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Practitioners Watch for How Far EESA's Limits on Executive Compensation Will Reach

The impact of the Emergency Economic Stabilization Act of 2008 (EESA) on executive compensation and benefits is just starting to unfold, tax professionals said on October 16. The Treasury Department and the IRS have issued extensive guidance in recent days to implement the \$700 billion financial markets rescue plan. Many provisions limit or restrict executive compensation for participating institutions. The practitioners spoke during a teleconference sponsored by American Bar Association Joint Committee on Employee Benefits.

Rescue Programs

The Treasury Department has developed four rescue programs under EESA. The Treasury may make direct purchases of troubled assets through the Troubled Asset Relief Program (TARP). The department may also purchase troubled assets via auction through the Troubled Asset Auction Program (TAAP). The Capital Purchase Program (CPP) is designed to recapitalize troubled financial institutions. Finally, the Treasury is developing the Programs for Systematically Significant Failing Institutions (PSSFI), which will be administered on a case by case basis. The IRS released guidance on the executive compensation provisions of TAAP on October 15.

"From the outset, there was a belief (in Congress) that some type of executive compensation restrictions ought to be part of the legislation," Mark A. Borges, Compensia, Inc., Corte Madera, Calif., noted. While EESA includes limits and restrictions on executive compensation, the rules differ for the various programs (TARP, TAAP, CPP, PSSFI), William F. Sweetnam, Jr., partner, Groom Law Group, Washington, D.C. added.

Under TAAP, the financial institution may not enter into any new employment contract that provides a golden parachute to a senior executive officer in the event of the executive's involuntary termination or in connection with the institution's bankruptcy. TAAP also limits the deductibility of compensation under Code Sec. 162(m).

Similar restrictions apply to the CPP, including "clawback" of bonuses and incentive compensation. The Treasury Department is still developing the PSSFI.

"Nine major financial institutions have already agreed to participate in CPP," Borges said. The impact of EESA may be even more widespread, Borges predicted. "It is possible that a large number of additional financial institutions will be eligible to participate as well."

Martha N. Steinman, co-chair, Global Compensation and Benefits, Dewey & LeBoeuf, New York, and moderator of the teleconference, had previously told CCH that there will likely be a "trickle down" effect from EESA. "There will be significant pressure on all public companies to take another look at their executive compensation arrangements."

Pension Plans

Pension plans may also have invested in troubled assets, Sweetnam, former Treasury Office of Tax Policy benefits tax counsel, noted. "Pension plans are not specifically enumerated or specifically excluded (under EESA)," he said. "I think there is authority for Treasury to purchase assets from pension plans but I question if that will be one of the Treasury Department's top priorities."

CCH asked the Treasury Department to confirm published reports that the government is focused on helping financial institutions at this time. CCH did not receive a response by press time.

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