

**HOUSE FINANCIAL SERVICES COMMITTEE APPROVES ALTERNATIVE  
EXECUTIVE COMPENSATION LEGISLATION; DEMANDS COMPANY-SPECIFIC  
TARP DOCUMENTS**

On March 26, the House Financial Services Committee (the “Committee”) approved HR 1664, legislation that would amend the executive compensation provisions of the Emergency Economic Stabilization Act of 2008 (the “EESA”) to “prohibit unreasonable and excessive compensation not based on performance standards” awarded to an employee or executive by a recipient of capital investments from the Troubled Assets Relief Program (the “TARP”) or certain federal loan programs described in more detail below so long as such a capital investment remains outstanding. Once TARP funds were repaid, an entity would no longer be subject to the restrictions in the bill.

The legislation, which is yet another response to the bonus controversy, takes a dramatically different approach from that of the tax bill passed by the House on March 19 or the tax legislation proposed by Senate Finance Committee Chairman Baucus (D-MT) and Senior Republican Member Grassley (R-IA). Rather than taxing bonuses awarded to executives of TARP recipients at prohibitively high levels, HR 1664 would:

- Prohibit any financial institution (as that term is defined broadly in the EESA) receiving a TARP capital investment, Fannie Mae, Freddie Mac or a federal home loan bank from making a “compensation payment” under any new or pre-existing arrangement, if the payment is “unreasonable or excessive.” This term is to be defined under standards to be established by federal financial institution regulatory agencies in cooperation with the Secretary of the Treasury and the TARP Congressional Oversight Panel. The legislation does not provide further direction to the regulatory agencies or the Secretary with respect to defining “unreasonable or excessive” compensation. This means that, in contrast to the inflexible approach of the House and Senate taxation bills, this legislation would allow regulatory and funding authorities the discretion to permit potentially large payouts in compensation if such payouts are financially justifiable and if restricting them might be adverse to the government's interests.
- Prohibit any compensation payment that includes a “bonus, retention payment, or other supplemental payment that is not directly based on performance-based measures” under standards established by the bank regulators, the Secretary of the Treasury and the TARP Congressional Oversight Panel. The bill provides that these performance-based standards include (1) stability of the institution and its ability to repay the TARP funds; (2) the employee's performance; (3) overall firm adherence to “appropriate risk management requirements”; and (4) other “shareholder and taxpayer accountability standards.” This guidance also allows significant flexibility in determining whether a bonus payment is permissible.

- Require TARP recipients, within 90 days of the date of enactment of the legislation, to file a report with the Treasury Department listing separately (but not identifying) the number of employees receiving compensation in excess of \$500,000, \$1 million, \$2 million, \$3 million and \$5 million in fiscal year 2009.

The legislation would not cover compensation and bonuses paid prior to its date of enactment. Also, entities participating in the Treasury Department's newly-established Public-Private Investment Program would not be subject to the restrictions.

Since there is growing discomfort in Congress regarding the use of the tax laws to "punish" TARP and other federal assistance recipients, and there is concern in the financial sector about the possible adverse impacts of inflexible approaches to the bonus situation, this legislation may be appealing to members of Congress looking for a way to address the bonus problem without the risk of exacerbating the current economic crisis. However, whether this bill or something like it is finally adopted and sent to President Obama will depend on how the Democratic leadership in the House and Senate reacts to it, whether the House Ways and Means and Senate Finance Committees are prepared to give up jurisdictional control of the issue in favor of a more flexible approach to the problem and whether Congress and the Obama Administration perceive that there is still sufficient public outrage over executive compensation issues to necessitate a legislative response.

The Committee vote on this legislation split more or less along party lines, with most Republicans opposed. We note that at the same March 26 meeting, the Committee voted unanimously to require Treasury Secretary Geithner to release to the House within 14 days "all documents, records and communications regarding American International Group (AIG)." The chief sponsor of this resolution stated that demand includes materials regarding

- (1) negotiation(s) concerning the controlled break-up of AIG into at least three government-controlled divisions;
- (2) negotiation(s) concerning the need for an additional \$30 billion from the TARP funds;
- (3) government communications and authorizations for payment of pre-existing bonus contracts with AIG executives.

The Committee's discussion of this "resolution of inquiry," which was initiated by Republican members, strongly implied that these records would be made public. If the House passes this resolution, and the Secretary of the Treasury complies with it, the precedent it sets will effectively create a new risk factor for TARP and other federal assistance recipients--that Treasury or other agencies will be unable to protect confidential business information required to obtain funding from being disclosed to Congress and in turn to the public.

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If you have any questions about this memorandum, please contact any of the members of the Willkie Farr & Gallagher Credit Crisis Task Force attached, or the attorney with whom you regularly work. The Task Force (which includes UK insolvency professionals from our strategic ally, Dickson Minto W.S., and attorneys from our European offices) was formed to respond to client questions and provide targeted advice in connection with the credit crisis.

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