



JONES DAY COMMENTARY

UPDATE ON THE TARP CAPITAL PURCHASE PROGRAM: ACTION DUE BY NOVEMBER 14, 2008

The Treasury Department's TARP Capital Purchase Program ("CPP") provides for the Treasury's purchase of up to \$250 billion of senior preferred shares in U.S. depository institutions and their U.S. holding companies. Of this amount, \$125 billion was committed initially to nine large institutions. On October 24 and 25, 2008, it became apparent that further purchase commitments were going to be made by the Treasury to 20 to 30 regional bank holding companies. The names and amounts committed to these institutions have not been released, and it appears that each institution will separately announce its participation in the CPP. At the end of that week, additional indications began to surface that insurance companies were seeking consideration. The Financial Services Roundtable also asked the Treasury Department to expand the CPP to include securities broker-dealers, insurance companies, automakers, and foreign-controlled firms.

What remains unclear is the effect of these developments on the CPP, the amount of money committed

to it, and the availability of funds for other institutions, as well as how nonpublicly traded institutions can participate in the CPP, although the Treasury continues to indicate that private institutions will be able to participate. The following are clear, however:

- The deadline to apply is November 14, 2008.
- All federal bank regulators encourage eligible institutions to participate.
- The Treasury intends to close all CPP purchases by December 31, 2008.
- Applications must be made at the highest-tier holding company, with copies to the federal regulator of the holding company's largest depository institution subsidiary.

Persons desiring to participate in the CPP should conclude their consideration and apply quickly.

ACTIONS

The Treasury and the federal bank regulators have published an interagency application and related guidelines for the CPP. A copy of the application is attached to this *Commentary*.

The following actions are suggested:

- Consider the amount of capital you may need in the form of CPP preferred stock.
- Discuss participation in the CPP and the amount of capital sought with your primary federal and state bank regulators as soon as possible. All institutions, particularly smaller and troubled institutions, will need to have their regulators advocate their interests in order to gain visibility and enhance their chances of utilizing the CPP. The Treasury has stated that it will look to a troubled institution's primary regulator for recommendations regarding any applications submitted. While the Treasury will disclose the institutions accepted in the CPP, it will not disclose those institutions that either withdraw their application or are rejected for participation in the CPP.
- Be prepared to discuss and offer your regulators solutions to current problems, such as concentrations of assets or risks, problem loan levels, "structural issues" (i.e., private company, lack of authorized preferred and common stock, etc.), and whether you expect to raise private capital in conjunction with the CPP. It is now clear that some applications will be rejected and that applicants need to be proactive to gain approval to participate. Practical and realistic alternatives to the CPP should also be considered.
- Plans to add capital from other sources should be disclosed.
- Consider whether your certificate of incorporation authorizes "blank" preferred stock issuable in series upon only board of directors' action.
- Consider whether you have sufficient amounts of common stock authorized and available for reservation for exercise of any warrants issuable to the Treasury under the CPP.
- Consider the use of depository preferred stock to preserve authorized but unissued preferred stock, to avoid a shareholders' meeting, and to provide future flexibility.
- Consider whether a shareholders' meeting will be needed to amend the certificate of incorporation to authorize preferred stock or to authorize or issue additional shares of common stock, and, if needed, prepare the proxy material for such meeting now. The Treasury's FAQs indicate that applicants will only have 30 days after preliminary Treasury approval to submit final documents and fulfill any outstanding requirements of the CPP.
- Consider whether any amendments or waivers are needed from existing investors to permit the issuance to the Treasury of preferred stock, warrants, or the common stock issuable upon exercise of the warrants, and whether any existing instruments contain anti-dilution or price protection covenants that may be triggered by participation in the CPP.
- Private institutions, including those that have elected to be taxed as "Sub S" corporations, should apply for the CPP, even though their means of participation remain to be defined.
- Absent action by the Treasury or the IRS, Sub S companies may have to decide whether the CPP capital is more important than maintaining their Sub S election.

CONCLUSIONS

The TARP CPP offers capital with reasonable terms, which should build investor, depositor, customer, and public confidence in those institutions that participate. The FDIC has stated that participation in the CPP "can bolster financial strength, or potentially support acquisitions, both of which allow for prudent lending that may be currently constrained by capital levels." Whether or not capital is currently needed, capital from the CPP offers:

- Opportunities to grow profitably in disrupted markets.

- Opportunities to meet increasingly stringent credit requirements by lenders and counterparties.
- Insurance against: further deterioration in economic and credit conditions; changes in accounting rules, such as FASB 140; and increases in minimum capital and liquidity requirements imposed by the bank regulators or legislative action.
- Reductions in risk that may attract new investors.
- Individually, and in conjunction with the FDIC's Temporary Liquidity Guarantee Program, additional liquidity.

Strong consideration should be given to participating promptly in the CPP.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Chip MacDonald

1.404.581.8622

cmacdonald@jonesday.com

Christopher M. Kelly

1.216.586.1238

1.212.326.3438

ckelly@jonesday.com

Kevyn D. Orr

1.202.879.5560

korr@jonesday.com

Brett P. Barragate

1.216.586.7205

1.212.326.3446

bpbarragate@jonesday.com

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our web site at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.



Application Guidelines for TARP Capital Purchase Program

This application is used to request participation in the Treasury Capital Purchase Program (CPP). Under the CPP, the U.S. Department of the Treasury (Treasury) may purchase qualifying capital in U.S. banking organizations.

The application must be submitted to the appropriate Federal banking agency (FBA) for the applicant. If the applicant is a bank holding company, the application should be submitted to both the applicant's holding company supervisor and the supervisor of the largest insured depository institution controlled by the applicant. All inquiries regarding preparation of the application should be directed to the appropriate FBA for the applicant. All applications must be submitted no later than 5pm (EST), November 14, 2008.

More detailed information, including submission instructions, can be found at the applicable FBA's website:

1. For the Federal Deposit Insurance Corporation: www.fdic.gov
2. For the Federal Reserve: www.federalreserve.gov
3. For the Office of the Comptroller of the Currency: www.occ.treas.gov
4. For the Office of Thrift Supervision: www.ots.treas.gov

The terms of the CPP are described generally in this application. However, this description is not binding on the Treasury and is intended to provide general information only. The actual terms and conditions of the CPP are contained in documentation that will be available from the Treasury Department on its web site at <http://www.treas.gov/initiatives/cesa/>.

Eligible Institutions

The CPP is available to bank holding companies, financial holding companies, insured depository institutions and savings and loan holding companies that engage solely or predominately in activities that are permissible for financial holding companies under relevant law. To qualify, the applicant must be established and operating in the United States and may not be controlled by a foreign bank or company.

Institutions must consult with their appropriate FBA prior to submitting this application.

Certain Conditions for Participation in the CPP

To be eligible for the CPP, the applicant must receive the approval of the Treasury. In addition, the applicant must agree to certain terms and conditions and make certain representations and warranties described in various agreements prepared by the Treasury and available on Treasury's website. A summary term sheet is currently available on Treasury's website and a detailed investment agreement and associated documentation will be posted soon. Each applicant must obtain and review a copy of these agreements and agree to all of the terms and conditions, including representations and warranties, contained in these agreements. In the event the applicant files an application with the appropriate FBA prior to the availability of the investment agreement, the applicant must file an amended application which includes updated responses to any items in the application that required prior review of the investment agreement.

In the event that an applicant cannot, by November 14, 2008, take action to be in compliance with all of the terms and conditions, including the representations and warranties, contained in the Treasury agreements, the applicant must provide an explanation of the condition or conditions that cannot be met and the reasons the condition or conditions cannot be met. This explanation must be attached to the application. Failure to agree to all terms and conditions may result in disqualification from the CPP.

If the applicant receives preliminary approval to participate in the CPP from the Treasury, the applicant will have 30 days from the date of notification to submit the investment agreements and related documentation.

Among the conditions to participation in the CPP is the requirement that, for so long as the Treasury owns shares or warrants in the applicant, certain senior officers of the applicant meet standards established by the Treasury for executive compensation in certain circumstances. These standards are explained on the Treasury web site at:
<http://www.treas.gov/initiatives/cesa/executivecompensation.shtml>.

For the first three years that the Treasury owns shares or warrants in the applicant, the applicant may not increase its dividend payments on common shares without the permission of the Treasury. In addition, the applicant may not repurchase or redeem any junior preferred shares, preferred shares ranking *pari passu* with the Senior Preferred, trust preferred, or common shares (other than in connection with certain employee benefit programs) during the first three years of the investment without the permission of the Treasury.

Form of Capital Qualifying for Purchase

All capital purchases will occur at the highest-tier holding company in cases in which the banking organization has a bank holding company or a savings and loan holding company. In these cases, the capital eligible for purchase by the Treasury under the CPP is cumulative perpetual preferred stock of the highest tier holding company. The shares must be *pari passu* with the most senior preferred shares available by the applicant.

In the case of an insured depository institution that is not controlled by a company, the capital eligible for purchase by the Treasury under the CPP is non-cumulative perpetual preferred stock

of the insured depository institution. The shares must be *pari passu* with the most senior preferred shares available by the applicant.

The maximum amount of capital eligible for purchase by the Treasury under the CPP is the lesser of (i) an amount equal to 3 percent of the Total Risk-Weighted Assets of the applicant or (ii) \$25 billion. The minimum amount eligible for purchase under the CPP is the amount equal to 1 percent of the Total Risk-Weighted Assets of the applicant. All measurements will be based on the information contained in the latest quarterly supervisory report filed by the applicant with its appropriate FBA, updated to reflect events materially affecting the financial condition of the applicant occurring since the filing of such report.

The shares purchased by the Treasury will have a dividend rate of 5 percent per year until the fifth anniversary of the date of the investment and a dividend rate of 9 percent per year thereafter. Dividends not paid must cumulate over the life of the investment in the case of shares purchased from a holding company for an insured depository institution. Shares may be redeemed by the applicant during the first three years following the investment only from the proceeds of a qualifying stock issuance by the applicant.

In all cases, the Treasury also must obtain warrants for common stock of the applicant. The terms of the warrants are explained in the Treasury agreements available on the Treasury web site. In general, the warrants must be convertible into an amount of common stock of the applicant equivalent in value to 15 percent of the amount of the capital purchased by the Treasury from the applicant under the CPP, calculated based on the average of closing prices of the common stock on the 20 trading days ending on and including the last trading day prior to the date of execution of the Purchase Agreement.

Other Information

The applicant must identify and describe any mergers, acquisitions, or other capital raisings that are currently pending or are under negotiation and the expected consummation date.

Confidentiality

Any applicant desiring confidential treatment of specific portions of the application must submit a request in writing with the application. The request must discuss the justification for the requested treatment. The applicant's reasons for requesting confidentiality should specifically demonstrate the harm (for example, loss of competitive position, invasion of privacy) that would result from public release of information (5 U.S.C. 552). Information for which confidential treatment is requested should be: (1) specifically identified in the public portion of the application (by reference to the confidential section); (2) separately bound; and (3) labeled "Confidential." The applicant should follow the same procedure when requesting confidential treatment for the subsequent filing of supplemental information to the application.

The applicant should contact the appropriate regulatory agency for specific instructions regarding requests for confidential treatment. The appropriate regulatory agency will determine

whether the information will be treated as confidential and will advise the applicant of any decision to make available to the public information labeled as "Confidential."



Application for TARP Capital Purchase Program (CPP)

Please complete the following information and follow the submission instructions as described on your Federal banking agency's website. In addition to completing the information on this form, please provide a description of any mergers, acquisitions, or other capital raisings that are currently pending or are under negotiation and the expected consummation date (no longer than 1 page).

In the event the applicant files an application with the appropriate Federal banking agency prior to the availability of the investment agreement, the applicant must file an amended application which includes updated responses to any items in the application that required prior review of the investment agreement.

Institution Name:

Address of Institution:

Primary Contact Name:

Primary Contact Phone Number:

Primary Contact Fax Number:

Primary Contact Email Address:

Secondary Contact Name:

Secondary Contact Phone Number:

Secondary Contact Fax Number:

Secondary Contact Email Address:

RSSD, Holding Company Docket
Number and / or FDIC Certificate
Number, As Relevant:

Amount of Preferred Shares
Requested:

Amount Of Institution's Authorized
But Unissued Preferred Stock
Available For Purchase:

Amount Of Institution's Authorized
But Unissued Common Stock:

Amount Of Total Risk-Weighted
Assets As Reported On The
Holding Company's Or Applicable
Institution's Most Recent FR-Y9,
Call Report, Or TFR, As Relevant:

Institution Has Reviewed The
Investment Agreements And
Related Documentation On
Treasury's Website (Yes/No):

Describe Any Condition, Including
A Representation Or Warranty,
Contained In The Investment
Agreements And Related
Documentation, The Institution
Believes it Cannot Comply With By
November 14, 2008 And Provide A
Timeline For Reaching
Compliance¹:

Type of Company²:

Signature of Chief Executive
Officer (or Authorized Designee):

Date of Signature:

¹ May be provided as an attachment, no longer than 1 page

² Publicly Traded Stock Company; Stock Company Without Publicly Traded Shares; Other (please specify)