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Treasury Posts New Term Sheet for Non-Publicly Traded Financial Institutions

Renee E. Becker

On November 17, 2008, the United States Treasury Department (the "Treasury") posted an additional term sheet (the "Non-Public Company Term Sheet") and a "Private Bank Program Q&A" for the participation of non-publicly traded financial institutions in the Troubled Asset Relief Program – Capital Purchase Program (the "Capital Purchase Program"). The Capital Purchase Program, developed in conjunction with the Emergency Economic Stabilization Act ("EESA") to assist financial institutions and increase lending to United States businesses and consumers, was previously geared toward publicly traded financial institutions. The term sheet for publicly traded financial institutions (the "Public Company Term Sheet") was posted on the Treasury's website on October 14, 2008.

What Does "Publicly Traded" Mean?

Consistent with previous guidance issued by the Treasury, the Non-Public Company Term Sheet defines a "publicly traded" company as a company (1) whose securities are traded on a national securities exchange and (2) required to file, under the federal securities laws, periodic reports such as the annual (Form 10-K) and quarterly (Form 10-Q) reports with either the Securities and Exchange Commission ("SEC") or its primary federal bank regulator. A company may be required to file periodic reports by virtue of having securities registered under Section 12 of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), which applies to all companies that are traded on an exchange or that have $10 million in assets and 500 shareholders of record, or pursuant to Section 15(d) of the Exchange Act, which requires companies that have filed a registration statement under the Securities Act of 1933, as amended (the "Securities Act"), and have 300 or

NEWSLETTER EDITORS

Katerina Hertzog Bohannon
Partner
kbohannon@manatt.com
650.812.1364

Harold P. Reichwald
Partner
hreichwald@manatt.com
310.312.4148

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more securityholders of record of the registered class, to file reports required under Section 13 of the Exchange Act, e.g., periodic reports.

Which Non-Public Financial Institutions Can Now Participate in the Capital Purchase Program?

The definition of a qualified financial institution ("QFI") remains substantially the same, except that it applies to non-publicly traded financial institutions. A non-publicly traded QFI means, generally, any (i) United States bank or savings association organized in a stock form that is neither publicly traded nor controlled by a bank holding company or savings and loan holding company, (ii) top-tier bank holding company or savings and loan holding company that engages solely or predominately in activities permissible for financial holding companies under relevant law, that in either case is not publicly traded, and (iii) United States bank or savings association that is not publicly traded and is controlled by a savings and loan holding company that is not publicly traded and does not engage solely or predominately in activities that are permitted for financial holding companies under relevant law. The Non-Public Company Term Sheet does not apply to S-Corporations (corporations that have made a valid election to be taxed under Subchapter S of the United States Internal Revenue Code), mutual depository institutions (entities organized in mutual form), and any financial institution controlled by a foreign bank or company.

What is the Deadline for Non-Publicly Traded QFIs to Apply for the Capital Purchase Program?

Applications for non-publicly traded QFIs must be submitted to the appropriate federal banking agency for the QFI by 5 p.m. on ***December 8, 2008*****.**

What Are the Similarities Between This Newly Issued Non-Public Company Term Sheet and the Public Company Term Sheet Issued on October 14, 2008?

The following terms of the Capital Purchase Program are the same for both publicly traded QFIs and non-publicly traded QFIs:

- The Treasury will be the initial holder of the securities issued by the QFI;
- The amount of Preferred issued will be equal to not less than 1% of a QFI's risk-weighted assets and not more than the lesser of (i) $25 billion and (ii) 3% of its risk-

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weighted assets;

- The Preferred will be perpetual and will have a liquidation preference of $1,000 per share;
- The Preferred will be accorded Tier 1 capital treatment;
- The ranking for the Preferred is senior to common stock and pari passu with existing preferred shares other than preferred shares that, by their terms, rank junior to any existing preferred shares;
- The Preferred will pay cumulative dividends at a rate of 5% per annum until the fifth anniversary of the date of this investment and thereafter at a rate of 9% per annum. For Preferred issued by banks that are not subsidiaries of holding companies, the Preferred will pay noncumulative dividends at a rate of 5% per annum until the fifth anniversary of the date of this investment and thereafter at a rate of 9% per annum;
- The Preferred may not be redeemed for a period of three years from the date of the Treasury's investment, except with the proceeds from a qualified equity offering, which results in aggregate gross proceeds to the QFI of not less than 25% of the issue price of the Preferred. The redemption provisions following the third anniversary of the date of the Treasury's investment are also unchanged from the Public Company Term Sheet;
- All benefit plans, arrangements, and agreements (including golden parachute agreements) shall be modified or terminated to the extent necessary to be in compliance with the executive compensation and corporate governance requirements of Section 111 of the EESA, and appropriate waivers shall be granted releasing the Treasury from any claims resulting from such modifications or terminations.

What Are the Significant Differences Between the New Non-Public Company Term Sheet and the Public Company Term Sheet?

The Public Company Term Sheet and the Non-Public Company Term Sheet differ in the following areas:

- **Common Dividends**: Under both term sheets, the Treasury's consent is required for any increase in common dividends per share until the third anniversary of the date of the investment. The Non-Public Company Term Sheet, however, adds that after the third anniversary and prior to the ***tenth*** anniversary, the

Treasury's consent shall be required for any increase in aggregate common dividends per share greater than 3% per annum; provided that no increase in common dividends may be made as a result of any dividend paid in common shares, any stock split, or similar transaction. In addition, from and after the tenth anniversary of the date of the Treasury's investment, the QFI shall be prohibited from paying common dividends until all equity securities held by the Treasury are redeemed in whole or the Treasury has transferred all of such equity securities to third parties.

- **Repurchases**: The Non-Public Company Term Sheet adds that the Treasury's consent is required for any repurchases of not only equity securities, as is the case with Publicly Traded Companies, but also trust preferred securities. Also, the Treasury's consent is required until the ***tenth*** anniversary of the Treasury's investment, instead of the third anniversary, as provided in the Public Company Term Sheet. From and after the tenth anniversary of the date of the Treasury's investment, the QFI shall be prohibited from repurchasing any equity securities or trust preferred securities until all equity securities held by the Treasury are redeemed in whole or the Treasury has transferred all of such equity securities to third parties.

- **Voting Rights**: If dividends on the Preferred are not paid in full for six dividend periods, whether or not consecutive, the Preferred will have the right to elect 2 directors, and such right will end when full dividends have been paid for (i) ***all prior dividend periods*** in the case of cumulative Preferred, or (ii) four consecutive dividend periods in the case of noncumulative Preferred. The Public Company Term Sheet does not state that the right to elect 2 directors ends when full dividends have been paid for all prior dividend periods in the case of cumulative Preferred.

- **Transferability**: As with the Public Company Term Sheet, the Preferred will not be subject to any contractual restrictions on transfer. The Non-Public Company Term Sheet adds that the Preferred will not be subject to the restrictions of any stockholders' agreement or similar arrangement that may be in effect among the QFI and its stockholders at the time of the Preferred investment or thereafter. The Non-Public Company Term Sheet further adds that the QFI is only required to file a shelf registration statement covering the Preferred if the QFI otherwise becomes subject to the periodic reporting requirements of Section 13 or 15 (d) of the Exchange Act. The Treasury covenants that neither it nor its transferees will effect any transfer of the Preferred which would require the QFI to become subject to the periodic reporting requirements of the

Exchange Act.

- **Related Party Transactions**: The Non-Public Company Term Sheet contains related party transaction provisions that are not contained in the Public Company Term Sheet. It provides that, for as long as the Treasury holds any equity securities of the QFI, the QFI and its subsidiaries will not enter into transactions with related persons (within the meaning of Item 404 under the SEC's Regulation S-K) unless (i) such transactions are on terms no less favorable to the QFI and its subsidiaries than could be obtained from an unaffiliated third party, and (ii) such transactions have been approved by the audit committee or comparable body of independent directors of the QFI.

- **Warrant**: Some of the warrant terms are modified from the Public Company Term Sheet. The Non-Public Company Term Sheet specifies that the Treasury will receive warrants to purchase, upon net settlement, a number of net shares of ***preferred stock*** of the QFI (the "Warrant Preferred") having an aggregate liquidation preference equal to 5% (as opposed to 15% under the Public Company Term Sheet) of the Preferred amount on the date of investment. Non-publicly traded QFIs will not experience common stock dilution upon exercise of the warrants as is the case with publicly traded QFIs, which are required to issue common stock upon exercise of the warrants in lieu of preferred stock. The initial exercise price for the warrants shall be $0.01 per share or such greater amount as the charter may require as the par value per share of Warrant Preferred. The warrants are still immediately exercisable and for a term of 10 years and the Treasury expressly states that it intends to immediately exercise the warrants. The same provisions with respect to the transferability of the Preferred applies to the warrants.

Do the Shelf Registration Requirements Apply to California Banks Chartered by the California Commissioner of the Department of Financial Institutions ("DFI")?

It should be noted that the Non-Public Company Term Sheet assumes that offers and sales of the non-publicly traded QFI's securities must comply with the applicable provisions of the Securities Act, and the rules and regulations thereunder. However, offers and sales of California state-chartered bank securities are exempt from the requirements of the Securities Act under Section 3(a)(2). Instead, offers and sales of securities by California state-chartered banks are subject to the permit requirements of the California Financial Code, as administered by the DFI, which do not allow sales of securities under a shelf registration statement and do not cover secondary sales of securities by shareholders whether or not affiliates of the issuer. California state-chartered banks cannot strictly comply with the provisions of the Non-Public Company Term Sheet requiring shelf registration. The provisions of any final agreements entered into with the Treasury will need to be modified to address this issue.

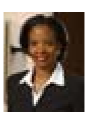
What if the Financial Institution Seeking to Participate in the Capital Purchase Program is currently unable to pay dividends?

The provisions of any final agreements entered into by California state-chartered banks with the Treasury, requiring the payment of dividends on the Preferred Shares, may need to be modified to reflect the limitations on the payment of dividends set forth in the California Financial Code. In many cases payment of each dividend on the Preferred may be subject to the prior approval of the DFI.

How do Non-Publicly Traded QFIs Apply for the Capital Purchase Program?

Applicants should complete the application and follow the procedures that can be found on the applicable federal banking agency website or on the Treasury website here. The actions that should be taken following submission of the application are the subject of our November 14, 2008, *BankingLaw@manatt* newsletter.

FOR ADDITIONAL INFORMATION ON THIS ISSUE, CONTACT:



Renee E. Becker Ms. Becker represents public and private companies, particularly financial institutions, in connection with mergers and acquisitions, public securities offerings, and corporate governance matters. Additionally, she advises public companies on various matters relating to federal securities law compliance and reporting under the Securities Act of 1933, the Securities Exchange Act of 1934, and the Sarbanes-Oxley Act of 2002, as well as state securities laws. Ms. Becker has represented public company acquirers in a number of fairness hearings before the California Department of Corporations.