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U.S. Treasury Issues Capital Purchase Program Documents for Publicly Traded Financial Institutions

By: Curtis R. Hearn, Margaret F. Murphy, and Allen E. Frederic, III

On October 31, 2008, the United States Department of the Treasury (“UST”) issued documents for publicly traded financial institutions (each hereinafter referred to as an “issuer”) applying for the voluntary Capital Purchase Program (“CPP”) authorized by the Emergency Economic Stabilization Act (the “EESA”), including forms of a securities purchase agreement (the “SPA”), a certificate of designations for senior preferred stock (the “Preferred Shares”), and Warrant (the “Warrant”). UST has announced that the CPP applicable to private institutions will have separate terms and application deadlines. Public issuers interested in the CPP must elect to participate by 5:00 pm (EDT) on November 14, 2008. To view copies of the CPP documents applicable to public issuers, click [here](#).

Under the CPP, UST will purchase Preferred Shares from issuers subject to a minimum subscription amount (as explained below) and receive a Warrant to purchase common stock of the issuer with an aggregate market value equal to 15 percent of the Preferred Share investment. Below is a summary of some of the material terms of the SPA, the Preferred Shares, and the Warrant.

Securities Purchase Agreement

Representations and Warranties

The SPA contains a comprehensive set of representations and warranties that survive the closing without limitation. The representations and warranties address such items as an issuer’s organization and authority, authorization to enter into the SPA and issue the Preferred Shares and Warrant, accuracy of public filings and financial statements, liabilities, litigation, employee benefit matters, taxes, and insurance.

Access to Information

Until such time as the amount of Preferred Shares held by UST is less than 10 percent of its initial investment, UST, acting through the appropriate federal banking agency, is permitted to examine the issuer’s corporate books and records and make copies thereof, review any information material to UST’s investment provided by the issuer to its appropriate federal bank agency, and discuss the affairs and finances of the issuer with its principal officers, each upon reasonable notice and during normal business hours. UST is obligated to use its reasonable best efforts to hold all non-public information provided by the issuer in confidence.

Transferability & Registration Rights

UST is permitted to transfer all or a portion of the Preferred Shares or common stock issuable upon exercise of the Warrant at any time, provided, however, that UST

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may not transfer the Warrant with respect to more than one half of the initial number of shares of the issuer's common stock until the earlier of (i) the date on which the issuer has received aggregate gross proceeds of not less than 100 percent of the issue price of the Preferred Shares from one or more "qualified equity offerings" (as defined below) and (ii) December 31, 2009.

A "qualified equity offering" is defined as the sale by an issuer after the date of investment by UST of Tier 1 qualifying perpetual preferred stock or common stock for cash.

Issuers eligible to register securities on Form S-3 are required to file a shelf registration statement covering the securities issued to UST within 30 days of closing. Issuers ineligible for Form S-3 are not required to file a shelf registration statement until requested to do so by UST.

To the extent UST intends to distribute any of the securities by means of an underwritten offering, the gross proceeds of which are expected to exceed (i) two percent of the initial aggregate liquidation preference of the Preferred Shares (if the initial aggregate liquidation preference is less than \$2 billion) or (ii) \$200 million (if the initial aggregate liquidation preference is equal to or greater than \$2 billion), the issuer must make reasonable efforts to facilitate such distribution.

Notwithstanding the foregoing, if it would be materially detrimental to the issuer for registration or an underwritten offering to be effected at such time, the issuer is permitted to defer such registration for a period not to exceed 45 days.

The issuer is also required to (i) cover all expenses in connection with the registration of the securities, (ii) file such supplements and amendments to the registration statement as may be necessary to help facilitate the distribution and sale of the securities subject to the registration statement, (iii) grant "piggyback" registration rights to the extent the issuer proposes to register any of its equity securities, (iv) use reasonable best efforts to cause the securities subject to the registration statement to be listed on each national securities exchange on which similar securities of the issuer are listed (or, if no such similar securities are listed on any national securities exchange, use reasonable best efforts to cause such securities to be listed on such exchange as UST may designate), and (v) indemnify holders of such securities against any losses arising out of any untrue statement of a material fact or omission of a material fact in such registration statement.

UST's registration rights may be transferred to another holder of the securities with a liquidation preference, or in the case of securities other than the Preferred Shares, a market value not less than an amount equal to (i) two percent of the initial aggregate liquidation preference of the Preferred Shares (if such initial aggregate liquidation preference is less than \$2 billion) and (ii) \$200 million (if the initial aggregate liquidation preference is equal to or greater than \$2 billion).

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Restrictions on Dividends & Repurchases

Prior to the earlier of (i) the third anniversary of the closing, or (ii) at such time as UST no longer holds Preferred Shares, an issuer is prohibited from increasing its regular quarterly cash dividend (if applicable) on its common stock and redeeming, purchasing, or acquiring shares of its common stock or other equity securities (other than the Preferred Shares), each subject to certain limited exceptions.

Until such time as UST no longer owns any Preferred Shares, an issuer is prohibited from repurchasing Preferred Shares from any other holder unless it offers to repurchase a ratable portion of Preferred Shares then held by UST.

Executive Compensation

For as long as UST holds securities of an issuer acquired pursuant to the CPP, an issuer must ensure that its compensation arrangements with its senior executive officers (which generally include an issuer's chief executive officer, chief financial officer, and the next three most highly compensated officers) (the "SEOs" and each an "SEO") comply with Section 111(b) of the EESA. The areas of compensation restriction under Section 111(b) of EESA are as follows:

Restrictions on Incentive Compensation that Encourages Excessive Risk Taking. The compensation committee of an issuer's board of directors is required to identify the features in SEO incentive compensation arrangements that could lead SEOs to take unnecessary and excessive risks that could threaten the value of the financial institution. The compensation committee is required to review the SEO incentive compensation with the senior risk officers to ensure that the SEOs are not encouraged to take such risks. The review is required to be made promptly and in no case more than 90 days after the purchase under the CPP. The compensation committee must meet at least annually with the senior risk officers to discuss and review the relationship between the financial institution's risk management policies and practices, and the SEO incentive compensation arrangements. The compensation committee must certify that it has completed the reviews of the SEO incentive compensation arrangements in accordance with the requirements. This certification is to be included in the compensation discussion and analysis of an issuer's proxy statement.

Clawback Rules. SEO bonus and incentive compensation paid during the period that UST holds an equity or debt position acquired under the CPP must be subject to recovery or "clawback" by the issuer if the payments were based on materially inaccurate financial statements or any other materially inaccurate performance metric criteria.

Golden Parachute Limits. An issuer that participates in the CPP is prohibited from making any golden parachute payment to a SEO during the period that UST holds an equity or debt position acquired under the CPP. Severance pay-

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ments can be made if they are below the amounts that would trigger an excise tax under the golden parachute rules in Sections 280G and 4999 of the Internal Revenue Code (the “280G Rules”). The 280G Rules are triggered when severance payments equal 300 percent or more of an executive’s “base amount.” The base amount is equal to the average of a CEO’s W-2 compensation over the five years preceding the severance. These limitations apply to any CEO’s involuntary termination of employment or any termination in connection with any bankruptcy filing, insolvency, or receivership of the issuer or a member of the same control group.

\$500,000 Deduction Limit for CEO Compensation. In order to participate in the CPP, an issuer must agree that it will not claim a federal income tax deduction for individual CEO compensation in excess of \$500,000 for any taxable year that includes any portion of the CPP period. The deduction limitation and the compensation for the taxable year are pro-rated for the portion of the year that is within the CPP period.

An issuer and its CEOs will be required to grant a waiver releasing UST from any claims they may otherwise have as a result of the modification of benefit plans and agreements necessary to put them in compliance with EESA and any guidance or regulations issued by UST.

Amendment

As a general matter, the consent of both parties is required to amend any provision of the SPA. Notwithstanding the foregoing, UST may unilaterally amend any provision of the SPA to the extent required to comply with any changes to federal statutes following the date of execution.

Termination

The SPA is terminable to the extent the closing does not occur by the 30th calendar day following the date of the SPA; however, the parties must consult in good faith for the 5 days following the 30th calendar day to determine whether to extend the term.

Senior Preferred Shares

Size, Rank, Term, Security & Regulatory Capital Status

The amount of Preferred Shares that may be issued under the CPP must not be less than one percent of the issuer’s risk-weighted assets and not more than the lesser of (i) \$25 billion and (ii) three percent of its risk weighted-assets. The Preferred Shares will have a perpetual term, rank senior to common stock and *pari passu* with existing preferred shares (other than preferred shares which by their terms rank junior to any existing preferred shares), and have a liquidation preference of \$1,000 per share. For regulatory capital purposes, the Preferred Shares will be treated as Tier 1 capital.

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Transfer

UST is permitted to transfer all or a portion of the Preferred Shares at any time, and the issuer is required to file a registration statement covering the Preferred Shares with the Securities and Exchange Commission (“SEC”) and use reasonable best efforts to cause the Preferred Shares to be listed on a national securities exchange on which similar securities of the issuer are listed (or if no such similar securities are listed on any national securities exchange, use reasonable best efforts to cause such securities to be listed on such exchange as UST may designate).

Dividends

Preferred Shares will pay quarterly dividends at the rate of five percent for the first five years and nine percent thereafter. Dividends will be cumulative for bank holding companies and non-cumulative for issuers that are not subsidiaries of holding companies.

Redemption

During the three year period from the date of the investment, Preferred Shares may only be redeemed if the issuer receives proceeds from a “qualified equity offering” equaling or exceeding 25 percent of the aggregate value of the Preferred Shares. After the third anniversary, Preferred Shares may be redeemed, in whole or in part, at any time at the option of the issuer. All redemptions shall be at 100 percent of the issue price, plus (i) in the case of cumulative Preferred Shares, any accrued and unpaid dividends and (ii) in the case of non-cumulative Preferred Shares, accrued and unpaid dividends for the then current dividend period (regardless of whether or not declared).

Voting Rights

Preferred Shares will not have voting rights, except class voting rights on (i) any authorization or issuance of shares ranking senior to the Preferred Shares, (ii) any amendment to the rights of the Preferred Shares, or (iii) any merger, exchange, or similar transaction which would adversely affect the rights of the Preferred Share holders. If dividends on the Preferred Shares are not paid in full for six quarters, holders of the Preferred Shares will have the right to elect two directors, with such right terminating when full dividends have been paid for four consecutive dividend periods.

Warrant

Size, Term, Exercise

UST will receive a Warrant to purchase a number of shares of common stock of the issuer having an aggregate market price equal to 15 percent of the Preferred Shares on the date of the investment, subject to reduction as explained below.

The Warrant will be immediately exercisable, in whole or in part, and have a

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10-year term. The initial exercise price for the Warrant, and the market price for determining the number of shares of common stock subject to the Warrant, shall be the market price for the common stock on the date of the Preferred Share investment (calculated on a 20-day trading average), subject to customary anti-dilution adjustments. The exercise price will be reduced by 15 percent of the original exercise price on each 6-month anniversary of the issue date of the Warrant if the consent of the issuer's shareholders is required to increase the authorized number of shares of the issuer's common stock and/or comply with exchange act rules, and such consent is not obtained (subject to a maximum reduction of 45 percent).

Transfer

The Warrant will not be subject to any contractual restrictions on transfer, except that UST may only transfer or exercise an aggregate of one-half of the Warrant prior to the earlier of (i) the date on which the issuer has received aggregate gross proceeds of not less than 100 percent of the issue price of the Preferred Shares from one or more "qualified equity offerings" and (ii) December 31, 2009. The issuer will file a registration statement covering the Warrant and underlying common stock with the SEC and cause the shares of common stock to be listed on the national exchange on which its common stock is traded.

Voting

The UST will agree not to exercise voting power with respect to any common stock issuable upon exercise of the Warrant.

Reduction

In the event the issuer receives aggregate gross proceeds of not less than 100 percent of the issue price of the Preferred Shares from one or more "qualified equity offerings" on or prior to December 31, 2009, the number of shares of common stock underlying the Warrant then held by UST shall be reduced by a number of shares equal to the product of (i) the number of shares originally underlying the Warrant (taking into account all adjustments) and (ii) 0.5.

Certain Issuances of Common Stock or Convertible Securities

Until the earlier of (i) the date on which UST no longer holds any portion of the Warrant or (ii) the third anniversary of the issue date, if shares of common stock or rights convertible into common stock (other than pursuant to a "permitted transaction") are issued, or a stock split or reclassification occurs, without consideration or at a consideration per share less than 90 percent of the market price of the security on the last trading day preceding the date of the agreement on pricing such shares, then as a result of the dilution caused by such issuance, (i) the number of shares issuable upon exercise of the Warrant shall be increased, and (ii) the exercise price of the Warrant shall also be adjusted.

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A “permitted transaction” means issuances (i) as consideration for or to fund the acquisition of business and/or related assets; (ii) in connection with employee benefit plans and compensation related arrangements in the ordinary course and consistent with past practice approved by the issuer’s board of directors; (iii) in connection with a public or broadly marketed offering and sale of common stock or convertible securities cash conducted by the issuer or its affiliates pursuant to registration under the Securities Act, or Rule 144A thereunder, on a basis consistent with capital raising transactions by comparable financial institutions; and (iv) in connection with the exercise of preemptive rights on terms existing as of the issue date.

Substitutions

In the event the issuer is no longer listed or traded on a national securities exchange or securities association, or any required stockholder approval of the issuance of a sufficient number of shares of common stock to be issued upon exercise of the Warrant is not obtained within 18 months after the issuance date, the Warrant will be exchangeable, at the option of UST, for senior term debt or another economic instrument or security of the issuer such that UST is appropriately compensated for the value of the Warrant.

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Please remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues you may contact the head of our Corporate and Securities Practice Group:

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