

Part III – Administrative, Procedural, and Miscellaneous

Guidance on the Application of § 409A(a) to Changes to Nonqualified Deferred Compensation Plans to Comply with an Advisory Opinion of the Office of the Special Master for TARP Executive Compensation

Notice 2009-92

I. Introduction

This notice provides that, subject to certain conditions, the compliance by a financial institution (TARP recipient) that has received financial assistance under the Troubled Asset Relief Program (TARP) with an advisory opinion of the Office of the Special Master for TARP Executive Compensation (the Special Master) determining that changing the time or form of payment of compensation to a service provider of the TARP recipient, or conditioning payment upon a TARP-related condition such as the prior repayment of some or all of the financial assistance, or both, is necessary for the payment or arrangement to be consistent with the standards set forth in Treasury's Interim Final Rule for TARP Compensation and Corporate Governance (74 FR 28394), will not result in a failure to comply with the requirements of § 409A(a) of the Internal Revenue Code (Code). This notice applies only to TARP recipients and the service providers of such TARP recipients and only to the extent that the compensation paid by the TARP recipient to a service provider of that TARP recipient is addressed by an advisory opinion of the Special Master issued after September 30, 2009. The Treasury Department and the IRS intend to amend the regulations under § 409A to incorporate guidance set forth in this notice as necessary.

II. Background

A. Section 409A of the Code

Section 409A prescribes certain requirements applicable to nonqualified deferred compensation plans. If a plan does not meet those requirements, participants in the plan are required to include in income immediately compensation otherwise deferred under the plan and pay taxes on such income, including an additional 20% tax and a tax generally based upon the underpayment interest that would have accrued had the amount been includible in income when first deferred or, if later, vested. As provided by § 409A(a)(1)(A)(i), a nonqualified deferred compensation plan must comply with the requirements of § 409A(a) both in form and in operation. Section 409A(e) provides that the Secretary of the Treasury (Secretary) shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of § 409A. On April 17, 2007, the Treasury Department and the IRS issued final regulations under § 409A that apply to taxable years beginning on or after January 1, 2009 (72 Fed. Reg. 19234).

Section 409A(a)(4) provides certain rules with respect to making an election to defer compensation under a nonqualified deferred compensation plan. Section 409A(a)(4)(B)(i) provides generally that a plan may permit compensation for services performed during a taxable year to be deferred at the participant's election only if the election to defer such compensation is made not later than the close of the preceding taxable year or at such other time as is provided in regulations. Section 409A(a)(4)(C) provides that a nonqualified deferred

compensation plan that permits, under a subsequent election (a subsequent deferral election), a delay in a payment or a change in the form of payment must require that (i) such election will not take effect until at least 12 months after the date on which the election is made, (ii) in the case of an election related to a payment not made on account of disability, death or the occurrence of an unforeseeable emergency, the payment governed by the election will be deferred for a period of not less than five years from the date the payment would otherwise have been made, and (iii) any election related to a payment to be made at a specified time or pursuant to a fixed schedule will be made not less than 12 months prior to the date of the first scheduled payment.

Section 1.409A-2(b)(7) of the Income Tax Regulations provides that a payment may be delayed to a date after a designated payment date under certain circumstances, and that in these circumstances the applicable plan provision will not fail to meet the requirements of establishing a permissible payment event and the delay in the payment will not constitute a subsequent deferral election, as long as the service recipient treats all payments to similarly situated service providers on a reasonably consistent basis. Such circumstances include (i) the delay of payments subject to § 162(m) to the extent the service recipient reasonably anticipates that if the payments were made as scheduled, the service recipient's deduction with respect to such payments would not be permitted due to the application of § 162(m), (ii) the delay of payments to the extent the service recipient reasonably anticipates that making the payments will violate Federal securities laws or other applicable law, and (iii) such other events

and conditions as the Commissioner may prescribe in generally applicable guidance published in the Internal Revenue Bulletin.

Section 409A(a)(3) provides that, except as provided in regulations issued by the Secretary, a nonqualified deferred compensation plan may not permit the acceleration of the time or schedule of payment of compensation deferred under the plan. Section 1.409A-3(j) further provides that a nonqualified deferred compensation plan may not permit the acceleration of the time or schedule of any payment, and no such accelerated payment may be made whether or not provided for under the terms of the plan, except pursuant to one of the exceptions set forth under such section.

Under § 1.409A-1(b)(4), an amount that constitutes a short-term deferral is not a deferral of compensation for purposes of § 409A. Generally, an amount must be paid not later than the end of the applicable 2 ½ month period (as defined in § 1.409A-1(b)(4)) in order to qualify as a short-term deferral. The applicable 2 ½ month period is the period ending on the 15th day of the third month following the later of the end of the service provider's first taxable year in which the right to payment is no longer subject to a substantial risk of forfeiture or the end of the service recipient's first taxable year in which such right is no longer subject to such risk. Under § 1.409A-1(b)(4)(ii), a payment that otherwise qualifies as a short-term deferral but is made after the applicable 2 ½ month period may continue to so qualify if (i) it was administratively impracticable to make the payment by the end of such period and, as of the date the legally binding right to the compensation arose, such impracticability was unforeseeable,

provided that the payment is made as soon as administratively practicable or (ii) making such payment by the end of such period would have jeopardized the ability of the service recipient to continue as a going concern, provided that the payment is made as soon as it would no longer have such effect. In addition, such a payment may continue to so qualify if the service recipient reasonably anticipates that § 162(m) would disallow its deduction for such payment and, at the time the legally binding right to the payment arose, a reasonable person would not have anticipated such disallowance, so long as the payment is made as soon as reasonably practicable following the first date on which the service recipient anticipates or reasonably should anticipate that, if it made the payment on such date, § 162(m) would not limit its ability to deduct the payment.

B. The Troubled Asset Relief Program (TARP)

In October, 2008, the Department of the Treasury (Treasury) established the TARP under the Emergency Economic Stabilization Act of 2008, as amended (12 U.S.C. 5021 et seq.) (EESA). EESA provided immediate authority and facilities that the Secretary of the Treasury (Secretary) could use to restore liquidity and stability to the financial system. Section 101(a) of EESA authorizes the Secretary to establish the TARP to “purchase, and to make and fund commitments to purchase, troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary, and in accordance with this Act and policies and procedures developed and published by the Secretary.” Section 101(c) of EESA authorizes the Secretary to take such actions as the Secretary deems necessary to carry out the authorities in EESA, including

without limitation issuing such regulations and other guidance as may be necessary or appropriate to define terms or carry out the authorities or purposes of EESA.

The American Recovery and Reinvestment Act of 2009 (ARRA) was signed into law on February 17, 2009. Title VII of Division B of ARRA amended in its entirety section 111 of EESA. Section 111 of EESA, both as originally promulgated and as amended, provides that certain entities that receive financial assistance from Treasury under the TARP (TARP recipients) will be subject to specified executive compensation and corporate governance standards to be established by the Secretary.

C. The Interim Final Rule and the Office of the Special Master for TARP Executive Compensation

On June 15, 2009, Treasury issued an Interim Final Rule setting forth the rules on executive compensation and corporate governance applicable to TARP recipients (74 FR 28394). The rules apply solely to TARP recipients, as defined in §30.1 (Q-1) of the Interim Final Rule. Section 30.16 (Q-16) of the Interim Final Rule establishes an Office of the Special Master for TARP Executive Compensation (the Special Master). Sections 30.11 and 30.16(a) (Q-11 and Q-16(a)) provide that the Special Master must approve any compensation payments to, and the compensation structure of, certain employees of a TARP recipient receiving exceptional assistance (Exceptional Assistance Recipient). The employees affected generally are the employees subject to the bonus payment limitations under section 111(b)(3)(D) of EESA, who generally are the TARP recipient's senior executive officers (SEOs) whose compensation is

subject to disclosure under Securities and Exchange Commission rules, and a number (determined by the level of TARP assistance received) of the next most highly compensated employees. In addition, the Special Master must approve the compensation structures of any other executive officers of the Exceptional Assistance Recipient, and certain other most highly compensated employees. Section 30.16(a)(3) (Q-16(a)(3)) provides that this determination is based upon whether the compensation structure for the affected employee, including in certain instances the amount payable or potentially payable under such compensation structure, will or may result in payments that are inconsistent with the purposes of section 111 of EESA or TARP, or are otherwise contrary to the public interest. For TARP recipients that are not Exceptional Assistance Recipients and their employees, and for other employees or payments to employees of Exceptional Assistance Recipients (such as payments not subject to section 111 of EESA), section 30.16(a)(4) (Q-16(a)(4)) provides that a TARP recipient or TARP recipient employee may request an advisory opinion from the Special Master as to whether a compensation structure is, or will or may result in payments that are, inconsistent with the purposes of EESA or TARP, or otherwise contrary to the public interest. Section 30.16(a)(4) (Q-16(a)(4)) further provides that the Special Master may render such an advisory opinion at his own initiative. An advisory opinion is not binding upon a TARP recipient receiving the opinion, but, under § 30.16(c)(3) (Q-16(c)(3)), may be relied upon by that TARP recipient and its employees, if that TARP recipient and its employees comply with the advisory opinion in all respects.¹

¹ For purposes of this notice, an advisory opinion includes any portion of a determination with

D. Interaction Between Advisory Opinions and § 409A

To render a favorable advisory opinion, the Special Master may determine that changes to a compensation arrangement, including the time and form of payment, are necessary for the arrangement, or payments under the arrangement, to be consistent with the purposes of EESA or TARP, and otherwise consistent with the public interest. The Special Master may also determine that to be consistent with the purposes of EESA or TARP, and otherwise consistent with the public interest, a payment must be subject to certain TARP-related conditions, such as the prior repayment of some or all of the financial assistance received by the TARP recipient. The Special Master and TARP recipients have raised the issue of the application of § 409A(a) to such changes in the time and form of payment of a compensation arrangement and of the tax consequences under that section of adherence to conditions that may apply. Specifically, TARP recipients have noted that compliance with changes as part of the overall restructuring of a compensation arrangement would often result in delays in payments and possibly acceleration of certain payments that would not comply with § 409A(a). Thus, in the absence of the guidance provided for in this notice, the TARP recipient would be forced to choose between (i) making a payment under the original terms of an agreement that the Special Master determined to be inconsistent with the purposes of EESA or TARP, or

respect to certain employees of Exceptional Assistance Recipients (see §30.16 Q-16(a)(3)(i) and (ii)), to the extent such portion of the determination addresses compensation arrangements or rights to payments that are not required to be approved by the Special Master under §30.16(a)(3)(i) or (ii) (Q-16(a)(3)(i) or (ii)) of the Interim Final Rule, for example because the determination addresses amounts payable pursuant to valid written employment contracts not subject to section 111 of EESA by virtue of the grandfathering rule of section 111(b)(3)(D)(iii) of EESA.

otherwise contrary to the public interest, or (ii) instead making a payment that the Special Master has determined to be consistent with the purposes of EESA or TARP, and otherwise to be consistent with the public interest, but that also would result in severe adverse tax consequences to the individual receiving the payment. The application of § 409A(a) in these circumstances would produce a disincentive for TARP recipients to comply with the Special Master's advisory opinions and act in accordance with the public interest, severely diminishing the Special Master's ability to fulfill his intended role and damaging the entire TARP program. Furthermore, in these circumstances the changes in the time and form of payment result from a determination by the Special Master that the original time and form of payment terms were inconsistent with the purposes of EESA or TARP or otherwise contrary to the public interest. Finally, the final regulations under § 409A were promulgated before the enactment of EESA and ARRA and did not consider or address the need for an exception for a delay or acceleration of a payment under a nonqualified deferred compensation plan as a condition of receiving a favorable advisory opinion.

Section 1.409A-2(b)(7)(iii) provides that the Commissioner, in guidance of general applicability, may prescribe events that constitute exceptions to the prohibition on the delay of payment set forth under § 409A. Sections 1.409A-2(b)(7)(i) and (ii) provide specific exceptions allowing for the delay of payment to the extent making the payment would result in the payment not being deductible under § 162(m), or would result in violations of laws, including Federal securities laws and other applicable laws. These provision of the regulations resolve

conflicts between § 409A and other laws by providing exceptions to the limitations under § 409A on further deferral of nonqualified deferred compensation, where compliance with those requirements would subject the employer to unfavorable tax treatment under § 162(m) or would violate other applicable law. The Treasury Department and IRS have determined that a delay in payment to comply with an advisory opinion of the Special Master in accordance with the guidance set forth in section III of this notice is another such event and the disclosure by the TARP recipient to the Special Master of all similarly situated service providers and, if requested by the Special Master, such information as may be necessary to make those service providers also subject to an advisory opinion, will satisfy the condition that the TARP recipient treat all payments to similarly situated service providers on a reasonably consistent basis. Section 409A(a)(3) authorizes the Secretary, by regulation, to permit a nonqualified deferred compensation plan to accelerate the time or schedule of payment of compensation deferred under the plan.

For the reasons discussed above, the Treasury and the IRS find that guidance permitting a TARP recipient to comply with an advisory opinion of the Special Master under the circumstances set out in this notice without triggering adverse tax consequences under § 409A(a) is necessary and appropriate. Pursuant to the authority in § 409A(a)(3), the Treasury Department and the IRS intend to issue regulations to allow for changes in the time and form of payment of nonqualified deferred compensation, including the acceleration of payments under a nonqualified deferred compensation plan by a TARP recipient, to the

extent necessary to comply with an advisory opinion or other determination issued by the Special Master and to specify when a delay in making a payment as a result of conditions imposed pursuant to such an advisory opinion or other determination will not cause an amount to fail to qualify as a short-term deferral, consistent with this notice.

III. Guidance

A. Eligibility

The guidance set forth in section III.B of this Notice applies to a service provider of a TARP recipient only if:

(1) the advisory opinion is addressed to that TARP recipient, and specifically addresses the compensation arrangement between the TARP recipient and the service provider;

(2) the TARP recipient has fully disclosed to the Special Master the identities of any similarly situated service providers of the TARP recipient and, to the extent requested by the Special Master, included those service providers in a request for an advisory opinion (for this purpose, an employee subject to §30.16(a)(3)(i) (Q-16(a)(3)(i)) of the Interim Final Rule, which addresses certain employees of Exceptional Assistance Recipients (generally the CEOs and the next 20 most highly compensated employees), will not be treated as similarly situated to an employee subject to §30.16(a)(3)(ii) (Q-16(a)(3)(ii)) of the Interim Final Rule, which addresses certain other employees of Exceptional Assistance Recipients (generally the 26th through 100th most highly compensated employees and any remaining executive officers), and an employee not in either of those

groups of employees will not be treated as similarly situated to an employee in one of those groups);

(3) the advisory opinion explicitly sets forth (a) a revised time and form of payment for the compensation that would have complied with the otherwise applicable requirements of § 409A(a) had such revised time and form of payment been the original time and form of payment, (b) a condition on payment that is directly related to the financial assistance received by the TARP recipient under the TARP program or the ability of the TARP recipient to repay the TARP assistance (for example, a condition that the amount cannot be paid prior to the repayment of all or a specified percentage or amount of the TARP assistance), or (c) a combination of (a) and (b);

(4) the advisory opinion does not authorize the TARP recipient or service provider to elect another time and form of payment other than in a manner compliant with § 409A(a) and the regulations thereunder without regard to the special rules set forth in this notice regarding compliance with advisory opinions (for this purpose a decision to repay some or all of the TARP assistance will not be treated as an election as to the time and form of payment, even if such repayment may affect the timing of some or all of the amount payable);

(5) the TARP recipient and the service provider enter into a written agreement containing the revised time and form of payment and any applicable conditions on payment not later than the end of the service provider's taxable year in which the advisory opinion is issued or the 15th day of the third month following the date the advisory opinion is issued, if later; and

(6) the TARP recipient and the service provider of the TARP recipient comply with the terms of the advisory opinion in all material respects.

B. Application of § 409A(a)

With respect to an arrangement between a TARP recipient and a service provider of the TARP recipient, if the conditions of section III.A. of this notice are met, changes in the time and form of payment pursuant to an advisory opinion will be treated in the following manner for purposes of § 409A(a) and the regulations thereunder:

(1) A failure to pay an amount upon the originally designated payment date will not be treated as an impermissible initial deferral election or subsequent deferral election, provided that the amount is paid pursuant to the advisory opinion. For this purpose, if the advisory opinion sets forth new payment dates pursuant to section III.A.3.a. of this notice, whether the amount is paid pursuant to the advisory opinion and in accordance with § 409A will be determined after application of the payment provisions under § 1.409A-3(d). For example, with respect to a payment date that is specified in the advisory opinion, the amount generally will be treated as paid pursuant to the advisory opinion if it is paid no earlier than 30 days before the specified payment date and no later than the last day of the service provider's taxable year in which the specified payment date occurs or, if later, the 15th day of the third calendar month after the specified payment date (in each case so long as the service provider is not permitted, directly or indirectly, to designate the taxable year in which the amount is paid). If the advisory opinion sets forth TARP-related conditions pursuant to section

III.A.3.b. of this notice that must be met before a service recipient can pay an amount (for example, a prohibition on a payment being made until the service recipient repays all or a specified amount or percentage of TARP financial assistance), the amount will be treated as paid pursuant to the advisory opinion and in accordance with § 409A if it is paid at the earliest date at which the service recipient reasonably anticipates that the making of the payment will be permissible under such advisory opinion. For example, with respect to satisfaction of TARP-related conditions, the amount generally will be treated as paid pursuant to the advisory opinion if it is paid upon satisfaction of the TARP-related conditions.

(2) To the extent compliance with an advisory opinion requires payment of an amount that otherwise qualified as a short-term deferral under § 1.409A-1(b)(4) at a time or in a form that would cause such amount to be treated as deferred compensation subject to § 409A, except as otherwise provided in the next sentence, the amount will be treated as deferred compensation under § 409A once the time and form of payment have been changed. To the extent that an advisory opinion requires only that the payment of such an amount be delayed until specified TARP-related conditions are met, and does not otherwise prescribe changes in the time or form of payment, such condition will not cause the amount to fail to qualify as a short-term deferral provided that the amount is paid at the earliest date at which the service recipient anticipates or reasonably should anticipate that the payment will be permissible pursuant to the advisory opinion.

(3) Payment of a deferred amount before the original payment date pursuant to an advisory opinion, EESA or the regulations thereunder (including §§30.11(a) and 30.16(a)(3) (Q-11(a) and Q-16(a)(3)) of the Interim Final Rule (Special Master approval of certain payments to employees of TARP recipients receiving exceptional financial assistance)² will be treated as a permissible acceleration. For this purpose, arrangements that provide for payment upon, or an earlier payment date resulting from, the satisfaction of a TARP-related condition, such as a repayment of some or all of the TARP assistance, will be treated as providing for a permissible acceleration of a payment under §409A.

(4) Once the TARP recipient and service provider have agreed to a revised time and form of payment pursuant to an advisory opinion and have set forth the revised time and form of payment in writing, the revised time and form of payment is treated as the time and form of payment for purposes of determining future compliance with § 409A and the regulations thereunder.

(5) Nothing in this notice is intended to permit corrections of failures to comply with § 409A, or to otherwise affect the application of § 409A to a

² The treatment under § 409A of required deferrals of payments under EESA and the regulations thereunder was discussed in the preamble to the Interim Final Rule (IFR). Taxpayers may rely on the guidance provided in that discussion. In addition, because the determinations by the Special Master with respect to certain employees of Exceptional Assistance Recipients (generally the executive officers and any other employees that are among the top 100 most highly compensated employees) are required under the IFR (see §30.16(a)(i) and (ii) (Q-16(a)(3)(i) and (ii)), taxpayers may also apply that guidance to any changes to existing rights required by those determinations, so that any resulting delay in a payment will not constitute a failure to comply with § 409A and will not cause a payment that otherwise would have been a short-term deferral to be treated as a payment of deferred compensation. Because that discussion did not address the potential for the required acceleration of a payment as part of an opinion requiring modifications of a compensation structure, that guidance has been provided in this notice. The guidance referred to in the preamble to the IFR and provided in this footnote is not applicable to advisory opinions provided under §30.16(a)(4) (Q-16(a)(4)) of the IFR, including the portion of a Special Master determination under §30.16(a)(i) and (ii) (Q-16(a)(3)(i) and (ii)) of the IFR that is an advisory opinion. (See note 1 of this notice).

compensation arrangement, including the application of § 409A to any change to a compensation arrangement that does not meet the conditions of section III.A of this notice.

C. Effective date.

The guidance in this notice is effective for arrangements addressed in advisory opinions issued by the Special Master pursuant to EESA and the guidance thereunder after September 30, 2009.

IV. Drafting Information

The principal author of this notice is Keith Ranta of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), although other Treasury and IRS officials participated in its development. For further information on the provisions of this notice, contact Keith Ranta at (202) 927-9639 (not a toll-free call). For further information about the Office of the Special Master for TARP Executive Compensation, contact that office at (202) 622-0667.