPP, the PEO (or person acting in a similar capacity) of the financial institution is required to provide a certification similar to the following to the CCO:

“I, [identify the principal executive officer of the financial institution], certify, based on my knowledge, that the compensation committee of [identify financial institution] reviewed within 90 days of the Department of the Treasury’s purchase of the [identify financial instrument] of [identify financial institution] under the Capital Purchase Program the incentive compensation arrangements of the senior executive officers, as defined in subsection 111(b)(3) of the Emergency Economic Stabilization Act of 2008 and regulations and guidance issued thereunder (SEOs), of [identify financial institution] with senior risk officers of [identify financial institution] to ensure that the SEO incentive compensation arrangements do not encourage the SEOs to take unnecessary and excessive risks that threaten the value of [identify financial institution].”

(3) First Fiscal Year Certification. Within 135 days of the completion of the first annual fiscal year of the financial institution during any part of which the financial institution has participated in the CPP, the PEO (or person acting in a similar capacity) of the financial institution is required to provide a certification similar to the following to the CCO:

“I, [identify the principal executive officer of the financial institution], certify, based on my knowledge, that:

- (i) The compensation committee of [identify financial institution] has met at least once during the most recently ended fiscal year with senior risk officers to discuss and review the relationship between the risk management policies and practices of [identify financial institution] and the incentive compensation arrangements of the senior executive officers, as defined in subsection 111(b)(3) of the Emergency Economic Stabilization Act of 2008 (EESA) and regulations and guidance issued

thereunder (SEOs), to ensure that the SEO incentive compensation arrangements do not encourage the SEOs to take unnecessary and excessive risks that threaten the value of [identify financial institution];

(ii) The compensation committee of [identify financial institution] has certified to the review of the SEO incentive compensation arrangements required under (i) above;

(iii) [Identify financial institution] has required that SEO bonus and incentive compensation be subject to recovery or “clawback” by [identify financial institution] if the payments were based on materially inaccurate financial statements or any other materially inaccurate performance metric criteria;

(iv) [Identify financial institution] has prohibited any golden parachute payment, as defined in the regulations and guidance issued under section 111(b) of EESA, to a SEO;

(v) [Identify financial institution] has instituted controls and procedures to limit the deduction for remuneration for federal income tax purposes to \$500,000 for each SEO for the most recently ended fiscal year as if section 162(m)(5) of the Internal Revenue Code applied to [identify financial institution]; and

(vi) The following individuals are the SEOs for the current fiscal year: [identify names and titles of SEOs of financial institution].”

(4) Years Following First Fiscal Year Certification. Within 135 days of the completion of each annual fiscal year of the financial institution after the first fiscal year during any part of which the financial institution has participated in the CPP, the PEO (or

person acting in a similar capacity) of the financial institution is required to provide a certification similar to the following to the CCO:

“I, [identify the principal executive officer of the financial institution], certify, based on my knowledge, that:

(i) The compensation committee of [identify financial institution] has met at least once during the most recently ended fiscal year with senior risk officers to discuss and review the relationship between the risk management policies and practices of [identify financial institution] and the incentive compensation arrangements of the senior executive officers, as defined in subsection 111(b)(3) of the Emergency Economic Stabilization Act of 2008 (EESA) and regulations and guidance issued thereunder (SEOs), to ensure that the SEO incentive compensation arrangements do not encourage the SEOs to take unnecessary and excessive risks that threaten the value of [identify financial institution];

(ii) The compensation committee of [identify financial institution] has certified to the review of the SEO incentive compensation arrangements required under (i) above;

(iii) [Identify financial institution] has required that SEO bonus and incentive compensation be subject to recovery or “clawback” by [identify financial institution] if the payments were based on materially inaccurate financial statements or any other materially inaccurate performance metric criteria;

(iv) [Identify financial institution] has prohibited any golden parachute payment, as defined in the regulations and guidance issued under section 111(b) of EESA, to a SEO;

(v) [Identify financial institution] has instituted controls and procedures to limit the deduction for remuneration for federal income tax purposes to \$500,000 for each SEO for the most recently ended fiscal year as if section 162(m)(5) of the Internal Revenue Code applied to [identify financial institution];

(vi) [Identify financial institution] has limited the deduction for remuneration for federal income tax purposes to \$500,000 for each SEO for the fiscal year prior to the most recently ended fiscal year as if section 162(m)(5) of the Internal Revenue Code applied to [identify financial institution]; and

(vii) The following individuals are the SEOs for the current fiscal year: [identify names and titles of SEOs of financial institution].”

(b) Recordkeeping Requirements. The financial institution is required to preserve appropriate documentation and records to substantiate each certification required under paragraph (a) of this § 30.12 (Q-12) for a period of not less than six years after the date of the certification, the first two years in an easily accessible place. The financial institution is required to furnish promptly to the TARP CCO legible, true, complete, and current copies of the documentation and records that are required to be preserved under paragraph (b) of this § 30.12 (Q-12) that are requested by the representative of the TARP CCO.

(c) Penalties for Making or Providing False or Fraudulent Statements. Any individual or entity which provides information or makes a certification to the Treasury that is relating to purchases under section 111 of EESA or required pursuant to 31 CFR Part 30 is subject to 18 U.S.C. 1001, which generally prohibits the making of any false or fraudulent statement to a federal officer. Upon receipt of information indicating that any

individual or entity has violated any provision of title 18 of the U.S. Code or other provision of federal law, the Treasury shall refer such information to the Department of Justice and the Special Inspector General provided for under EESA.

Dated: _____

Neel Kashkari
Interim Assistant Secretary for Financial Stability