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Global Finance Group Client Alert

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U.S. Treasury Publishes Standard-Form CPP Documentation

On October 31, 2008 the U.S. Department of the Treasury (the “Treasury”) published form documentation for the issuance of senior preferred stock (the “Preferred Stock”) and warrants (the “Warrants”) by publicly traded financial institutions (“Participating Institutions”) participating in the Treasury’s capital purchase program (the “CPP”) authorized by the Emergency Economic Stabilization Act of 2008. The documents include standard forms of a Securities Purchase Agreement, Preferred Stock certificate of designations and Warrant to purchase shares of common stock (collectively, the “Standard CPP Documents”).

In addition, on October 28, 2008 the Treasury completed the purchase of Preferred Stock and Warrants from an initial eight financial institutions pursuant to the CPP. The initial Participating Institutions are Bank of America Corporation (“BOA”) (having an aggregate \$15 billion liquidation preference), Bank of New York Mellon Corporation (\$3 billion), Citigroup Inc (\$25 billion), The Goldman Sachs Group, Inc. (\$10 billion), JPMorgan Chase & Co. (\$25 billion), Morgan Stanley (\$10 billion), State Street Corporation (\$2 billion) and Wells Fargo & Company (\$25 billion); Merrill Lynch & Co., Inc. agreed to issue \$10 billion of Preferred Stock on or prior to January 31, 2009 if its pending merger with BOA had not been completed at such time (if the BOA merger is completed prior to such time BOA has agreed to issue an additional \$10 billion of Preferred Stock).

Consistent with the CPP term sheet (the “CPP Term Sheet”) originally published by the Treasury on October 14, 2008 (and re-published with the Standard CPP Documents), each of the initial Participating Institutions issued a Warrant to the Treasury to purchase (over a 10-year exercise period) such Participating Institution’s common stock in an initial amount equal to 15% of the liquidation preference of Preferred Stock issued by such Participating Institution. The exercise price of each Warrant is based on the average trailing 20-day trading price of the underlying common stock (subject to customary – and frankly not onerous – anti-dilution adjustments).

Please feel free to discuss any aspect of this Client Alert with your regular Milbank contacts or with any of the members of our Structured Finance Group, whose names and contact information are provided herein.

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The terms of the Standard CPP Documents (as made available on the Treasury's website and as filed by various initial Participating Institutions with the U.S. Securities and Exchange Commission) are consistent with the CPP Term Sheet (a copy of the CPP Term Sheet can be found here <http://www.treas.gov/press/releases/reports/termsheet.pdf>). A few terms and conditions of the Standard CPP Documents are worth noting:

1) The issuance of Preferred Stock and Warrants by each Participating Institution pursuant to the form Standard CPP Documents is implemented by way of a letter agreement between the Participating Institution and the Treasury, which specifies certain deal-specific information and attaches disclosure schedules for the Participating Institution. With certain minor exceptions (e.g., Preferred Stock liquidation preferences and dividend payment dates), the terms of the Preferred Stock and Warrants are the same for all initial Participating Institutions.

2) Each Participating Institution agrees in the recitals to the Preferred Stock purchase agreement to (a) "expand the flow of credit to U. S. consumers and businesses on competitive terms to promote the sustained growth and vitality of the U.S. economy" and (b) "work diligently, under existing programs, to modify the terms of residential mortgages as appropriate to strengthen the health of the U.S. housing market". There are no other provisions of the Standard CPP Documents that elaborate on these general undertakings, and it is unclear what, if any, standards will be applied by the Treasury going forward to determine whether any particular Participating Institution is in compliance with them.

3) As previously disclosed by the Treasury, the Standard CPP Documents require, as a condition to the issuance of Preferred Stock, that the Participating Institution and its top five senior executives modify (and, if required, terminate) any relevant compensation and other employment arrangements to the extent required to comply with the Emergency Economic Stabilization Act's prohibition against "golden parachute" payments to such executives. The Standard CPP Documents require each affected senior executive to sign a letter at closing waiving any claims he or she may have against the Treasury or the Participating Institution as a result of changes to such executive's compensation arising from such modifications. These limitations on executive compensation and benefits remain in effect for each Participating Institution for so long as the Treasury continues to own any securities acquired pursuant to the CPP.

4) The Standard CPP Documents do not limit a Participating Institution's ability to pay dividends on its common stock (other than to cap dividend payments at existing levels for up to three years) and do not limit a Participating Institution's ability to use the Preferred Stock proceeds to acquire another banking institution, despite considerable attention paid to these issues during and since the Congressional debate on the Emergency Economic Stabilization Act.

5) The Standard CPP Documents afford the Treasury, acting through the Participating Institution's primary Federal bank regulator, customary inspection and information rights with respect to the Participating Institution and its officers, and also allows the Treasury access to material information relating to the Participating Institution on file with the primary Federal bank regulator.

6) The Preferred Stock is optionally redeemable by the Participating Institution only with the approval of the Participating Institution's primary Federal bank regulator, and may not in any case be redeemed during the three years after closing except with proceeds of the issuance of a minimum (equal to 25% of the aggregate liquidation preference of the Preferred Stock issued by the Participating Institution) of preferred or common equity qualifying as Tier 1 Capital (a "Qualified Equity Offering"). The Preferred Stock is perpetual and not mandatorily redeemable, but if on or prior to December 31, 2009 the Participating Institution undertakes a Qualified Equity Offering resulting in net proceeds at least equal to the aggregate liquidation preference for the Preferred Stock, the number of shares of the Participating Institution's common stock subject to the Warrant is reduced by 50%, whether or not such proceeds are in fact applied to redeem the Preferred Stock (and the

Treasury is limited from transferring or exercising more than half of the Warrant prior to December 31, 2009 or such issuance, if earlier).

7) Dividends on the Preferred Stock issued by all initial Participating Institutions are cumulative, and compound if unpaid on the quarterly dividend payment dates (the CPP Term Sheet does provide that if a bank that is not a subsidiary of a holding company issues Preferred Stock under the CPP, dividends on such Preferred Stock will not be cumulative). The proceeds of such Preferred Stock will qualify without limitation as Tier 1 capital of such Participating Institutions notwithstanding that dividends thereon are cumulative, under an amendment to the capital rules of the U.S. Federal Reserve issued on October 16, 2008.

8) The Preferred Stock is not convertible into common stock and is non-voting, except in limited circumstances (e.g., issuance of shares ranking senior to Preferred Stock, amendments to rights of Preferred Stock and mergers in which the Preferred Stock is exchanged for securities with materially less favorable terms). If Preferred Stock dividends are not fully paid for six or more quarters, the holders of the Preferred Stock have the right to appoint two directors to the Participating Institution's board. Furthermore, the Treasury has agreed not to exercise any voting rights with respect to shares of common stock acquired upon exercise of the Warrant.

9) The Participating Institution is required to file a shelf registration statement covering resales of the Preferred Stock, the Warrant and the shares of common stock subject to the Warrant within 30 days after closing, and the Treasury's registration rights are transferable to transferees of the Preferred Stock and the Warrant (subject to minimum transfer amounts).

10) If the Participating Institution's common stock ceases to be listed on a national securities exchange while the Warrant remains unexercised (other than as a result of a merger, etc.), the Treasury (but not any transferee thereof) may require that the Warrant be exchanged for an economic interest classified as GAAP permanent equity having an equivalent fair market value (as determined by the Treasury).

11) To the extent necessary under applicable national securities exchange rules or a Participating Institution's corporate charter documents, each Participating Institution is required to use reasonable best efforts to obtain stockholder approval of the potential issuance of its common stock upon exercise of the Warrant and, if such approval is not obtained at a stockholders meeting, to continue to seek such approval at least once in every subsequent six-month period. Assuming a Participating Institution's corporate charter documents authorizes its board of directors to fix the terms of and issue so-called "blank check" preferred stock, a separate stockholder vote on the Preferred Stock generally will not be required.

12) The Treasury is permitted to amend unilaterally any provision of the Securities Purchase Agreement to the extent required to comply with changes to applicable Federal statutes following the issuance of the Preferred Stock and Warrant.

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