



ALERT:

US Department of Treasury's Process for Selecting Financial Agents and Other Contractors

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Now that the federal government's economic rescue plan has become law, many are interested in the next steps the U.S. Department of Treasury will take to implement the new law. Under the Economic Stabilization Act of 2008, Treasury is authorized to select asset managers, as well as consultants and other types of advisors to assist the agency in handling the portfolio of troubled assets Treasury expects to acquire under the Troubled Assets Relief Program (TARP) provisions of the new law. This opportunity may be of interest to those in the financial industry because a wide range of entities may seek to provide services to Treasury in connection with the TARP. Given its commitment to implement TARP quickly, today Treasury issued very general guidance concerning the process it will follow to retain "financial agents" to manage assets and to select contractors to provide other services and supplies, and interim guidelines on how it will deal with conflicts of interest. This guidance is summarized below.

Importantly, Treasury has also issued three solicitation notices seeking:

- Multiple entities to provide securities asset management services;
- One or more entities to provide whole loan asset management services; and
- One entity to provide custodian, accounting, auction management and other infrastructure services.

The deadline for responding to these solicitations is 5 p.m. October 8, 2008. The solicitations may be found at <http://www.treasury.gov/press/releases/hp1185.htm> or please click [here](#).

General information about types of assets to be managed. Treasury will retain "financial agents" to serve as asset managers and to provide other services in connection with mortgage-backed securities and whole mortgage loans. The mortgage-backed assets in question will be Prime, Alt-A, and Subprime residential mortgage backed securities (MBS), commercial MBS, and MBS collateralized debt obligations. Whole loan asset managers may handle residential first mortgages, home equity loans, second liens, commercial mortgage loans, and possibly other types of mortgage loans acquired to promote market stability. Treasury may hire managers for other types of securities if Treasury decides that it needs to acquire such other types to promote market stability.

Treasury states that it generally expects to designate multiple asset managers and sub-managers to obtain the proper expertise in different asset types and different segments of the mortgage credit market. However, the agency may not select all asset managers at the same time, but may make selections in a sequence that matches Treasury's asset acquisition schedule and project plan for the portfolio. Treasury states that, for example, an asset manager for whole loans may not be selected at the same time as an asset manager for MBS, or a primary manager may be selected prior to a sub-manager. And as business requirements evolve, the agency may issue select more asset managers, consistent with the process outlined here.

Who can qualify. To provide a number different services in connection with TARP, including the asset management and other services that are the subject of the solicitations issued today, Treasury is authorized to designate "financial institutions" as financial agents of the federal government. The new law defines "financial

institution” as “any institution, including, but not limited to, any bank, savings association, credit union, security broker or dealer, or insurance company, established and regulated under the laws of the United States or any State, territory, or possession of the United States, the District of Columbia, Commonwealth of Puerto Rico, Commonwealth of Northern Mariana Islands, Guam, American Samoa, or the United States Virgin Islands, and having significant operations in the United States, but excluding any central bank of, or institution owned by, a foreign government.” Thus, a range of institutions can qualify to be financial agents.

The first three solicitations noted above seek proposals from financial institutions to enter into “financial agent” agreements. Significantly, those solicitations specify that to be selected, the entities cannot be on the federal debarment or suspension list, or be subject to any pending or current enforcement actions or regulatory investigations, or be on any type of probationary status if currently doing business with Treasury or any other federal agency. Entities also cannot be delinquent on any debts owed the government and must agree to disclose all potential conflicts of interest. Interested entities should therefore assess at the outset whether there are legal compliance issues that would affect the company’s eligibility to enter a contract with the federal government.

Duties of Financial Agents. Treasury has indicated that it generally will use its current authority to retain “financial agents” to hire asset managers. As financial agents (rather than contractors) of the United States, asset managers will have a fiduciary agent-principal relationship with the Treasury, and will therefore be responsible for “protecting the interests of the United States.” In practice, a fiduciary responsibility generally means the fiduciary is obligated to put the interests of its principal ahead of its own interests.

Application of the Federal Acquisition Regulation. Treasury may also obtain services or supplies using procurement contracts under the Federal Acquisition Regulation (FAR). In general, the FAR requires the solicitation of offers from all responsible sources. However, competition for procurements may be limited for various reasons, including in circumstances of unusual or compelling urgency, and Treasury has advised that due to the need for expeditious implementation of TARP, it anticipates that a number of contracts will be awarded through other than full and open competition, using the established FAR provisions applicable under conditions of unusual and compelling urgency. Information on contracts awarded by Treasury will be posted at www.fedbizopps.gov (Federal Business Opportunities website) and/or at www.fpds.gov (Federal Procurement Data System). Where applicable, procurement opportunities will be posted at www.fedbizopps.gov. Businesses may submit capability statements to the Department’s Office of the Procurement Executive at ootpe@do.treas.gov. For information on how small businesses can participate in Treasury contracting, contact Treasury’s Office of Small and Disadvantaged Business Utilization at TreasuryOSDBU@do.treas.gov.

Conflicts of Interest. The interim COI guidelines and the specific solicitations issued so far require applicants to provide information on any actual or potential conflicts of interest that could arise from the performance of duties as contractor under TARP, including any conflicts that arise because of interests held by corporate affiliates. The guidelines indicate that Treasury is concerned with actual or potential (organizational) conflicts of interest in situations where a contractor’s (or agent’s) performance of a contract could potentially affect its other interests, or where a contractor (or agent) obtains sensitive, non-public government or private information. The guidelines also advise that potential personal conflicts of interest involving individual contractor employees were also a potential concern. The guidelines indicate that Treasury anticipates addressing potential conflicts of interest on a case-by-case basis through non-disclosure agreements, solicitation requirements for pre-award disclosure of actual or potential conflicts of interest and the submission and, possibly, negotiation of conflict mitigation plans, or waivers of such conflicts. It should be noted that the organizational conflict of interest rules applicable to government procurement contracts (in particular, FAR 9.5) and cases interpreting and applying them are likely to serve as a model and provide the basis for how Treasury assesses conflicts of interest and efforts to mitigate them.

Thus potential contractors or financial agents should be prepared to disclose actual or potential conflicts of interest and to submit and defend conflict mitigation plans, and would likely benefit from consultation with counsel regarding how best to address those subjects.

Potential candidates should also be aware that Treasury may request non-disclosure agreements and conflict of interest agreements in advance of supplying a solicitation.

Selection Procedures for Asset Managers. Thus far, Treasury has only released guidance concerning the selection procedures it will employ for entities seeking to serve as asset managers. Prospective financial agents will be solicited through the issuance of a public notice, posted on the Treasury website, requesting that interested and qualified financial institutions respond. The notices will describe the asset management services sought by the Treasury, set forth the rules for submitting a response, and list the factors that will be considered in selecting financial institutions. The notice will also include minimum qualifications, such as years of experience and minimum assets under management, and eligibility requirements, such as a clean audit opinion. As previously mentioned, Treasury has already released notices soliciting securities asset managers; whole loan asset managers; and custodian, accounting, auction management and other infrastructure services.

Treasury will evaluate the initial responses from all interested and qualified applicants and will invite certain candidates to continue to the second phase of the selection process. This second phase, and subsequent phases, may be conducted under confidentiality agreements to facilitate information exchange, but consistent with the public disclosure and transparency provisions of the Act. In the second phase, the prospective financial agents will be asked to provide additional information about their expertise, as well as asset management strategies, risk management, and performance measurement. This phase may include telephone conversations to allow questioning by and of the Treasury. Treasury will evaluate the responses from the second phase candidates, and will determine whether a candidate will continue to be considered. In this last stage, a financial institution may be required to conduct face-to-face discussions on “portfolio scenarios, public policy goals, and statutory requirements,” and to respond to interview questions to assess the capabilities of prospective individuals to be assigned to manage assets.

Following any face-to-face meetings, Treasury will make final selections of the financial institutions to be designated as asset managers. Entities selected to be asset managers will be required to sign a “Financial Agency Agreement” with the Treasury, a copy of which will be provided for review during the second stage of the selection process. Treasury advises that the applicant’s willingness to enter into the standard Financial Agency Agreement, with the established terms and conditions currently applied to financial agents of the United States, will be among the factors used in evaluating the financial institution. Treasury has indicated that at each stage in the selection process, personnel from the Offices of the Fiscal Assistant Secretary and the Assistant Secretary for Financial Markets, and possibly additional personnel within the Offices of Domestic Finance and Economic Policy, will evaluate the candidate submissions and make recommendations to the head of the Office of Financial Stability, who will make the final decision.

Treasury notes that it will not reimburse or otherwise compensate a prospective asset manager for expenses or losses incurred in connection with the selection process.

Treasury will issue separate notices, consistent with these procedures, specifically to identify smaller and minority- and women-owned financial institutions that do not meet the minimum qualifications for current assets under management in the initial notices. Such financial institutions will be designated as sub-managers within the portfolio.

The agency warns that given its need to implement TARP quickly, the selection process for asset managers may involve extremely short deadlines for submitting information and for traveling to Washington, D.C. for

meetings or interviews with Treasury officials. The notices issued today are a good example. Responses to these notices are due within 48 hours.

Although the foregoing guidance concerns the selection of asset managers, procedures for hiring other types of consultants and advisors may be similar. Thus, familiarity with the procedures for asset managers may help inform and help prepare entities interested in providing other types of services.

Recommendations. If the response time for today's solicitations concerning asset management services is any indication, entities interested in providing other services to Treasury in connection with TARP should start preparing now to respond to a solicitation. Among the things that can be done in advance of a specific solicitation are:

- Preparing materials that will be suitable for an initial response to a solicitation, including information on qualifications, capabilities and prior experience, biographical information regarding key personnel, and proposed fee;
- Identifying other companies that may be potential "subcontractors," including small and minority owned businesses;
- Identifying potential conflicts of interest and preparation of appropriate disclosure materials and a conflict of interest mitigation plan; and
- Setting up a system to monitor for the issuance of public notices of solicitations; and
- A front-end assessment of whether there are legal compliance issues that would affect the company's eligibility to enter a contract or financial agent agreement with the federal government, such as debarments, suspensions, enforcement actions or regulatory investigations, and if such issues exist, developing a plan to address them.

Steptoe's new **Troubled Asset Task Force** is ready to advise financial institutions, sellers and purchasers of assets, asset managers, and program managers on the economic stabilization legislation passed this week by the U.S. Congress. Focused on helping businesses at every scale nationwide navigate wisely in the wake of the current tumult in capital markets, the Task Force is structured to advise clients in the post bailout economy and the new regulatory landscape. This multi-disciplinary group will provide coordinated representation in matters involving Congressional oversight investigations; white collar criminal defense; federal contracting opportunities; tax law, ERISA and executive compensation; and, mortgage and asset securitization and structured financing. Steptoe's restructuring and distressed asset attorneys are also aboard to formulate complex and innovative approaches to workouts and troubled real estate transactions, and counsel clients on the judicious sale and acquisition strategies and liquidation of distressed assets. The Troubled Asset Task Force is well aligned with and supports the firm's national Subprime & Credit Crisis Team, organized last year in response to early concerns within the residential lending market.

Leadership of the Task Force is provided by Washington, D.C.-based partners Scott A. Sinder, chair of Steptoe's Government Affairs & Public Policy practice and General Counsel to the Commercial Mortgage Securities Association; John T. Collins, a member of the firm's Corporate, Securities and Finance practice and its Regulatory & Industry Affairs Department, who was formerly General Counsel to the US Senate Banking Committee, a Senior Attorney at the Washington D.C. Federal Reserve Board and a Staff Attorney with the SEC; and Scott H. Katzman, head of Steptoe's Corporate, Securities and Finance practice.

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