

## CONCERNS FOR NON-EXCHANGE-LISTED PUBLIC COMPANIES

*This group consists of companies that file 10-K/10-Q/8-K reports with the SEC (or FDIC or OCC if there is no holding company) but are not listed on Nasdaq, AMEX, or the NYSE. Some banks may be listed on the Nasdaq Over-the-Counter Bulletin Board, and others may be traded on the “pink sheets” or through informal community and market contacts. In addition to the issues affecting smaller public companies generally, the absence of an exchange listing presents particular problems for these companies under the program as currently structured.*

The TARP Capital Public Term Sheet presents the following issues and concerns:

### Senior Preferred Stock

**Type of Security:** If the company’s articles of incorporation do not authorize preferred stock, the shareholders will need to approve, and the company will need to file, an amendment to the articles of incorporation authorizing preferred stock and allowing the board to issue it and set its terms. In addition, banks without holding companies may be required to seek prior regulatory approval to amend their charters.

If the company is subject to the SEC’s proxy rules (and it generally will be), preliminary proxy materials will need to be filed with the SEC for review. A lengthy review process could result in the inability to mail the proxy materials in time to provide adequate notice to shareholders, which would then make the company unable to issue the Senior Preferred Stock within the required time frame.

**Shelf Registration:** Although a company in this category will be able to file a shelf registration with the SEC, the registration process is likely to involve significant effort and expense. This is because most companies will need to file an S-1 registration statement and file periodic updates after effectiveness, whereas exchange-listed companies can file automatically updating, short-form S-3 registration statements.

Furthermore, the SEC will have an opportunity to review the registration statement (1) before declaring it effective and (2) afterward when post-effective amendments (such as the annual 10-K) are filed. The company will not be able to control the timing or outcome of these reviews.

While this process greatly benefits Treasury if fully liquid securities are the result, the benefit is arguably outweighed by the effort and expense involved, particularly given the limited trading volume of the securities that will be issued.

**Reasonable Efforts to List the Securities:** As is the case with shelf registration, the listing process will involve time and expense that may not be offset by the resulting liquidity of the securities.

**Executive Compensation:** Management needs to be sure that the “senior executive officers,” as defined under the TARP Capital rules, will sign an agreement consenting to “clawback” rights

regarding future bonus and incentive compensation paid based on materially inaccurate earnings statements or other criteria. The board also needs to be comfortable with the limitations on payments made to terminated executives and with the inability to deduct more than \$500,000 of annual executive compensation for the senior executives. Finally, management needs to make sure it is in a position to make any amendments to senior executive compensatory arrangements to address these requirements before Treasury makes the investment (i.e., before the end of this year).

### **Warrants**

**Underlying common stock:** If the company's articles of incorporation do not authorize the issuance of sufficient shares of common stock upon exercise of the warrants, the company will need to amend its articles of incorporation to authorize the additional shares. Although the Warrant Term Sheet does not require that these shares be authorized when the warrants are issued, penalty provisions will apply if shareholder approval is not obtained within six months thereafter. When shareholder approval is sought, the preliminary proxy filing requirements described in "Shelf Registration" above will apply.

**Exercise Price:** The exercise price is required to be equal to the 20-trading-day trailing average of the common stock, which could be impossible to determine if the stock is not traded on an exchange.

**Shelf Registration:** The same issues are presented as in the case of the Senior Preferred described above.

**Requirement to List on an Exchange:** The same issues are presented as in the case of the Senior Preferred described above, except that listing is required as opposed to a "reasonable efforts" undertaking. If the company's common stock does not meet applicable listing requirements, then the company will not be able to meet this requirement. Perhaps the "substitution" provisions of the warrant would apply automatically at this point, although those provisions on their face address the loss of exchange listing, as opposed to the inability to list the stock in the first place.