

## CONCERNS FOR PRIVATE COMPANIES

*This group consists of companies that do not file 10-K/10-Q/8-K reports with the SEC (or FDIC or OCC if there is no holding company) and are therefore not listed on Nasdaq, AMEX, or the NYSE. They may be listed on the Nasdaq Over-the-Counter Bulletin Board, traded on the “pink sheets,” or traded only through informal community and market contacts.*

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.

**Shelf Registration:** Although it is possible for a private company to file a shelf registration statement with the SEC, the registration process (1) will be tantamount to “going public,” (2) would involve significant effort and expense, and (3) may not be in the company’s long-term best interest. For example, management would need to prepare extensive disclosure regarding, among other things, the company’s business, financial condition, results of operations, cash flows, executive compensation, management, capital structure and other information. Furthermore, the company may be required to obtain a new audit of its prior financial statements to address the auditor independence requirements of the Sarbanes-Oxley Act.

The SEC will have an opportunity to review the registration statement before declaring it effective, and the company will not be able to control the timing or outcome of this process. After registration, the company would need to update the shelf registration statement on an ongoing basis and to continue filing periodic SEC reports. Post-effective amendments will again be subject to SEC review.

While this process provides a valuable benefit for Treasury if fully liquid securities are the result, we believe the benefit is 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:** Because exchange listing requires registration of the securities, the listing process would involve unreasonable time and expense for the reasons identified in “Shelf Registration” above.

**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**

**Exercise Price:** The exercise price is required to be equal to the 20-trading-day trailing average of the common stock, which a private company will not typically be able to determine.

**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.