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Treasury Requires TARP Recipients to Adopt Excessive or Luxury Expenditures Policy

On June 15, 2009, the U.S. Department of the Treasury ("Treasury") announced an interim final rule regarding standards for executive compensation and corporate governance practices for those entities receiving financial assistance under the Troubled Asset Relief Program ("TARP"). Although the interim final rule contains many new standards for TARP recipients, the focus of this article is the requirement that TARP recipients adopt an "excessive or luxury expenditures policy."

The Emergency Economic Stabilization Act of 2008 requires a TARP recipient's board of directors to put in place a company-wide policy regarding "excessive or luxury expenditures." The interim final rule defines the term "excessive or luxury expenditures" to mean excessive expenditures on any of the following:

(1) entertainment or events,

(2) office and facility renovations,

(3) aviation or other transportation services, or

(4) other activities or events that are not reasonable expenditures for staff development, reasonable performance incentives, or other similar measures conducted in the normal course of the TARP recipient's business operations.

The interim final rule requires that the board of directors of each TARP recipient make the determination of exactly what constitutes "excessive and luxury expenditures." Some expenditures that have received recent press attention as excessive or luxury expenditures include resort trips and use of corporate jets; however, this is obviously a subjective determination. In addition, the interim final rule requires that the board of directors of each TARP recipient do the following before the later of ninety days after the closing date of the agreement between the Treasury and the TARP recipient or September 13, 2009:

(1) adopt an excessive or luxury expenditures policy,

(2) file the policy with the Treasury, and

(3) post the text of the policy on the TARP recipient's Internet website (if a website is maintained).

The policy must include clear standards to ensure appropriate review and approval of potentially excessive and luxury expenditures. At a minimum, the policy should (1) identify the types and categories of expenses prohibited or requiring prior approval; (2) adopt approval procedures for those expenses requiring prior approval; (3) mandate principal executive officer and principal financial officer certification of the prior approval of any expenditures requiring the prior approval of any senior executive officers, other similar executive officers or the board of directors; (4) mandate prompt internal reporting of any violation of the policy; and (5) mandate accountability for adherence to the policy.

It is important that every TARP recipient adopt an excessive or luxury expenditures policy and comply with the steps set forth above. In addition, the board of directors of every TARP recipient must take the further step of ensuring the prompt implementation of the policy, as well as ongoing compliance. The FDIC and other bank regulatory agencies have indicated that they will be reviewing compliance with all TARP requirements during their regular examinations of TARP recipients. As a result of the new interim final rule, an appropriate, board-approved excessive or luxury expenditures policy will likely be one more item on the examiner checklist.

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