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Financial Services Report

Special Report

Treasury Announces Standard Terms of Public Bank Capital Purchase Program

This report highlights certain key terms of the U.S. Department of the Treasury's Capital Purchase Program ("CPP") documentation for publicly traded financial institutions, the forms of which were published on October 31, 2008. The documentation is in the form of "standard terms," reflecting the Treasury's desire to enter into the same documentation with all participating institutions. Publicly traded financial institutions wishing to apply must do so by 5:00 p.m. eastern time on Friday, November 14, 2008. The Treasury advised that it will publish details for privately held eligible institutions at a later date. In the meantime, the public institution documents provide some insight into how the CPP might work for private institutions.

With few exceptions, the documentation is generally consistent with the Treasury's CPP term sheet and guidance previously issued by the Treasury. The following is a summary of the key terms of the Treasury's form Securities Purchase Agreement ("SPA") and related documents that institutions should consider when determining whether to apply for the CPP.

Representations and Warranties

The SPA contains representations and warranties customarily found in underwriting and similar agreements used in public and private sales of securities. For example, the SPA includes standard representations and warranties with respect to undisclosed liabilities, taxes, litigation, environmental matters, insurance, intellectual property, ownership of real property, financial statements, internal controls, disclosure controls and procedures, and ERISA matters. However, institutions should consider some of the more significant representations and actions that may be required to comply with the terms of the SPA, as follows:

- Institutions must ensure that they have sufficient authorized capital to issue both the preferred shares and the common shares underlying the warrant. With respect to the preferred shares, participating institutions must have "blank check" preferred stock as well as a sufficient number of authorized but unissued preferred stock (or consider issuing depositary receipts). With respect to the warrant, institutions can proceed with the issuance, subject, if necessary, to an obligation to hold a special meeting of stockholders to obtain approval for an increase in the authorized number of common shares to accommodate any exercise of the warrant and/or any stockholder approval required by any exchange on which the institution's securities are traded. Institutions should also assess the applicability of any preemptive rights of their existing security holders as such rights relate to the CPP.

- Institutions must ensure that all necessary steps have been taken to exempt the Treasury's purchase from any anti-takeover provisions of the institution's poison-pill agreements, charter, or by-laws as well as applicable state anti-takeover laws.

- The SPA requires the institution to disclose to the Treasury regulatory matters, including cease-and-desist orders, written agreements, memoranda of understanding, commitment letters, capital directives, board resolutions adopted pursuant to a regulatory agency request, or any other similar regulatory agreement.

- Each institution must represent and warrant that it has not taken any action that would subject the sale of preferred shares to the registration requirements under the Securities Act of 1933.

- All of the representations and warranties are qualified by reference to matters previously disclosed in the institution's most recent Form 10-K and other periodic reports filed during the current fiscal year. In other words, the institution's recently filed SEC reports can effectively serve as a "schedule of exceptions" to its representations in the SPA, although thorough diligence and careful consideration of the adequacy of its previously disclosed statements should be undertaken. The SPA also contemplates disclosure schedules for certain representations to qualify them with respect to matters not previously disclosed.

Closing Conditions

The SPA contains customary closing conditions, including delivery of a written opinion of counsel in the form provided by Treasury as well as compliance with the executive compensation requirements (discussed below).

Dividends/Redemptions

As earlier noted in the CPP term sheet, the SPA places the following dividend and securities repurchase/redemption restrictions on participating institutions for three years (or earlier if all preferred shares issued to the Treasury have been redeemed by the institution or transferred by the Treasury):

- Common dividends cannot be increased above current levels without Treasury approval. Under this provision, an institution could reduce its dividend and subsequently restore it during the three-year period. As is typically the case where preferred stock is issued, no common dividends may be paid unless dividends on the preferred shares have been paid in full.

- Redemption or repurchase of equity or trust preferred securities is not permitted without Treasury's approval. Institutions may, however, redeem or repurchase such securities under certain circumstances, including to offset dilution related to employee benefit plans in a manner consistent with past practice, certain market-making and related transactions by a broker-dealer subsidiary of the institution, as custodian/trustee for another beneficial owner, or pursuant to certain agreements pre-dating participation in the CPP.

Executive Compensation

- The SPA confirms that in order to receive the investment, the financial institution must certify that it has amended all compensation agreements, plans, and arrangements to ensure compliance with CPP's clawback requirements and prohibition on golden parachute (severance) payments.

- If necessary to make the executive compensation changes effective, the financial institution must obtain the consent of the senior executive officers to the changes. In addition, those officers must provide a waiver of claims against the government in the form attached to the SPA.

- To meet the consent requirement, most, if not all, financial institutions will use a letter agreement executed by each executive officer stating that the executive officer agrees that each compensation arrangement is deemed amended to provide for the clawback and a severance payment limitation. The letter agreement should also reference (i) the officer's consent to any change in incentive plans required to avoid "unnecessary and excessive" risk-taking and (ii) delivery by the executive officer of the required waiver. Use of a letter agreement avoids the need to amend each and every compensation plan, program, and agreement.

Registration Rights

- Institutions that are not Form S-3 eligible as of the signing date of the SPA will not be required to file a resale shelf registration statement unless and until the Treasury requests that the institution do so. For private institutions, this rule likely alleviates the concern that participating in the CPP would require the institution to go public and, for non-Form S-3 eligible issuers, that a registration on Form S-1 would be immediately required.

- Where an institution is Form S-3 eligible, a shelf registration statement registering the resale of the securities must be filed within 30 days of closing. Given the prompt filing deadline, institutions should determine their S-3 status as of the expected date of signing and begin to make appropriate arrangements prior to entering into the SPA.

- If requested by the Treasury, the institution must facilitate an underwritten distribution of securities if the gross proceeds exceed (i) 2% of the initial aggregate liquidation preference, if such liquidation preference is less than $2 billion and (ii) $200 million, if the aggregate liquidation preference is equal to or greater than $2 billion. Lead underwriters will be chosen by the Treasury, with consideration given to any broker-dealer affiliate of the institution. In the case of a Treasury requested underwritten offering, the institution and its directors and officers will be subject to a lock-up, or "clear market," period starting 10 days before and ending 60 to 90 days after the offering, during which period they may not sell certain classes of equity securities.

- The institution may exercise customary "blackout" rights to defer any registration or underwritten offering and to prohibit the Treasury from reselling under any outstanding shelf if the registration statement or related prospectus contains any material misstatement or omission, subject to certain limitations.

- The SPA contains customary "piggyback" registration rights pursuant to which the Treasury may participate in certain registered offerings initiated by the institution or other holders, including underwritten offerings. In underwritten offerings, the institution has first priority to sell its shares, followed by the Treasury, and finally other holders. The institution must use its reasonable best efforts to amend any agreement in place as of the date of the SPA that is inconsistent with the registration and related rights granted to the Treasury under the SPA, including agreements containing inconsistent registration priority terms. However, to the extent those efforts fail, any conflicting priority provision contained in those earlier agreements will prevail over the priority provisions contained in the SPA if compliance with the SPA's priority provisions would result in a breach under the earlier agreements.

Repurchase of Securities Issued to Treasury

The institution may repurchase from the Treasury its warrants or any other securities the Treasury has purchased only after redemption of all preferred shares issued to the Treasury or after the Treasury has transferred all preferred shares. Such a repurchase must be at Fair Market Value upon written notice. Importantly, Fair Market Value is to be determined by the institution's board of directors in good-faith reliance on an opinion from a nationally recognized independent investment banking firm.

Preferred Stock and Warrants

The form of certificate of designations for the preferred stock and the form of warrant are attached as annexes to the SPA. These forms and the publication of recently executed documents for completed CPP transactions reflect several differences from the term sheet previously published by the Treasury. These differences include, with respect to the preferred stock, an ability to alter the previously announced quarterly dividend payment dates (February 15, May 15, August 15, and November 15 of each year) to address an institution's circumstances, and the ability to aggregate qualified equity offerings for purposes of attaining the threshold (25% of the issue price) necessary to redeem the preferred stock issued to Treasury. To address concerns regarding the accounting treatment of the warrants, the warrants now must be converted into a *permanent equity* interest in the institution (instead of senior term debt) in the event that the institution fails to obtain requisite stockholder approval or its stock ceases to be traded on a national securities exchange. For more information regarding the material terms of the preferred shares and the warrants, see the Treasury's Term Sheet at *http://www.ustreas.gov/press/releases/reports/termsheet.pdf* and our Financial Services Report, Summary of TARP Capital Purchase Program, dated October 14, 2008 at *www.vedderprice.com.*

Treasury Authority to Amend Terms of SPA

The SPA provides that Treasury may "unilaterally amend any provision of this Agreement to the extent required to comply with any changes after the Signing Date in applicable federal statutes." This provision confers broad authority on the Treasury, possibly acting in concert with Congress, to retroactively impose unanticipated obligations or limitations on participating institutions to the extent Congress enacts changes in "applicable" statutes. Some such legislative changes have already been proposed by members of Congress regarding compensation, lending, and foreclosure practices.

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If you have specific questions regarding the SPA for publicly traded institutions or would like to discuss this bulletin further, please contact any of the attorneys listed below.

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