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Who Will Bailout the Bailoutters?: An Overview of the Unique Legal Risks Facing Treasury's New Asset Managers and their Subcontractors

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On October 3, 2008, Congress passed and President Bush signed into law the Emergency Economic Stabilization Act of 2008 (EESA).[1] Pursuant to the authority granted to it under the EESA, the Department of the Treasury (Treasury) is now in the early stages of implementing the sweeping Troubled Asset Relief Program (TARP).[2] This authority includes the power to enter into agreements with private sector financial institutions to serve as asset managers for the portfolio of troubled assets that Treasury will purchase under the EESA. As firms have begun to jockey in earnest for a piece of the action, whether it be directly from Treasury or through subcontracts or consulting agreements, those private sector institutions must be mindful of the unique, and for the most part uncharted, legal and attendant financial risks that are likely to lay ahead. The potential traps, and there are many, may prove painful for the unwary.

Treasury has two available legal devices for utilizing private-sector firms to implement TARP: (1) financial agent authority; and (2) procurement contracts awarded under the Federal Acquisition Regulation (FAR),[3] the regulatory regime that governs standard federal executive agency contracting. To date, Treasury has used its financial agent authority to retain Bank of New York Mellon to serve as its custodian for the implementation of TARP,[4] while utilizing FAR-based procedures in awarding a contract to EnnisKnupp and Associates to serve as Treasury's investment advisor.[5] Estimates suggest that five to ten firms will ultimately be selected by Treasury to handle the bulk of portfolio management services.[6] While the total number of asset managers in privity with Treasury will likely not exceed 10 firms, there are sure to be a significant number of subcontract agreements between Treasury's agents and contractors and those seeking to provide financial services in support thereof. In addition, Treasury has stated that it intends to issue a solicitation for small and small disadvantaged businesses, but the release date is presently unknown.

Although there are meaningful differences in legal status between financial firms serving as agents of the government and those that merely serve in the more traditional role of government contractor or subcontractor, regardless of the authority employed by Treasury private sector firms doing business for or on behalf of Treasury will face special legal and regulatory requirements. These requirements are different from, and more stringent than, the rules that apply to purely commercial transactions. These unique federal procurement rules and regulations, including rules against improper business gratuities, conflicts of interest, and false claims and statements to the government, present many potential pitfalls, risk of significant penalty, and, in some cases, criminal liability.

Click to download a PDF and continue reading Dan Forman's article, "Who Will Bailout the Bailoutters?: An Overview of the Unique Legal Risks Facing Treasury's New Asset Managers and their Subcontractors," which appeared in the October 27th edition of *Bloomberg Securities Law Report*.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Daniel R. Forman
Partner – Washington, D.C.
Phone: +1 202.624.2504
Email: dforman@crowell.com