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TREASURY DEPARTMENT CAPITAL PURCHASE PROGRAM

On Monday, October 20, 2008, the U.S. Department of Treasury, the U.S. Federal Reserve Bank, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency and the Office of Thrift Supervision jointly issued a single, standardized application pursuant to which all "Qualifying Financial Institutions"¹ may voluntarily opt in to the Treasury Department's Capital Purchase Program. The Treasury and the agencies are encouraging all such institutions to use the program to "increase the flow of financing to U.S. businesses and consumers and to support the U.S. economy," although reportedly some banks are considering using a portion of the federal money to acquire other banks. Treasury Secretary Paulson has indicated that while the main purpose of the program is to facilitate well-capitalized financial institutions, under certain circumstances consolidation may be the best result. If interested in participating in the Capital Purchase Program, Qualifying Financial Institutions are directed to contact, or deliver completed applications to, their primary regulator (the Federal Reserve, the FDIC, the OCC, or the OTS, as applicable). The deadline for submitting applications is 5:00 P.M. (Eastern time) on November 14, 2008. Nine major financial institutions² have already elected to participate in the program, as was announced in dramatic fashion last week.

Under the Capital Purchase Program, the Treasury will invest up to \$250 billion in preferred stock of participating institutions. Each eligible institution may sell such securities to the Treasury in amounts equal to one percent to three percent of such institution's risk-weighted assets (not to exceed \$25 billion per institution). Such securities will (i) be senior to any common stock of such institution; (ii) rank *pari passu* with other preferred shares; (iii) be non-voting (other than class voting on matters that could adversely affect such securities); and (iv) pay a five percent dividend for the first five years. Even though the dividend adjusts to nine percent thereafter, this program is still considered to be a very favorable cost of capital for banks and financial institutions in the current market. In addition to any such purchase, Treasury will receive warrants to purchase common shares of each participating institution, in an amount up to 15 percent of the amount of the preferred stock investment in such institution. In return, each such participating institution must (a) comply with Treasury's requirements relating to executive compensation and certain other corporate governance matters, in each case during the time when Treasury owns such securities; and (b) agree to all terms and conditions (including representations and warranties) set forth in, and enter into, a detailed investment agreement and related documentation. The forms of such investment agreement and related documentation are not yet available to the public. At this point, it appears that the program is targeting publicly-held institutions, but it is possible that privately held entities may be able to participate as well.

¹ A "Qualified Financial Institution" is defined as "(i) any U.S. bank or U.S. savings institution not controlled by a Bank Holding Company ("BHC") or Savings and Loan Company ("SLHC"); and (ii) any U.S. BHC, or any U.S. SLHC which engages solely or predominately in activities that are permitted for financial holding companies under relevant law, and any U.S. bank or U.S. savings association controlled by such a qualifying U.S. BHC or U.S. SLHC; except that QFI shall not mean any BHC, SLHC, bank or savings association controlled by a foreign bank or company." (See <http://www.treas.gov/initiatives/eesa/docs/faq-cpp.pdf>.)

² Goldman Sachs, Morgan Stanley, Citigroup, Wells Fargo, JPMorgan Chase, Bank of America, Bank of New York Mellon, Merrill Lynch and State Street.

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Links to the application and frequently asked questions, both on the Treasury web site, are below, as is a link to the October 20, 2008 joint press release issued by each of the four regulatory agencies relating to the application process. Please feel free to contact any of the HRO attorneys listed in this alert with any questions.

<http://www.treas.gov/initiatives/eesa/docs/application-guidelines.pdf>

<http://www.treas.gov/initiatives/eesa/docs/faq-cpp.pdf>

<http://www.federalreserve.gov/newsevents/press/bcreg/20081020a.htm>

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