WILLKIE FARR & GALLAGHER LLP

CLIENT
MEMORANDUM

**SPECIALIZED OR SMALLER FIRMS MAY FIND BUSINESS OPPORTUNITIES IN THE TREASURY DEPARTMENT'S TROUBLED ASSETS RELIEF PROGRAM**

The Treasury Department ("Treasury") this week conducted a 48-hour request for bids from larger financial institutions to implement the Troubled Assets Relief Program (the "TARP") enacted as part of the Emergency Economic Stabilization Act (the "Act"). The speed with which bidders had to respond, the qualifications described, and the nature of the services sought by Treasury suggest that some of the eventual "winners" may seek to form consortia with other businesses, or otherwise seek "subcontractors," to help deliver services to the government in a timely and effective way. Such needs may present business opportunities for smaller or specialized firms to participate in the TARP by providing supporting services to the financial institutions selected under this program.

On Monday, October 6, Treasury issued three notices announcing the solicitation of financial institutions to provide certain services for the portfolio of troubled mortgage-related assets (including securities, obligations, and other instruments based on or related to residential and commercial mortgages) that will be acquired by Treasury pursuant to the Act. The services sought include: securities asset management; whole loan asset management; and "portfolio infrastructure services," such as accounting, auction management, and custodian services for Treasury's portfolio. The deadline for responses was Wednesday, October 8. The Treasury press release with links to the notices is at http://www.treas.gov/press/releases/hp1185.htm.

As defined by the Act, "financial institutions" generally includes banks, savings associations, credit unions, securities brokers or dealers, and insurance companies organized and regulated under federal or state law and having "significant operations" in the United States. According to Treasury, the pool of institutions suitable to bid comprises those meeting specified standards of organizational eligibility as well as a set of minimum qualifications, including current assets under management or custody of at least $25 billion (for "whole loan" asset management), $100 billion (for securities asset management), and $500 billion (for portfolio infrastructure services). Primary contractors are required to be financial institutions. However, the Treasury notices regarding bidding seem to contemplate that primary contractors may partner with subcontractors that need not be financial institutions. For example, in the notice regarding asset managers, Treasury states that "the Financial Institution must be able and willing to partner with other Financial Institutions selected to be sub-managers ***and*** with subcontractors, as directed by the Treasury." This suggests that investment managers need not be registered with the Securities and Exchange Commission in order to serve as subcontractors under the TARP.

For each type of prospective service provider, the notices describe a comprehensive, complex and wide-ranging set of duties, as briefly summarized below. The notices indicate that Treasury expects each service provider selected by Treasury to have *either* significant in-house resources already in place that can be dedicated to meeting these demanding obligations (without damaging its primary business functions) *or* the capacity to find and manage a team of outside consultants or "subcontractors" to implement various aspects of the service being provided immediately and effectively.

Treasury's notice with respect to asset managers indicates that the duties of the selected institutions will include, among others: managing assets as instructed by Treasury; devising, documenting, and executing strategies meeting Treasury's investment policy and guidelines; measuring and reporting on standards for best execution with brokers, dealers, and other counterparties; executing potentially multi-billion dollar trades in a single day; and providing a dedicated team to carry out these services. The Treasury email contact for this solicitation is securities@do.treas.gov.

The solicitation for asset management of "whole loans" (i.e., individual mortgage loans) describes numerous responsibilities, including: conducting pre- and post-transactional diligence and review of loans and loan portfolios; establishing and managing the "transactional infrastructure" of loan data files; performing whole loan valuations; providing "integrated asset management" for loans and loan portfolios; monitoring and reporting to Treasury on loan and loan portfolio performance; directing the liquidation of properties; and providing all related administrative and technical services, such as hardware, software, and recordkeeping. The Treasury email contact for this solicitation is wholeloans@do.treas.gov.

Financial institutions seeking to provide portfolio infrastructure services will be required to perform a variety of functions for "a highly complex, multi-manager portfolio" of troubled mortgage-related assets. These include: providing custody and cash accounts; confirming settlements, trades, and other transactions with asset managers; designing, testing, and managing systems for the acquisition of mortgage-related securities in multiple simultaneous auctions and rounds of auctions potentially involving thousands of sellers; and supplying accounting, reporting, pricing, valuation, market information, trustee, or operational services. The Treasury email contact for this solicitation is custodian@do.treas.gov.

The notices contemplate that financial institutions selected as a result of this process will, as appropriate, engage third parties as subcontractors for the purpose of performing the government services. Companies interested in participating as subcontractors should be aware that certain special conditions will be binding on the selected "primary" financial institutions. We anticipate that these institutions will likely seek to bind subcontractors to similar conditions that assure the selected primary financial institution that it will be able to fulfill its obligations to Treasury.

Specifically, the primary financial institutions performing services for Treasury will not be government contractors in the usual sense. Rather, because each institution will be holding or handling assets belonging to the U.S. government, it will become a "financial agent of the United States" ("Financial Agent") with a direct agent-principal fiduciary relationship with the government and the responsibility to protect the interests of the United States. This fiduciary standard is higher than that applicable to government contractors.

Each selected primary financial institution will also be required to sign a Financial Agency Agreement (the "Agreement") with the government requiring the Financial Agent to meet rigorous standards with respect to auditing, recordkeeping, and government oversight of its TARP-related activities. In general, Treasury has no blanket authority to indemnify Financial Agents against any losses associated with providing services to the government (although unusual risks and losses may be evaluated on a case-by-case basis) and the Financial Agent is legally accountable for any failure to comply with its obligations under the Agreement.

Subcontractors that would be directly involved in handling U.S. government assets should, therefore, also expect to be designated as Financial Agents. Subcontractors not handling government assets can expect to be asked to assume contractual obligations that protect the primary financial institution in its role as a Financial Agent. Companies should carefully evaluate the potential risks and benefits of providing such services to the government through the selected primary financial institution.

Treasury's expedited timetable for implementing the TARP indicates that prospective subcontractors should immediately contact Treasury, and financial institutions that may have applied to Treasury, to describe their interest and specialized expertise.

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This memorandum was prepared by Gregory B. Astrachan and Russell Smith. The Task Force (which includes UK insolvency professionals from our strategic ally, Dickson Minto W.S., and attorneys from our European offices) was formed to respond to client questions and provide targeted advice in connection with the proposed Government bailout and the credit crisis (including the Lehman Brothers Holdings Inc. bankruptcy). If you have any questions about this memorandum, please contact any of the members of the WF&G Government Rescue and Credit Crisis Task Force listed below or the attorneys in the asset management group or other attorneys with whom you regularly work.

October 10, 2008

| GOVERNMENT RESCUE AND CREDIT CRISIS TASK FORCE | | |
|---|---|---|
| ***Bankruptcy and Restructuring Matters*** | ***Prime Brokerage Agreements and Broker-Dealer Issues*** | ***Securitizations and Repurchase Agreements*** |
| Marc Abrams<br>(212) 728-8200<br>mabrams@willkie.com | Roger Blanc<br>(212) 728-8206<br>rblanc@willkie.com | Jack Habert<br>(212) 728-8952<br>jhabert@willkie.com |
| Shelley Chapman<br>(212) 728-8268<br>schapman@willkie.com | Larry Bergmann<br>(202) 303-1103<br>lbergmann@willkie.com | Thomas French<br>(212) 728-8124<br>tfrench@willkie.com |
| Matthew Feldman<br>(212) 728-8651<br>mfeldman@willkie.com | Matthew Comstock<br>(202) 303-1257<br>mcomstock@willkie.com | ***Commodities and Futures Trading and Regulation*** |
| Michael Kelly<br>(212) 728-8686<br>mkelly@willkie.com | ***Government Rescue*** | Rita Molesworth<br>(212) 728-8727<br>rmolesworth@willkie.com |
| Alan Lipkin<br>(212) 728-8240<br>alipkin@willkie.com | Russell Smith<br>(202) 303-1116<br>rsmith@willkie.com | ***Litigation*** |
| Paul Shalhoub<br>(212) 728-8764<br>pshalhoub@willkie.com | Gregory Astrachan<br>(212) 728-8608<br>gastrachan@willkie.com | Benito Romano<br>(212) 728-8258<br>bromano@willkie.com |

| *Derivatives* | *Hedge Funds* | *Securities Enforcement* |
|---|---|---|
| Jack Habert<br>(212) 728-8952<br>jhabert@willkie.com | Daniel Schloendorn<br>(212) 728-8265<br>dschloendorn@willkie.com | Gregory S. Bruch<br>(202) 303-1205<br>gbruch@willkie.com |
| Thomas French<br>(212) 728-8124<br>tfrench@willkie.com | Rita Molesworth<br>(212) 728-8727<br>rmolesworth@willkie.com | Elizabeth P. Gray<br>(202) 303-1207<br>egray@willkie.com |
| | | Julie A. Smith<br>(202) 303-1209<br>jasmith@willkie.com |
| ***Purchases of Real Estate Assets and Real Estate Related Securities*** | ***Credit Agreements and Other Loan Documents*** | ***1940 Act Registered Funds Including Money Market Funds*** |
| David Boston<br>(212) 728-8625<br>dboston@willkie.com | William Hiller<br>(212) 728-8228<br>whiller@willkie.com | Barry Barbash<br>(202) 303-1201<br>bbarbash@willkie.com |
| Steven Klein (Real Estate)<br>(212) 728-8221<br>sklein@willkie.com | William Dye<br>(212) 728-8219<br>wdye@willkie.com | Rose DiMartino<br>(212) 728-8215<br>rdimartino@willkie.com |
| Eugene Pinover (Real Estate)<br>(212) 728-8254<br>epinover@willkie.com | Jeffrey Goldfarb<br>(212) 728-8507<br>jgoldfarb@willkie.com | Margery Neale<br>(212) 728-8297<br>mneale@willkie.com |

Willkie Farr & Gallagher LLP is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our facsimile number is (212) 728-8111. Our website is located at www.willkie.com.