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Treasury Department's Private Sector Utilization Program Under TARP Begins To Take Shape

On October 6, 2008, the Department of the Treasury announced that it would seek the assistance of private entities to provide certain services required to implement the Troubled Asset Relief Program ("TARP") created by the Emergency Economic Stabilization Act of 2008 ("Act"). *See* *Emergency Economic Stabilization Act Offers Opportunities for Sellers, Contractors, and Purchasers* (Oct. 6, 2008). Treasury's announcement indicated it would use two mechanisms—procurement contracts and financial agent agreements ("FAAs")—to acquire such services, and Treasury has quickly utilized both procedures.

On October 11, 2008, Treasury hired Ennis Knupp & Associates as an investment advisor to assist in evaluating potential asset managers and other vendors. Ennis Knupp will also help develop and maintain investment policies and guidelines and assist with the oversight of Treasury's multiple asset managers. Treasury stated that it hired Ennis Knupp using a procurement contract under the Federal Acquisition Regulation ("FAR") and that it solicited offers from only six firms given "compelling urgency to quickly establish the TARP." The compelling urgency justification that Treasury employed was not the "urgent and compelling circumstances" provision in Section 107 of the Act that authorizes the Secretary of the Treasury to waive certain provisions of the FAR. Rather, Treasury used limited procurement procedures under the FAR's long established "unusual and compelling urgency" exception to the Competition in Contracting Act requirements for full and open competition. Ennis Knupp's contract has a performance period of one year.

In addition, Treasury has issued notices for the selection of financial agents for three types of services: whole loan asset management, securities management, and custodial services. *See* *Treasury Initiates Selection of Financial Agents for Troubled Assets Relief Plan* (Oct. 7, 2008). In its notices for these services, Treasury announced that any entity "designated to provide services pursuant to this notice, shall be a financial agent of the United States, and not a contractor. Neither this notice, nor the services sought by the Treasury, is a procurement subject to the Federal Acquisition Regulation." On October 14, 2008, Treasury announced the selection of its first financial agent under the TARP, Bank of New York Mellon, to provide custodial and other infrastructure services. Treasury entered into a FAA with Bank of New York Mellon for an initial performance period of three years.

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Authors and Contributors

For more information regarding this client alert, please contact your usual Fried Frank attorney or any of the attorneys listed below:

Washington, DC

Thomas P. Vartanian
+1.202.639.7200

James J. McCullough
+1.202.639.7130

David L. Ansell
+1.202.639.7011

Robert H. Ledig
+1.202.639.7016

Gordon L. Miller
+1.202.639.7173

William S. Speros
+1.202.639.7327

Fried, Frank, Harris, Shriver & Jacobson LLP

New York
One New York Plaza
New York, NY 10004-1980
Tel: +1.212.859.8000
Fax: +1.212.859.4000

Washington, DC
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2505
Tel: +1.202.639.7000
Fax: +1.202.639.7003

Frankfurt
Taunusanlage 18
60325 Frankfurt am Main
Tel: +49.69.870.030.00
Fax: +49.69.870.030.555

Hong Kong
in association with
Huen Wong & Co.
9th Floor, Gloucester Tower
The Landmark
15 Queen's Road Central
Hong Kong
Tel: +852.3760.3600
Fax: +852.3760.3611

Shanghai
4oth Floor, Park Place
1601 Nanjing Road West
Shanghai 200040
Tel: +86.21.6122.5500
Fax: +86.21.6122.5588

Fried, Frank, Harris, Shriver & Jacobson (London) LLP

London
99 City Road
London EC1Y 1AX
Tel: +44.20.7972.9600
Fax: +44.20.7972.9602

Fried, Frank, Harris, Shriver & Jacobson (Europe)

Paris
65-67, avenue des Champs Elysées
75008 Paris
Tel: +33.140.62.22.00
Fax: +33.140.62.22.29

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