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FINANCIAL SERVICES REGULATORY & ENFORCEMENT, CREDIT MARKET DISTRESS TEAM UPDATE

Contracting for the Troubled Assets Relief Program: Working with Treasury

October 7, 2008

The "Emergency Economic Stabilization Act of 2008" (the "Act") that was enacted last week creates a program known as the "Troubled Asset Relief Program" or "TARP," which allows "financial institutions" to sell certain "troubled assets" to the US Treasury. On October 6, 2008, Treasury issued a notice that briefly describes the process it will follow to select "asset managers" for different types of troubled assets covered by the Act. Treasury also issued three solicitations for "asset management" and "custodian" services. Interested parties must respond to the solicitation(s) by 5:00 p.m. on October 8, 2008.

The following briefly explains Treasury's authority under the Act and how it may impact the entities that Treasury selects to administer TARP.

What is Treasury's Authority Under the Act to Acquire Services (and Products) for TARP?

Under Section 101(c) of the Act, Treasury may designate financial institutions as "financial agents of the Federal Government" to "perform reasonable duties related to" the Act "as may be required." Treasury long has had authority to designate "financial agents." Although these asset manager designations to be made as a result of the solicitations are not treated as procurements, Treasury nonetheless is implementing them in part based on procurement concepts. As with any agreement to provide services to a US Government agency, the agreements are contracts with the Government. The Act contains numerous provisions to protect taxpayers, including audit of TARP and the activities of any of its agents.

The Act also permits Treasury to conduct procurements applying the Federal Acquisition Regulations, with its standard contract clauses. Under Section 107(a) of the Act, the Treasury Secretary may, subject to congressional review, "waive specific provisions of the Federal Acquisition Regulation upon a determination that urgent and compelling circumstances make compliance with such provisions contrary to the public interest."

How and When Will Treasury Implement TARP?

Treasury is quickly implementing TARP. The three solicitations issued on October 6, 2008, will result in the rapid selection of entities to perform certain services as designated financial agents. The three types of services being sought are: (1) Custodian, Accounting, Auction Management and Other Infrastructure Services; (2) Securities Asset Management Services; and (3) Whole Loan Asset Management Services. In issuing the solicitations, Treasury stated that as "financial agents, asset managers will have a fiduciary agent-principal relationship with the Treasury with responsibility for protecting the interests of the United States." The solicitations each include a clause that acknowledges this fiduciary duty.

In addition to their fiduciary duties as agents, the financial institutions selected by Treasury under the solicitations issued on October 6 (and other entities selected to assist Treasury with TARP) will be subject to complex conflict of interest rules. As required by the Act, Treasury issued "interim guidelines" on October 6, 2008, regarding conflicts of interest. These guidelines are modeled on the organizational conflicts of interest process in the Federal Acquisition Regulation, and also encompass personal conflicts of interest of the type applied to procurement matters.

The Asset Manager Solicitations – Who is Eligible?

Entities responding to the asset manager solicitations issued by Treasury on October 6, 2008, must qualify as "financial institutions" as defined in the Act. The solicitations also set forth other eligibility requirements, including requirements that entities are not on the Federal Debarment and/or Suspension List and are not subject to any pending or current enforcement actions or regulatory investigations.

The solicitations include specific qualification requirements such as amount of assets under management, size of portfolio managed, and the minimum length of time the entity has been in business. Finally, respondents must identify any "real or potential conflicts of interest" they would have in performing the work and set forth a plan to "avoid, mitigate, or neutralize" such conflicts.

What is the Selection Process?

In its October 6 notice describing the selection process, Treasury announced that it will implement a multi-step process. Treasury will evaluate the initial responses and invite selected candidates to continue to a second phase. Treasury will evaluate additional information requested from the second phase candidates and will determine whether a candidate will continue to be considered. The last stage may include face-to-face discussions. The financial institutions selected as asset managers must be willing to execute a Financial Agency Agreement that Treasury will disclose to respondents during the second stage of the selection process.

The asset manager solicitations state that Treasury will notify a financial institution if its response "is selected, rejected, or requires further information." They further state that Treasury is not required "to discuss the reasons, in either general or specific terms, or at any stage of the selection process" why an institution's response "was not accepted or that the selection process may have been terminated."

Conclusion

Treasury is getting TARP underway with these first solicitations, but has significantly more acquisition tasks to implement the program. Based on the information currently available, Treasury plans to use a variety of acquisition mechanisms, including providing opportunities for small, minority and women-owned businesses. We will provide further analysis as this process advances.

If you have questions about the information presented in this Update please contact the Mayer Brown attorney with whom you normally communicate or any of the attorneys listed below.

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