Report to the Congressional Oversight Panel for Economic Stabilization

Legal Analysis of the Investments by the U.S. Department of the Treasury in Financial Institutions under the Troubled Asset Relief Program

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Annex I

Foreword

In late December 2008, the Congressional Oversight Panel for Economic Stabilization asked me to serve as a special legal advisor for the purpose of preparing an analysis of the legal structure and terms of the investments by the U.S. Department of the Treasury in financial institutions pursuant to the Troubled Asset Relief Program created under the Emergency Economic Stabilization Act of 2008. The scope and methodology of the report was agreed upon with the Panel. Specifically, it was agreed that (i) the report would review generally the Capital Purchase Program created by Treasury and focus on the same set of specific investments that would be reviewed by the valuation report being concurrently prepared, (ii) the report would be based entirely on review of publicly available documents and (iii) the report would provide an explanation of the structure and terms of the investments and an analysis of how those terms compare to what is customary market practice in transactions between private parties (but would not make judgments as to whether the terms were appropriate from a public policy standpoint). The analysis of how the terms compare to market practice would be based on my general experience as a securities and corporate finance lawyer for approximately 25 years, and particularly on comparisons to a set of recent transactions agreed upon with the Panel. I am not a bank regulatory lawyer and the analysis does not focus on bank regulatory law issues.

The opinions in this report are solely my own. I withdrew from my law firm in order to assist the Panel and prepare this report. Catherina Celosse acted as counsel for the Panel in the development of the report. Consistent with the Panel's direction, the draft is based solely on review of publicly available documents and is an analysis made within the "four-corners" of the agreements. I have not had access to any non-public information nor have I had discussions with Treasury or its counsel.

Timothy G. Massad

I. Introduction

This report provides a legal analysis of the investments by the U.S. Department of the Treasury in financial institutions pursuant to the Troubled Assets Relief Program ("TARP") created under the Emergency Economic Stabilization Act of 2008 ("EESA"). The purpose is to provide an understanding, from a legal point of view, of the structure of the investments and the terms of the securities received by Treasury. This includes pricing terms such as dividend rate and redemption features, as well as other terms such as covenants, voting rights, transfer restrictions etc. The report does not analyze terms from a valuation standpoint; that is covered by the valuation report concurrently provided by Duff & Phelps.

This report focuses on the terms of the Capital Purchase Program ("CPP") created by Treasury under TARP, and specifically on the largest investments made by Treasury under the CPP. The report also looks at the investment by Treasury of TARP funds in non-automotive financial institutions outside of the CPP: these are the investments in American International Group, Inc. ("AIG") on November 25, 2008, Bank of America Corporation ("Bank of America") on January 16, 2009 and Citigroup Inc. ("Citigroup"), announced on November 23, 2008 and closed on December 31, 2008. The specific investments covered by this report include all those covered by the valuation report as well as others.

The analysis considers whether the terms of the TARP investments are customary and consistent with market practice in a legal sense. This is based on the author's experience as a securities and corporate finance lawyer and on a comparison to a set of transactions described below under "Comparative Transactions". There is a wide range of market practice, and terms vary depending on many factors including in particular the credit-worthiness of the issuer, the relative strengths of the parties and the preferences of investors. Opinions also vary as to what is customary, and the analysis cannot be reduced to a quantitative assessment as with the valuation analysis. While the legal analysis reviews the material terms of the agreements individually, it should be kept in mind that an investment decision by a private investor to purchase securities of this type is usually made on the basis of the terms as a whole, and an investor's willingness to agree to a particular set of non-economic terms usually is greatly influenced by the attractiveness of the economic terms.

This report does not address whether the investments were good or bad investments. Because they were investments by the government seeking to fulfill certain public purposes, that conclusion requires a consideration not only of the terms of the investments from a commercial perspective but also an evaluation of the policy objectives and whether the investments contributed to achieving the objectives, matters which are beyond the scope of this report. The assessment of whether the terms were consistent with market practice is intended only to provide a benchmark. It is not intended to judge whether Treasury made wise public policy choices with respect to any particular term or to suggest that public policy objectives should not influence those terms. The ultimate question for the Panel to consider is whether the actions taken by Treasury are working to stabilize financial markets and institutions, reduce foreclosures

and help American families. It is hoped that the report contributes to understanding the investments and thereby contributes to answering that question.

In addition, the report does not consider the other actions that were taken by the U.S. government in response to the financial crisis concurrently with the making of these investments. These actions affected the institutions that received these funds and may have affected the value and efficacy of the investments. The Treasury, the Federal Reserve Board, the Federal Deposit Insurance Corporation (FDIC) and other government entities took a wide variety of actions throughout the fall of 2008 and continuing through today. These included actions to stabilize financial markets, increase liquidity and strengthen financial institutions generally, such as enhanced borrowing arrangements for financial institutions, guarantees of financial institution debt and certain transaction accounts, increased insurance of deposits, and the commercial paper market initiatives. These actions also included additional agreements and arrangements made with particular institutions that received the TARP investments, such as lending facilities and guarantees of or funding arrangements for specified asset pools in the case of AIG, Bank of America and Citigroup. While all of these measures may be relevant to evaluating the effectiveness of the TARP investments from a policy standpoint, they are beyond the scope of this report.

The legal analysis does not cover all terms and provisions of the documents. In describing the terms, certain details, including defined terms, exceptions and qualifications, are omitted in the interest of highlighting the material terms in a readable fashion. Readers should review the definitive documents for a more detailed understanding of the terms and provisions.

The analysis is organized as follows. A summary of findings is given first. There is then an overview of the CPP and the additional investments in AIG, Bank of America and Citigroup, followed by a brief discussion of the specific comparative transactions that were considered. The analysis then reviews the basic documentation used by Treasury, and then considers individual material terms.

In addition, a chart attached as Annex I sets forth, in a matrix fashion, a summary comparison of the terms of (i) the Treasury standard forms used for the CPP, (ii) the actual documentation used in the ten largest transactions under the CPP as well as the additional investments in AIG, Bank of America and Citigroup, (iii) the U.S. comparative transactions and (iv) the U.K. comparative transactions.

II. **Summary of Findings**

The following highlights some of the findings of the legal report:

- From a legal point of view (and exclusive of pricing terms), the standard terms of investments used in the CPP were generally within the range of what would be customary in a preferred stock investment in a large financial institution by a large private investor, although there are a few exceptions. It should be kept in mind that what is customary varies widely

especially in light of the credit-worthiness of the issuer. The terms used by Treasury were standard terms for all institutions regardless of variations in credit-worthiness and were written for "healthy" banks.

- Some of the unusual terms included the issuer's right to reduce the number of warrants by 50% in certain circumstances, the issuer's right to redeem the preferred securities without a premium, and the issuer's right to buy back the warrants and any common shares acquired at fair market value in certain circumstances, all of which favor the issuer. One unusual term that favored Treasury is the right to amend the securities purchase agreement to comply with changes in federal law.

- The documentation for the investments was quite similar to, and appears to be based on, the documentation used in the investment by Warren Buffett's Berkshire Hathaway into The Goldman Sachs Group which was closed just prior to the launch of the CPP. Pricing-related terms were not nearly as favorable to Treasury as those obtained by Berkshire Hathaway as noted in the valuation report. In most other areas the terms are as good as, and in some cases better than, those in the Berkshire Hathaway agreements, although such other areas, which include covenants, voting rights and transfer restrictions, are generally not as important to the average investor.

- In order to meet regulatory requirements, Treasury could not require the issuer to redeem the securities (that is, repay Treasury) at a fixed date. Treasury included a number of provisions that appear to be designed to encourage the issuer to replace the Treasury investment with private capital, which was presumably one of Treasury's objectives. Some of these have a negative impact on valuation.

- The terms of the CPP documents provide for Treasury to be a passive investor rather than to seek to control or significantly influence management. This is evidenced by providing for only limited voting rights, not having any board seats or board observers, agreeing not to exercise voting rights on common shares acquired under the warrants and not imposing any covenants other than (with few exceptions) those that are customary for preferred stock investments. This approach can be contrasted with the more activist approach of the U.K. government in its contemporaneous investments in banks. It obtained the right to designate directors, prohibited all common stock dividends, imposed covenants requiring lending and required the banks to develop restructuring plans. Also by contrast, Treasury imposed far more restrictive covenants and terms on the automotive companies in the TARP loans provided to them.

- There are few provisions directed at the public policy purposes of EESA. For example, in the CPP transactions there are no covenants restricting use of the proceeds nor any requirements to report how the funds are used.

There are no covenants on lending or foreclosure mitigation or requiring the issuer to take actions with respect to problems that might have led to the need for the Treasury investment. There is a covenant on executive compensation (which is limited to the specific requirements of EESA) but there is no reporting that would enable Treasury to monitor compliance, although Treasury has recently published regulations addressing this issue.

- The use of standardized documents created significant implications that should be considered in the policy debate on the program. Standardized documents enabled Treasury to make a large number of investments quickly because it did not have to negotiate terms or make policy or credit choices. It encouraged wide participation and may have contributed to a perception that the program was fair. Speed of execution and wide participation were important Treasury objectives in October 2008 when the program was launched. Treasury also avoided giving signals to the market that it viewed one institution as weaker than another through individually negotiated terms, and avoided subjecting itself to criticism for why it chose particular terms for a particular institution. On the other hand, the use of standardized terms meant that Treasury could not address differences in credit quality or risk among institutions. Insofar as terms were designed for stronger banks, they may have been too lenient for weaker banks. Treasury also could not impose specific requirements on a recipient that it deemed necessary to insure stability and soundness. (The Treasury view may have been that the government could use its power as a regulator to do so.) A major question for the policy debate is therefore whether the basic design of the program--provide capital to large numbers of institutions using standard terms designed for “healthy” banks--made sense, because so many issues follow from the answer to that question.

- The CPP documents were used as the basis for the investments made under the TIP and SSFI programs; these investments had somewhat more restrictive covenants and terms, however. The CPP was a voluntary program for healthy banks; TIP and SSFI are for institutions experiencing more difficulty or at risk of failure. The two institutions funded under the TIP also received funds under CPP, and the TIP program was not created until months after the first investment now grouped under that program was announced. The Panel may wish to consider whether these various programs fit together into a coherent overall strategy.

III. <u>Overview of the TARP Investments in Financial Institutions.</u>

A. <u>The Capital Purchase Program</u>

Most of the Treasury’s investments in financial institutions as of January 10, 2009 have been made pursuant to the Capital Purchase Program or CPP. Under this program, Treasury set aside $250 billion of TARP funds for the purchase of preferred stock and warrants from financial institutions on standardized terms. In its

announcement of the program on October 14, 2008, Treasury emphasized that the program was for "healthy" institutions and said the program would be available to qualifying financial institutions or "QFIs" that elected to participate by 5:00 p.m. on November 14, 2008. Treasury initially released a term sheet and highlighted certain of the standard terms in its announcement. The standard form contracts were not released until about two weeks later once the initial transactions were closed. There were some differences between the initial term sheet and the standard forms, which perhaps reflected negotiations with the original nine participants.

The first transactions under the CPP were investments (or commitments to invest) in nine institutions totaling in the aggregate $125 billion. These transactions were announced on October 14, 2008 and closed (with one exception) on October 28, 2008.[1] In describing the nine institutions, Secretary Paulson said, "These are healthy institutions, and they have taken this step for the good of the U.S. economy. As these healthy institutions increase their capital base, they will be able to increase their funding to U.S. consumers and businesses."[2] The term sheet for the CPP stated that the nine institutions were "moving quickly and collectively to signal the importance of the program for the system."[3]

Treasury subsequently announced ten additional groups of investments, bringing the total number of institutions to 317 and the total funds committed to $194.2 billion through January 23, 2009. Treasury is continuing to provide funds under

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[1] One of the first nine investments was a commitment to invest $10 billion in Merrill Lynch. Troubled Asset Relief Program Transaction Report, Department of Treasury, January 6, 2009, *available at* http://www.ustreas.gov/initiatives/eesa/docs/001-06-09-CPP-Report.pdf. Treasury agreed that the $10 billion would be an additional amount invested in Bank of America if the merger of the two institutions was completed, which occurred on January 1, 2009. *See* Merrill Lynch & Co., Inc. Current Report on Form 8-K, filed October 30, 2008 with U.S. Securities and Exchange Commission, *available at* http://idea.sec.gov/Archives/edgar/data/65100/000095012308013938/y72269e8vk.htm. These funds were subsequently invested in Bank of America after completion of the merger.

[2] Press Release, Statement by Secretary Henry M. Paulson, Jr. on Actions to Protect the U.S. Economy, Department of Treasury, October 14, 2008, *available at* http://www.ustreas.gov/press/releases/hp1205.htm. According to many press reports, notwithstanding Treasury's description of the program as voluntary, at least some of the nine bank holding companies did not regard themselves as "volunteers" and believed they were required to accept the Treasury proposal. *See* Mark Landler and Eric Dash, Drama Behind a $250 Billion Banking Deal, New York Times, October 14, 2008.

[3] Press Release, Treasury Announces TARP Capital Purchase Program Description, Department of Treasury, October 14, 2008, *available at* http://www.ustreas.gov/press/releases/hp1207.htm.

the program. Treasury made 44 investments in November, 162 in December and 105 in January. The transaction sizes generally declined over time as Treasury invested in smaller banks. Of the total investments, 25 were in excess of $1 billion each, 50 were less than $1 billion and $100 million or more, and 244 were less than $100 million. There were 78 investments of $10 million or less.[4]

The CPP application materials stated that generally speaking, any bank, savings association, bank holding company and savings and loan holding company organized under the laws of the U.S. and that is not controlled by a foreign entity holding company was eligible for the program. An institution seeking funds was required to submit an application to the Federal banking agency that was its primary federal regulator (*e.g.*, either the Federal Reserve, the Office of the Comptroller of the Currency, the Office of Thrift Supervision or the FDIC). The application was required to be approved by the primary regulator first, and then by Treasury. Treasury has not announced, and has stated it will not announce, any withdrawal or denial of an application; however, Treasury has stated that applicants who are not deemed qualified may be encouraged to withdraw their applications.[5] In at least one case, Treasury agreed to award to one bank an amount of funds that was contingent on its acquisition of another bank, and some alleged that the target bank was told it needed to merge and would not receive funds under the program.[6]

The application also indicated that the terms of investment were effectively non-negotiable: once approved by Treasury, the applicant had 30 days "to

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4 *See* Troubled Asset Relief Program Transaction Report, Department of Treasury, January 27, 2009, *available at* http://www.ustreas.gov/initiatives/eesa/docs/transaction_report_01272009.pdf. (Pursuant to the requirements of EESA, Treasury has posted 14 completed transaction reports through January 27, 2009, which provide some details as to the various transactions.) The total of 317 institutions in which Treasury has invested excludes Merrill Lynch. The number of investments totals 319 and not 317 because there were two investments in each of Bank of America and Sun Trust Banks, Inc. The valuation analysis of the investment in Bank of America pertains only to the initial investment of $15 billion.

5 Press Release, Treasury Releases Responses to Congressional Oversight Panel, Department of Treasury, December 31, 2008, and attached responses at pages 11-12, *available at* http://www.treas.gov/press/releases/hp1336.htm.

6 The PNC Financial Services Group, Inc., Current Report on Form 8-K filed October 24, 2008, regarding acquisition of National City Corporation, *available at* http://idea.sec.gov/Archives/edgar/data/713676/000119312508216000/0001193125-08-216000-index.idea.htm. Sabrina Eaton, National City's bailout application never seriously considered, The Plain Dealer, *available at* http://blog.cleveland.com/business/2008/11/national_citys_bailout_applica.html.

submit the investment agreements and related documentation", and "failure to agree to all terms and conditions may result in disqualification from the CPP".[7]

Treasury stated at the outset that the program would be available to all types of financial institutions. In announcing the first nine investments, the Treasury description of the program said, "These healthy institutions have voluntarily agreed to participate on the same terms that will be available to small and medium-sized banks and thrifts across the nation."[8]

Treasury did not make investments in smaller banks for several weeks. Treasury focused initially on the largest institutions, and the standard documentation initially made available by Treasury was only for publicly-held companies. Treasury subsequently published forms for non-public institutions excluding "S" corporations and mutual organizations. The transactions announced in late December 2008 and January 2009, included investments in 90 institutions that were privately-held or were community development institutions. Of the $194.2 billion invested as of January 23, 2009 under the CPP, approximately $1.7 billion was invested in such institutions (over one-third of which went to two institutions).[9]

Treasury recently published a term sheet for subordinated debt investments in S corporations; terms for mutual organizations are apparently "still under consideration".[10] Treasury has been criticized for failing to provide opportunities for S corporations and mutual organizations to participate in the program from the start. The

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[7] Application Guidelines for TARP Capital Purchase Program, Department of Treasury, *available at* http://www.ustreas.gov/initiatives/eesa/docs/application-guidelines.pdf.

[8] Press Release, Joint Statement by Treasury, Federal Reserve and FDIC, Department of Treasury, October 14, 2008, *available at* http://www.treas.gov/press/releases/hp1206.htm.

[9] Press Release, Treasury Releases Capital Purchase Program Term Sheet for Privately Held Financial Institutions, Department of Treasury, November 17, 2008, *available at* http://www.treas.gov/press/releases/hp1277.htm; Troubled Asset Relief Program Transaction Report, Department of Treasury, January 27, 2009, *available at* http://www.ustreas.gov/initiatives/eesa/docs/transaction_report_01272009.pdf.

[10] Term Sheet--TARP Capital Purchase Program; Subchapter S Corporations, Department of Treasury, available at http://www.ustreas.gov/initiatives/eesa/docs/scorp-term-sheet.pdf, United States Department of the Treasury Section 105(a) Troubled Asset Relief Program Report to Congress for the Period December 1, 2008 to December 31, 2008, at page 3, *available at* http://www.ustreas.gov/initiatives/eesa/docs/105Report_010609.pdf.

American Bankers Association has said that of the more than 8,000 banks in the United States, roughly 2,500 are S corporations and 550 are mutual companies.[11]

The specific CPP investments that are reviewed in this report are the largest eight investments (which are the ones reviewed in the valuation analysis) plus the two other completed investments in the first group of nine announced on October 14, 2008. The institutions and respective amounts of these eight investments were as follows:

Bank of America Corporation ($15 billion);

The Bank of New York Mellon ($3 billion);

Citigroup Inc. ($25 billion);

The Goldman Sachs Group, Inc. ("Goldman Sachs") ($10 billion);

JPMorgan Chase & Co. ($25 billion);

Morgan Stanley ($10 billion);

The PNC Financial Services Group ($7.7 billion);

State Street Corp. ($2 billion);

U.S. Bancorp ($6.6 billion); and

Wells Fargo & Company ($25 billion).[12]

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[11] Hilary Johnson, Community banks want bailout bucks, Financial Week, December 7, 2008, *available at* http://www.financialweek.com/apps/pbcs.dll/article?AID=/20081207/REG/812049983. *See* note 28 for a discussion of why the existing forms are not suitable for S corporations and mutual organizations.

[12] Information concerning the terms of transactions is based on documents made publicly available by Treasury and the SEC filings of the financial institutions that received TARP funds. *See* Bank of America Corporation, Current Report on Form 8-K filed October 30, 2008, *available at* http://idea.sec.gov/Archives/edgar/data/70858/000119312508220360/0001193125-08-220360-index.idea.htm; The Bank of New York Mellon Corporation, Current Report on Form 8-K filed October 30, 2008, *available at* http://idea.sec.gov/Archives/edgar/data/1390777/000119312508220414/0001193125-08-220414-index.idea.htm Citigroup Inc., Current Report on Form 8-K filed October 30, 2008, *available at* http://idea.sec.gov/Archives/edgar/data/831001/000095012308013952/0000950123-08-

B. The SSFI and TIP Investments

In addition to the CPP investments, Treasury has made three other investments of TARP funds in non-automotive financial institutions (as well as guaranty commitments described below). One of these, the investment in AIG, was made pursuant to Treasury's Systemically Significant Failing Institutions (SSFI) program. The other two, which were additional investments in Citigroup and Bank of America, were made pursuant to Treasury's Targeted Investment Program (TIP). Both Citigroup and Bank of America had previously received CPP funds. The investments are collectively referred to as the SSFI/TIP investments and are discussed below.

Citigroup

On November 23, 2008, Treasury agreed to invest an additional $20 billion in Citigroup preferred stock and received warrants to acquire common stock (referred to herein as the "second Citigroup investment"). The preferred stock pays cumulative dividends at 8% per annum and the warrants had an aggregate exercise price equal to 10% of the preferred stock investment. Citigroup was one of the original nine participants in the CPP program and received $25 billion on October 28, 2008. The

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013952-index.idea.htm; The Goldman Sachs Group, Inc., Current Report on Form 8-K filed October 31, 2008, *available at* http://idea.sec.gov/Archives/edgar/data/886982/000095012308014085/0000950123-08-014085-index.idea.htm; JPMorgan Chase & Co., Current Report on Form 8-K filed October 31, 2008, *available at* http://idea.sec.gov/Archives/edgar/data/19617/000119312508220563/0001193125-08-220563-index.idea.htm; Morgan Stanley, Current Report on Form 8-K filed October, 30, 2008, *available at* http://idea.sec.gov/Archives/edgar/data/895421/000095010308002687/0000950103-08-002687-index.idea.htm; The PNC Financial Services Group, Current Report on Form 8-K filed January 2, 2009, *available at* http://idea.sec.gov/Archives/edgar/data/713676/000095012309000024/0000950123-09-000024-index.idea.htm; State Street Corp., Current Report on Form 8-K filed October 31, 2008, *available at* http://idea.sec.gov/Archives/edgar/data/93751/000119312508221638/0001193125-08-221638-index.idea.htm U.S. Bancorp, Current Report on Form 8-K filed November 14, 2008, *available at* http://idea.sec.gov/Archives/edgar/data/36104/000095013708013730/0000950137-08-013730-index.idea.htm; Wells Fargo & Company, Current Report on Form 8-K filed October 30, 2008, *available at* http://idea.sec.gov/Archives/edgar/data/72971/000095012308013950/0000950123-08-013950-index.idea.htm. *See* also note 1 regarding Merrill Lynch investment. The additional $10 billion invested in Bank of America on January 9, 2009 was made on the same terms as the initial investment made on October 28, 2008, including the same exercise price for the additional warrants.

additional $20 billion was described upon closing, months after the initial announcement, as part of the Targeted Investment Program.[13] In addition to the investment of $20 billion, Treasury and the FDIC agreed to provide a guarantee of approximately $301 billion of loans, securities and commitments of Citigroup backed by residential and commercial real estate and other assets. This pool of assets appears to be the type of illiquid or difficult to value assets that Treasury originally contemplated purchasing under TARP.[14] Citigroup agreed to issue additional preferred shares to Treasury ($4 billion)

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[13] The designation of the second Citigroup investment as part of the Targeted Investment Program, and the reference to such program, appeared in Treasury's transactions reports for the first time on January 5, 2009, following the closing of the investment on December 31, 2008. The second Citigroup investment and the Bank of America investment on January 16, 2009, were the only investments under that program as of January 23, 2009. *See* Troubled Asset Relief Program Transaction Report, Department of Treasury, January 27, 2009, *available at* http://www.ustreas.gov/initiatives/eesa/docs/transaction_report_01272009.pdf and infra note 17. At the time of the announcement of the second Citigroup investment, Treasury did not refer to it as part of any particular program. The eligibility considerations for the Targeted Investment Program announced in early January include whether destabilization of the institution would cause systemic disruptions to the nation's financial markets, credit, payments and settlement systems, or would threaten asset prices or the broader economy. *See* Program Description for Targeted Investment Program, Department of the Treasury, at http://www.ustreas.gov/initiatives/eesa/program-descriptions/tip.shtml.

[14] This report will not evaluate the terms of the eligible asset guarantee or the value of the consideration received by the U.S. government for such guarantee but the arrangements are briefly summarized here. The structure of the arrangement is that the U.S. Government agreed to assume 90% of all losses on the portfolio after Citigroup assumed an amount equal to the first $39.5 billion of losses. The government's share of such losses will be allocated first to Treasury up to $5 billion and then to the FDIC up to $10 billion, with the Federal Reserve funding any losses beyond that amount through a non-recourse loan under which interest payments are recourse to Citigroup. This means Citigroup is liable for the interest payments on any such funding (at the overnight index swap rate plus 300 basis points) but any recovery of principal would come only from recovery on the pool of assets. Term Sheet attached to Press Release, Joint Statement by Treasury, Federal Reserve and the FDIC on Citigroup, Department of Treasury, November 23, 2008, *available at* http://www.ustreas.gov/press/releases/hp1287.htm; Citigroup Inc, Current Report on Form 8-K filed January 16, 2009, *available at* http://idea.sec.gov/Archives/edgar/data/831001/000095010309000098/0000950103-09-000098-index.idea.htm. On December 31, 2008, Treasury submitted a report to Congress that outlined a new Asset Guarantee Program (AGP) for systemically significant institutions. Report to Congress Pursuant to Section 102 of the Emergency Economic Stabilization Act, Department of Treasury, December 31, 2008, at page 1-2, *available at* http://www.ustreas.gov/press/releases/reports/0010208%20sect %20102.pdf. In its most recent transactions report, Treasury referred to the Asset Guarantee Program and listed the Citigroup guarantee under such program.

and the FDIC ($3 billion) as a fee for such guarantee. Citigroup also issued warrants to Treasury to purchase shares of Citigroup common stock for an aggregate exercise value of 10% of the total $27 billion in preferred stock issued to the U.S. government.

AIG

Second, Treasury invested $40 billion in AIG preferred stock on November 25, 2008. This investment was announced as part of Treasury's program for Systemically Significant Failing Institutions. The criteria for the SSFI program were announced at the same time.[15] The AIG investment was made in conjunction with actions taken by the Federal Reserve Board to restructure the credit facility provided to AIG on September 16, 2008, and to provide additional lending facilities to AIG. The TARP funds were used to pay down in part the existing Federal Reserve credit facility. In effect, loans provided by the Federal Reserve Bank of New York were converted to a preferred stock investment under TARP. Treasury received nonconvertible preferred stock paying a 10% cumulative dividend together with warrants to purchase up to 53,798,766 shares of AIG common stock or two percent of its outstanding common stock.[16] The transaction was the only investment under the SSFI program as of January 23, 2009.

[15] The eligibility criteria for SSFI assistance announced by Treasury include "the extent to which the failure of an institution could threaten the viability of its creditors and counterparties; the number and size of financial institutions that are seen by investors or counterparties as similarly situated to the failing institution, or that would otherwise be likely to experience indirect contagion effects from the failure of the institution; whether the institution is sufficiently important to the nation's financial and economic system; or the extent and probability of the institution's ability to access alternative sources of capital and liquidity." *See* Program Description for Systemically Significant Failing Institutions Program, Department of the Treasury, at http://www.ustreas.gov/initiatives/eesa/program-descriptions/ssfip.shtml.

[16] This report will not evaluate the lending facility components of the November AIG transaction or the September transaction which it modified. However, those terms are briefly summarized here: On September 16, 2008, the Federal Reserve provided a two-year, $85 billion secured revolving credit facility to AIG at an interest rate of three month LIBOR plus 8.5%, and Treasury acquired Series C convertible participating preferred stock that represented 79.9% of the total dividends on common stock and 79.9% of the total vote. In addition, the government replaced the chairman and CEO, and AIG announced a plan to focus on its core property and casualty insurance businesses and sell other assets. In the November restructuring, the interest rate on the credit facility was modified to LIBOR plus 300 basis points and the Series C preferred stock was amended so that it is convertible into 77.9% of the total vote of the common (as the new warrants represented two percent of AIG's common stock as of November 25, 2008). The New York Federal Reserve Bank also provided $52.5 billion in loans to fund arrangements to purchase residential mortgage-backed securities from

Bank of America

On January 16, 2009, Treasury invested an additional $20 billion in Bank of America and received additional preferred stock and warrants (referred to herein as the "third Bank of America investment"). Bank of America was also one of the original nine participants in the CPP, and received $15 billion on October 28, 2008, and an additional $10 billion on January 9, 2009, following its merger with Merrill Lynch. The additional $20 billion was invested pursuant to the Targeted Investment Program and the terms are very similar to the terms of the second Citigroup investment. Treasury acquired preferred stock paying an 8% cumulative dividend rate and warrants to acquire common stock with an aggregate exercise price equal to 10% of the preferred stock investment. Concurrently with this investment, Treasury, the Federal Reserve Board and the FDIC agreed to provide a guarantee or loss sharing arrangement with respect to $118 billion of Bank of America assets.[17]

For purposes of reviewing the Citigroup and AIG investments made in November and the most recent Bank of America investment, the documents made public by Treasury and by Citigroup, AIG and Bank of America in their SEC filings were reviewed.[18]

AIG's securities lending collateral portfolio and to purchase collateralized debt obligations on which AIG had written credit default swaps. Press Release, Federal Reserve Board and Treasury announce restructuring of financial support to American International Group, Board of Governors of the Federal Reserve System, November 10, 2008, *available at* http://www.federalreserve.gov/newsevents/press/other/20081110a.htm.

[17] Documents for the guarantee or loss sharing arrangement have not been made public but the term sheet indicates the arrangement is similar to the arrangement made in connection with the second Citigroup investment. It applies to a pool of financial instruments consisting of securities backed by real estate loans and corporate debt, as well as derivative transactions that reference such securities and other instruments. Bank of America absorbs losses up to $10 billion, and the government and Bank of America share losses in excess of that amount, with the government assuming 90% and Bank of America assuming 10%. The Federal Reserve provides a non-recourse loan for excess losses. Bank of America issued additional preferred stock and warrants to Treasury and FDIC for such guarantee. Bank of America Corporation, Current Report on Form 8-K filed January 22, 2009, *available at* http://idea.sec.gov/Archives/edgar/data/70858/000119312509009753/0001193125-09-009753-index.idea.htm.

[18] Citigroup Inc., Current Report on Form 8-K filed November 26, 2008, *available at* http://idea.sec.gov/Archives/edgar/data/831001/000095012308016585/0000950123-08-016585-index.idea.htm and Current Report on Form 8-K filed December 31, 2008, *available at* http://idea.sec.gov/Archives/edgar/data/831001/000095010308003069/

IV. The Comparative Transactions

This analysis looks at the material legal terms of the TARP investments in non-automotive financial institutions in light of general market practice. It also compares them to the terms of specific private sector investments in some of the large U.S. financial institutions that were the initial recipients of TARP funds (the "U.S. comparative transactions"). These include the two transactions that are considered in detail in the valuation analysis which occurred around the time of the announcement of the CPP and the initial investments under the CPP—Berkshire Hathaway's investment in Goldman Sachs and Mitsubishi UFJ Financial Group's investment in Morgan Stanley. The U.S. comparative transactions also include four transactions involving Citigroup, Merrill Lynch and Morgan Stanley which took place between November 2007 and October 2008. The analysis also considers the terms of the recent investments in financial institutions by Her Majesty's Treasury in the United Kingdom (the "U.K. government transactions") and the investment by Qatar Holding LLC ("Qatar Holding") and entities representing the beneficial interests of HH Sheikh Mansour Bin Zayed Al Nahyan, a member of the Royal Family of Abu Dhabi ("Sheikh Mansour") in Barclays Bank PLC in November 2008 (the "Barclays transaction" and collectively with the U.K. government transactions, the "U.K. transactions").

A. The U.S. Comparative Transactions

The following is a list of the U.S. comparative transactions considered in the legal analysis:

Citigroup	$12.5 billion investment by Government of Singapore Investment Corporation, Kuwait Investment Authority and others in convertible preferred stock (January 15, 2008) (referred to herein as "Citi—GIC")
Citigroup	$7.5 billion investment by Abu Dhabi Investment Authority in units consisting of a contract to purchase common stock and

0000950103-08-003069-index.idea.htm; American International Group, Inc., Current Report on Form 8-K filed November 26, 2008, *available at* http://idea.sec.gov/Archives/edgar/data/5272/ 000095012308016447/0000950123-08-016447-index.idea.htm; Current Report on Form 8-K filed December 2, 2008, *available at* http://idea.sec.gov/Archives/edgar/data/5272/000095012308016800/0000950123-08-016800-index.idea.htm and Current Report on Form 8-K filed December 15, 2008 *available at* http://idea.sec.gov/Archives/edgar/data/5272/000095012308017611/ y73279e8vk.htm; Bank of America Corporation, Current Report on Form 8-K filed January 22, 2009, *available at* http://idea.sec.gov/Archives/edgar/data/70858/000119312509009753/0001193125-09-009753-index.idea.htm. *See* notes 13 - 16 for references to Treasury documents.

	trust preferred securities (November 26, 2007) ("Citi—Abu Dhabi")
Goldman Sachs	$5 billion investment by Berkshire Hathaway in preferred stock and warrants (announced on September 23, 2008) ("Goldman Sachs—Berkshire Hathaway")
Merrill Lynch	$6.6 billion investment by Korean Investment Corporation, Kuwait Investment Authority and others in convertible preferred stock (January 15, 2008) ("Merrill—Korea/Kuwait")
Morgan Stanley	$5.6 billion investment by China Investment Corporation in units consisting of a contract to purchase common stock and trust preferred securities (December 19, 2007) ("Morgan Stanley—CIC")
Morgan Stanley	$9 billion investment by Mitsubishi UFJ Financial Group in convertible preferred stock (announced on September 22, 2008; amended and closed on October 13, 2008) ("Morgan Stanley—MUFJ")

For purposes of this analysis, data available in SEC filings by the recipient institutions was reviewed.[19]

[19] Each financial institution filed a Current Report on Form 8-K with the SEC for the investment which summarized the material terms of the investment. Attached as exhibits to the Form 8-Ks were documents pertaining to each transaction. In some cases, transaction documents were filed as exhibits to a Quarterly Report on Form 10-Q. The documents attached varied by transaction. In some cases, the actual purchase agreements, together with the forms of certificates of designation for preferred stock and/or warrants (if warrants were issued), were filed. In other cases, a detailed description of the securities was provided, which appeared to be an excerpt from the offering memorandum used to sell the securities. It is possible that documents not made public would contain terms that are relevant to the comparison summarized in this report and set forth in the chart. However, one would not expect any such additional terms to be material assuming the issuers complied with the requirements of Form 8-K. *See* Citigroup Inc., Current Report on Form 8-K filed November 26, 2007, *available at* http://www.ustreas.gov/initiatives/eesa/docs/transaction_report_01132009.pdf; Citigroup Inc., Current report on Form 8-K filed January 15, 2008, *available at* http://idea.sec.gov/Archives/edgar/data/831001/000110465908002663/0001104659-08-

B. The U.K. Transactions.

The U.K. government stated on October 8, 2008 that it would invest up to £50 billion to recapitalize certain financial institutions. This was part of a three-part program that also included a £200 billion special liquidity facility and a program to guarantee bank debt. At that time, the U.K. government said that seven of the largest U.K. banks and the largest building society had agreed to participate in "a Government-supported recapitalization scheme" in which the institutions would increase their Tier 1 capital by £25 billion in the aggregate by the end of the year. The Government pledged to facilitate this process by being willing to invest £25 billion in preference shares or ordinary equity—in effect, the institutions could draw on the funds if they could not otherwise raise the money. The Government also indicated it would accept applications from other institutions and would provide an additional £25 billion if needed.[20]

To date, only three banks have taken up the U.K. government's offer: RBS, Lloyds TSB and HBOS. Because Lloyds TSB and HBOS had agreed to merge at

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002663-index.idea.htm; The Goldman Sachs Group, Inc., Current Report on Form 8-K filed September 29, 2008, *available at* http://idea.sec.gov/Archives/edgar/data/886982/000095012308011720/0000950123-08-011720-index.idea.htm; The Goldman Sachs Group, Inc., Current Report on Form 8-K filed October 2, 2008, *available at* http://idea.sec.gov/Archives/edgar/data/886982/000095012308011959/0000950123-08-011959-index.idea.htm; The Goldman Sachs Group, Inc., Quarterly Report on Form 10-Q filed October 8, 2008, exhibits 4.2 and 10.1, *available at* http://idea.sec.gov/Archives/edgar/data/886982/000095012308012298/0000950123-08-012298-index.idea.htm; Merrill Lynch & Co. Inc., Current Report on Form 8-K filed January 16, 2008, *available at* http://idea.sec.gov/Archives/edgar/data/65100/000095012308000429/0000950123-08-000429-index.idea.htm; Morgan Stanley, Current Report on Form 8-K filed December 27, 2007, *available at* http://idea.sec.gov/Archives/edgar/data/895421/000095010307003145/0000950103-07-003145-index.idea.htm; Morgan Stanley , Current Report on Form 8-K filed October 3, 2008, *available at* http://idea.sec.gov/Archives/edgar/data/895421/000089882208000945/0000898822-08-000945-index.idea.htm; Morgan Stanley, Current Report on Form 8-K filed October 14, 2008, *available at* http://idea.sec.gov/Archives/edgar/data/895421/000089882208001004/0000898822-08-001004-index.idea.htm; and Morgan Stanley, Current Report on Form 8-K filed October 17, 2008, *available at* http://idea.sec.gov/Archives/edgar/data/895421/000089882208001017/0000898822-08-001017-index.idea.htm.

[20] Press Release, Financial Support to the Banking Industry, HM Treasury, *available at* http://www.hm-treasury.gov.uk/press_100_08.htm.

the time the U.K. government agreed to invest, the investments in those institutions were effectively made as a single transaction. The two transactions are very similar. In both the RBS and Lloyds TSB—HBOS transactions, the U.K. government purchased both ordinary shares, which are the U.K. equivalent of common shares in the U.S., and preference shares. The structure of the transactions was that the banks made "open offers" to their existing shareholders to purchase new ordinary shares. Each existing shareholder had the right to purchase a fixed number of new shares for each existing share it owned. To the extent that the bank did not raise sufficient capital from the subscriptions by existing shareholders, the U.K. government agreed to purchase the remaining shares. In addition, the U.K. government agreed to purchase a fixed amount of preference shares. The recapitalization program, as well as the other elements of the U.K. government plan, required approval by the European Commission because they involved state aid to private enterprises.[21]

The Government committed a total of £37 billion to RBS and Lloyds TSB—HBOS. In the case of RBS, the U.K. government agreed to purchase up to £15 billion of ordinary shares and £5 billion of preference shares. In the case of Lloyds TSB—HBOS, the U.K. government committed to purchase up to £13 billion in new ordinary shares and £4 billion of preference shares.

In both cases, after the open offers were launched, the common share prices of the banks fell below the prices offered to shareholders and very few shareholders took up the offers. In the RBS offer, which closed in late November, existing shareholders purchased 0.24% of the total shares offered to them, and the U.K. government purchased the remainder, investing a total of about £15 billion in ordinary shares for a 57.9% stake in the bank. In the Lloyds—HBOS offer, which closed on January 9, 2009, existing shareholders purchased 0.24% of the shares of HBOS and 0.50% of the shares of Lloyds TSB offered to them, and the U.K. government purchased the remainder, investing a total of almost £13 billion in ordinary shares for a 43.4% stake in the combined entity.[22]

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[21] *See* Commission Européenne, State Aid N 507/2008, Financial Support Measures to the Banking Industry in the UK, November 13, 2008, *available at* ec.europa.eu/community_law/state_aids/comp-2008/n507-08-conf.pdf (hereinafter referred to as the "EC Decision"). *See* also note 37 below regarding the state aid issue.

[22] The Royal Bank of Scotland Group plc, Prospectus for Placing and Open Offer of 22,909,776,276 New Shares at 65.5 pence per New Share, November 4, 2008, and documents referred to therein, *available at* http://www.investors.rbs.com/downloads/finalprospectus.pdf; The Royal Bank of Scotland Group Plc, Result of Placing and Open Offer, November 28, 2008, *available at* http://www.investors.rbs.com/investor_relations/announcements/ReleaseDetail.cfm?ReleaseID=351016; Lloyds TSB Group Plc, Proposed Acquisition of HBOS plc by means of a scheme of arrangement under sections 895 to 899 of the Companies Act 2006, Proposed Placing and Open Offer of 2,596,653,203 Open Offer Shares at 173.3 pence per

Barclays plc elected not to take advantage of the U.K. government offer and raised capital privately. Its chairman stated in remarks to shareholders at a shareholder meeting that Barclays did not wish to be restricted by the terms the government was offering. The Barclays transaction consisted of the sale of perpetual reserve capital instruments, warrants for ordinary shares and mandatorily convertible notes to Qatar Holding and Sheikh Mansour in November 2008 for approximately £7 billion.[23]

C. Limitations of Using Comparative Transactions.

As with comparisons in the valuation analysis, the purpose of the comparisons to other transactions is not to suggest that Treasury should have received the same terms, but only to provide a benchmark. The terms of the U.S. comparative transactions were the products of negotiations between private parties, each concerned with maximizing its financial and other interests—presumably, the investor's interests were to get the highest possible return consistent with its desired level of risk, and the issuer's interest was to obtain capital at the most efficient price and for the least burden. By contrast, Treasury was acting to achieve the public policy objectives set forth in the EESA, among which were to "restore liquidity and stability to the financial system" in an environment where there was fear of a collapse of the financial system.[24]

Open Offer Share, Proposed Capitalisation Issue, Circular to Shareholders and Notice of General Meeting of the Company, November 3, 2008, *available at* http://www.pres.investorrelations.lloydstsb.com/hbosacquisition/files/LloydsTSBCircularFinal.pdf; and related prospectus *available at* http://www.pres.investorrelations.lloydstsb.com/hbosacquisition/files/c99540CCL.pdf; and documents referred to therein; Lloyds TSB Group Plc, Results of Placing and Open Offer, January 12, 2009, *available at* http://www.pres.investorrelations.lloydstsb.com/hbosacquisition/files/2009Jan12_Results_of_Placing_and_Open_Offer.pdf

[23] Barclays PLC, Comments of Marcus Agius, Group Chairman, at General Meeting, November 24, 2008, *available at* http://www.investorrelations.barclays.co.uk/INV/A/Content/Files/General_Meeting_241108.pdf; Press Release, Barclays announces update to Capital Raising, Barclays plc, November 18, 2009, *available at* http://offer.barclays.com/index1/index_main.php?task=view§ion=press&language=en&cnt=bb&med=asx&type=video. Terms of investments were obtained from prospectuses.

[24] Some would say that there is inherent lack of comparability because it was the inability of the financial institutions to raise the necessary amounts of private capital quickly enough that created the need for government intervention. However, comparisons of the terms of the government investments to those in private transactions

There are also differences as to when the transactions took place. Only two of the six U.S. comparative transactions—the Goldman Sachs—Berkshire Hathaway and Morgan Stanley—Mitsubishi UFJ transactions—occurred around the time of the Treasury investments (although both were announced before the passage of EESA). The four others took place over the preceding twelve months, a period when the problems giving rise to the financial crisis were becoming apparent, but the conditions were not as severe. It should also be noted that at the time of the Morgan Stanley—CIC transaction and the Merrill Lynch—Korea/Kuwait transaction, Morgan Stanley and Merrill Lynch had not yet become bank holding companies, which created differences in the regulatory oversight, business profile and outlook, liquidity position and other circumstances of the institutions relative to bank holding companies. Morgan Stanley was a bank holding company at the time of the Mitsubishi transaction, and all the TARP investments (other than the AIG investment and the automotive investments) were made in banks or bank holding companies.[25]

In addition, the securities purchased in the various transactions are not identical, which creates additional limitations on the usefulness of the comparisons.

There are also limitations in making comparisons with the actions taken by the U.K. government (or by any other government) in responding to the financial crisis. There are differences in government policies and political environments, regulatory structures and corporate law and practice, among other things, which shaped the terms of the investments made by each government. While mindful of these limitations, this analysis notes some comparisons to the U.K. government investments as agreed with the Panel in light of the similarities in circumstances and because the U.K. program appears to have influenced Treasury in deciding to implement a capital injection program in lieu of its original plan to purchase illiquid mortgage-related assets.

Comparisons to the Barclays transaction raise the general limitations of using a private transaction noted above as well as the fact that there are significant differences in the structure of the transaction and in U.K. practice. The publicly available documents are also limited.

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are nevertheless relevant benchmarks in assessing the reasonableness or fairness of the terms.

[25] Also, at the time of the AIG investment, Treasury was entitled to hold almost 80% of the voting power of the equity of AIG. Investments by parent entities into subsidiaries are often made on the basis of little documentation and simple terms because the parent controls the entity and does not need the benefit of contractual provisions that are designed to protect unaffiliated parties. However, Treasury did not treat this investment in that manner.

V. **The Documentation Used by Treasury.**

Treasury used standard documents for all the CPP investments. Treasury has produced two sets of forms, one for Public QFIs and one for Non-Public QFIs excluding S corporations and mutual organizations. The two sets of forms are quite similar to one another. The standard documentation in both cases consists of a letter agreement, a securities purchase agreement that is attached as an exhibit to the letter agreement and a form of certificate of designation for the preferred stock. (The certificate of designation sets forth the specific terms of the preferred stock and is filed as an amendment to the issuer's charter in its state of incorporation.) For the Public QFIs, there is a form of warrant for common stock. In the case of Non-Public QFIs, there is a form of warrant for preferred stock paying a 9% dividend rather than common stock. The other principal differences between the two sets of forms are discussed below.

The terms of the actual investments appear to be the same for all participants. Based on this review of the largest ten transactions, the only differences are those contemplated by the forms—that is, differences that pertain to the size of the investment and the issuer's capital structure or both. The number of preferred shares to be issued, number of common shares underlying the warrants and exercise price of the warrants are all dependent on the size of the investment and certain particulars concerning the issuer's capital structure. This analysis has not verified whether Treasury has followed its formulas for sizing the investments at 1-3% of risk-weighted assets, or for calculating the strike price of the warrants. However, the aggregate exercise price of the warrants equals 15% of the preferred stock investment in the transactions examined.

The potential dilutive effect of the warrants on existing holders of common shares varies among the transactions because (i) the number of warrants is based on an amount equal to 15% of the value of the investment in preferred stock as well as the strike price, (ii) the preferred stock investment amount ranges between 1-3% of risk-weighted assets and the strike price depends on the then current market price of the common shares, and (iii) the amount of common shares relative to total risk-weighted assets may differ widely across institutions.

Treasury used the CPP documents as the starting point for the SSFI/TIP investments, although certain terms of the transactions differed from the CPP investments, including dividend rate, absence of the warrant reduction feature and certain covenants as discussed below.

Treasury has reported that of the 317 recipients as of January 23, 2009, 84 were privately-held and 6 were community development institutions, representing a total of $1.7 billion of the $194.2 billion invested. No actual transactions involving the Non-Public QFI forms are reviewed in this analysis as they are not publicly available, but the form itself is reviewed. The Non-Public QFI forms provide for Treasury to receive warrants to purchase a second series of preferred stock paying a cumulative 9% dividend, rather than common stock. Treasury reported that it has exercised the warrants of the

Non-Public QFIs and that it waived the requirement for warrants in the case of the community development institutions.[26] The other principal differences between the two sets of forms are the following: (i) while both forms prohibit any increase in common stock dividends for an initial period of up to three years, the Non-Public QFI form restricts dividends thereafter as well, (ii) the Public QFI form permits the issuer to buy back any equity securities held by Treasury at fair market value once the preferred stock is redeemed (or transferred by Treasury), but the Non-Public QFI form has no such provision, (iii) the Non-Public QFI form contains a covenant prohibiting affiliate transactions unless certain requirements are met, (iv) there are some differences in transfer restrictions, and (v) the Public QFI form provides for registration rights, whereas the Non-Public QFI form does not provide for registration rights unless the institution becomes a reporting company. These differences are discussed further below.[27]

Treasury has recently published a term sheet for investments in S corporations and indicated it is working on enabling mutual organizations to access the program.[28]

Before analyzing specific terms, it is worth considering as a whole the documents used by Treasury. The CPP standard forms are quite similar to, and appear to be based on, the documentation used by Berkshire Hathaway for its investment in Goldman Sachs. The CPP form of Securities Purchase Agreement, certificate of designation for preferred stock and warrant are quite similar in organization and content to the Berkshire Hathaway papers, which were signed and filed with the SEC just a few

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[26] Troubled Asset Relief Program Transaction Report, Department of Treasury, January 27, 2009, *available at* http://www.ustreas.gov/initiatives/eesa/docs/transaction_report_01272009.pdf.

[27] *See* discussion in the appropriate sections below of these differences and see Section V(H) for an explanation of registration rights.

[28] The CPP forms did not accommodate S corporations because as a matter of federal tax law S corporations can only issue one type of stock; issuing a second type, such as the preferred stock contemplated by the CPP, would cause them to lose their S corporation status, which carries certain tax benefits to owners of the S corporation. S corporations do not pay tax at the corporate level, much like a partnership. In addition, in general, only individuals can be S corporation stockholders. The term sheet provides for subordinated debt investments. Term Sheet--TARP Capital Purchase Program; Subchapter S Corporations, Department of Treasury, available at http://www.ustreas.gov/initiatives/eesa/docs/scorp-term-sheet.pdf. Mutual organizations have membership interests rather than capital stock and thus cannot issue the securities contemplated by Treasury, although many can issue types of subordinated obligations that are effectively like capital stock in many ways.

weeks before Treasury launched its program.[29] As discussed in the valuation analysis, the pricing-related terms of the CPP agreements, such as dividend rate, number of warrants (including the warrant reduction feature discussed below), exercise price of the warrants and optional redemption provisions, are not nearly as favorable to Treasury as the terms that Berkshire Hathaway received from Goldman Sachs. The terms of the CPP agreements in most other areas are as good as, and in some cases better than, those in the Berkshire Hathaway agreements, although these other areas are typically less important to investors. Such other provisions include voting rights of the preferred stock, covenants restricting common stock dividends and stock repurchases, exercise period of and anti-dilution adjustments for the warrants, transfer restrictions, representations and warranties by the issuer, conditions to closing, and amendment provisions. One other area where the terms obtained by Treasury are not as good, though it could be thought of as a pricing-related term, is the right of the issuer under the Treasury agreements to repurchase the warrants and any underlying common shares at fair market value after the preferred shares have been redeemed or transferred by Treasury. All of these issues are discussed in more detail below.[30]

Two other general observations are in order: first, in order to meet regulatory requirements, Treasury could not require the issuer to redeem the securities (that is, repay Treasury) at a fixed date. However, Treasury included a number of provisions, as discussed below, that appear to be designed to encourage the QFI to replace the Treasury investment with private capital, which was presumably one of Treasury's objectives. These include the dividend step-up provision, the lack of a premium on optional redemption and (in the Public QFI form) the QFI's right to reduce the number of warrants in certain circumstances and to repurchase the warrants and underlying common shares at fair market value once the preferred stock is redeemed or transferred. Some of these provisions have a negative impact on valuation as indicated by the valuation report; that is, they make the security less attractive to an average investor.

Second, the contracts generally provide for Treasury to be a passive investor. This is evidenced by providing for only limited voting rights, not having any board seats or board observers, agreeing not to exercise voting rights on common shares acquired under the warrants and (in the CPP investments) not imposing any covenants other than those that are customary for passive preferred stock investments. (The U.S. government has considerable power as a regulator over banks and bank holding companies and Treasury may have believed the government should exercise influence as

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[29] It is customary in corporate legal practice to prepare transaction documents by starting with documents from another transaction and "marking them up", and the Berkshire Hathaway papers appear to have been the starting point for Treasury.

[30] As noted earlier, this report does not address the valuation difference between the Berkshire Hathaway investment and the Treasury investments which is addressed in the valuation report.

a regulator and not as a shareholder.) In any event, the contractual approach can be contrasted with the more activist approach of the U.K. government as well as the approach taken by Treasury in the TARP loans made to the automotive companies, as discussed below.

Treasury's decision to structure the CPP by creating standard forms for all transactions, and not deviating from those forms, created implications that the Panel may wish to consider in the context of any policy debate as to whether the investments were good policy choices. First, the design of the program enabled Treasury to avoid having to negotiate any of the terms with any institution, which would have required substantially more Treasury resources and required the making of policy or credit choices. That would have made it difficult to complete as many transactions as quickly as Treasury did. The program design also may have contributed to a perception that the program was "fair"—at least as among financial institutions that were deemed eligible. That may have encouraged many institutions to participate. Speed of execution and wide participation were important Treasury objectives in October 2008 when the program was launched. The absence of individually negotiated terms meant also that completed transactions did not suggest to the marketplace that, because of the inclusion of more restrictive terms in one case versus another, Treasury had determined that one institution was weaker than another; such signals could have in turn affected confidence in, or market prices of the securities of, particular institutions. Treasury also avoided subjecting itself to criticism for why it required or did not require particular terms for an institution.

On the other hand, the program design meant that Treasury could not address differences in credit quality or risk among institutions, or in their need for capital, by varying the terms of each investment.[31] Insofar as the standard terms were set for strong institutions, they may have been too lenient for weaker institutions. The program design also meant that Treasury could not impose specific requirements on a recipient to take certain actions that it deemed necessary for the stability or soundness of an institution. (The Treasury view may have been that the government could use its power as a regulator to do so.) It meant the government's only choice was to decide whether an institution was eligible and what the size of the investment would be within the range of 1-3% of risk-weighted capital. A determination that an institution was not eligible had potentially harsh consequences for the institution.

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[31] In customary market practice, there are often differences in pricing-related terms as well as non-economic terms depending on the credit-worthiness of the issuer. In theory, Treasury could have incorporated a customized, risk-based approach to setting the dividend rate at least for large public companies, for example by reference to the yields on other publicly traded securities or credit default swap rates (or perhaps they could have varied the number of warrants taken), and still have maintained the general standardized terms of the documents. But this would have left the question of how to price the securities for less widely-traded institutions, and its effects on speed of execution and participation rates are impossible to know.

A major question for the policy debate is therefore whether the basic design of the program--provide capital to a large number of institutions by using standard terms designed for "healthy" banks--made sense, because so many issues follow from the answer to that question

VI. Review of Structure and Terms of Investments

A. Basic Structure of Investments.

(1) General. The CPP forms provided for an investment in senior preferred stock in an amount equal to 1-3% of risk-weighted assets of the institution but not more than $25 billion. In addition, Treasury received warrants to purchase common stock in an amount, based on the exercise price, equal to 15% of the investment. Risk-weighted assets are the total assets of a financial institution that are weighted for credit risk. This concept is the primary building block in determining whether a financial institution has the necessary minimum amount of capital. Tier 1 capital, which is a core measure of capital, is set as a percentage of risk-weighted assets.

Treasury's use of a formula based on risk-weighted assets to determine the size of its investment is consistent with a purpose of the CPP which is to increase the capital of financial institutions. (Capital increases were needed in light of the write-offs pertaining to mortgage-related assets and other losses.) However, this analysis does not evaluate whether setting a 1-3% range for all institutions was appropriate. It is also not clear whether Treasury's decision as to the size of any particular investment within the 1-3% of risk-weighted assets range depended primarily on the applicant's request, the primary regulator's recommendation or other factors. Banks that do not receive CPP funds thus may face the prospect of having significantly lower Tier 1 capital ratios than competing banks that did receive CPP funds.

(2) Preferred Stock in the Capital Structure. Common stock, preferred stock and debt are the basic elements of the capital structure of any corporation. As a general matter, holders of debt have claims for specific amounts that take precedence over the ownership interests of holders of equity securities. In a bankruptcy or liquidation, holders of equity securities are entitled only to the residual value, if any, that remains after all holders of debt securities and other claims that have priority by law are paid. The advantage of purchasing preferred stock over common stock is that preferred stock can carry a priority over common stock in liquidation and as to payment of dividends. A liquidation preference means that in a bankruptcy or liquidation, after creditors' claims are discharged, the preferred holders would be entitled to receive the stated liquidation preference prior to any payment to common stockholders. A priority as to dividends means that preferred stockholders are entitled to receive dividends before any dividend is paid to the common stockholders. Generally, preferred stock does not carry the same voting rights as common stock although there are exceptions (including the AIG preferred stock issued in September 2008, as discussed below). In addition, preferred stock may be convertible into common stock or it is sometimes issued with warrants for common stock, as is the case in the CPP. Convertible preferred stock was issued in three of the U.S. comparative transactions, as discussed below. The

combination of nonconvertible preferred stock and warrants is similar to a convertible preferred in that an investor receives a fixed return and has an opportunity to realize upside if the common stock price increases, although the holder of convertible preferred stock must give up the fixed return to realize such upside.

Preferred stock can have a fixed dividend rate—meaning that a specified amount of dividends is payable in each dividend period—in which case an investor would consider the security to pay a fixed return. However, the payment of dividends is still subject to the declaration of the board of directors; it does not have the same fixed, contractual status as an interest payment on debt. Preferred stock can provide for cumulative dividends, which means that if the board of directors fails to declare the dividend in any period, the dividend still accumulates or is due later, as discussed below. In general, a Delaware corporation can pay dividends out of surplus or net profits, which terms are defined by state law and are not equivalent to accounting concepts.

Preferred stock is often described as junior or senior, which refers to the relative priorities assigned to each series of preferred stock. The preferred purchased by Treasury is "senior" which means it is *pari passu* to other senior preferred and senior to any junior preferred stock. (It does not have a super priority over other senior preferred stock, which would not be possible without consent of holders of outstanding senior preferred stock.) Because Treasury purchased senior preferred stock, the issuer cannot issue preferred stock in the future that would have a higher priority as to dividends or liquidation preference.[32]

The issues of capital structure discussed above are largely shaped by state corporation law (or applicable banking law in the case of a bank rather than a bank holding company), which governs the issuance of preferred stock, the rights and designations that may be assigned to a series of preferred stock and the payment of dividends. The Treasury forms were consistent with the provisions and requirements of Delaware law, the most common jurisdiction of incorporation for corporations. Whether the terms and arrangements in the CPP forms will work for any particular institution will depend on what is permitted by the law under which the institution is organized, which may be state corporation law, state banking law or federal banking law.

(3) Preferred Stock and Tier 1 Capital. Although not all preferred stock qualifies as Tier 1 capital under U.S. regulations, the senior preferred stock issued to Treasury did. This is because concurrently with the CPP program, the Federal Reserve issued a rule that permits bank holding companies that issue senior perpetual preferred stock to Treasury under the CPP to include that stock as Tier 1 capital, even though some

[32] The priority feature is simply one of order of payment in the capital structure; it does not address amount of payment. The fact that an issuer has senior preferred stock outstanding which carries a 5% dividend rate does not prevent it from issuing preferred stock that carries a 10% dividend rate in the future.

of its features would have otherwise rendered it ineligible for inclusion or would have limited its inclusion.[33]

(4) Preferred Stock and Corporate and Regulatory Approvals. Another reason preferred stock may have been attractive to Treasury (and to many banks desiring to complete CPP transactions quickly) is that many public companies, particularly large companies that access the capital markets periodically, have what is known as "blank-check preferred" already authorized in their corporate charters. This allows the board of directors to issue preferred stock having whatever terms the board decides to approve at the time without obtaining the approval of stockholders as a matter of corporate law. The terms that can be assigned are subject to any limitations imposed by the terms of the charter, including outstanding series of preferred stock; for example, it may not be possible to approve a preferred having a priority as to liquidation or dividends over other outstanding senior preferred stock, as discussed above. But most other terms, including dividend rate, redemption terms and conversion features, can be set by the board without stockholder approval as a matter of corporate law. Blank check preferred gives an institution flexibility to negotiate special terms with an investor and issue the stock quickly.[34]

Not all states permit blank check preferred stock. If a state does not permit it, or if a QFI did not already have blank check preferred stock authorized in its charter, the QFI would likely need to obtain shareholder approval for the issuance of preferred stock to Treasury.

In the case of public companies, the approval of existing common stockholders for the issuance of voting securities (or securities convertible into or exercisable for voting securities) that represent 20% or more of the outstanding voting power is generally required under the rules of the national securities exchanges. Because the CPP preferred stock is not convertible (and has only customary, limited voting rights in certain circumstances), this approval requirement was not an issue for the preferred

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[33] *See* Capital Adequacy Guidelines: Treatment of Perpetual Preferred Stock Issued to the United states Treasury Under the Emergency Economic Stabilization Act of 2008, 12 C.F.R. §225, *available at* http://edocket.access.gpo.gov/2008/pdf/E8-25489.pdf. Bank holding companies generally may not include perpetual preferred stock, whether cumulative or noncumulative, that has a dividend step-up rate, and the amount of cumulative perpetual preferred stock that a bank holding company may include in its Tier 1 capital currently is subject to a 25% limit. The new rule makes an exception for preferred stock issued under the TARP program, which has a dividend step-up.

[34] Because the preferred stock issued in the November AIG transaction is senior to that issued in the September AIG rescue, stockholder approval is required.

stock; however, it was potentially an issue for the warrants as discussed below.[35] The issues concerning voting rights of the preferred stock are also discussed in more detail below.

(5) Warrants. The Public QFI form provides for Treasury to receive warrants to purchase common stock at a fixed price which is known as the exercise or strike price. Treasury set the exercise price to be approximately equal to the current market price of the common stock at the time of the investment. The warrants give Treasury the potential for additional return should the QFI common stock price increase above the market price at the time the investment was made. The Non-Public QFI form provides for Treasury to receive a warrant for a separate series of preferred stock (with a dividend rate of 9%). See further discussion of warrants below.

(6) U.S. Comparative Transactions. Among the U.S. comparative deals, the Goldman Sachs—Berkshire Hathaway deal is, like the CPP program, an investment in cumulative nonconvertible preferred stock plus warrants. The structures used in the other U.S. comparative transactions are somewhat different. Three of the other U.S. transactions are for noncumulative convertible preferred stock (Citi—GIC, Merrill—Korea/Kuwait and Morgan Stanley—MUFJ). Noncumulative dividends are not as favorable to an investor as cumulative dividends because, if not declared in the current period, the dividends do not accrue as discussed below. However, noncumulative perpetual preferred stock can be treated as Tier 1 capital without limit. Convertible preferred stock means that the investor can convert the preferred shares into common shares at a fixed ratio without the payment of additional consideration. The other two U.S. comparative transactions are for units consisting of a contract to purchase common stock plus trust preferred securities (Citi—Abu Dhabi, Morgan Stanley—CIC). Trust preferred securities pay a fixed return and are similar to a preferred stock.[36] All the U.S. comparative transactions involve a combination of two elements: a fixed rate of return (which is paid on a preferred instrument) and a right to upside if the common stock price increases (either through warrants, convertibility or a contractual obligation to

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[35] The convertible preferred stock issued by AIG in September represented more than 20% of the voting power but was exempted from the NYSE approval requirement pursuant to the exigent circumstances exception. *See* below at note 39.

[36] Trust preferred securities became popular with bank holding companies several years ago because they can be considered equity for purposes of meeting capital adequacy requirements and debt for purposes of treating the payments as a deductible expense for corporate income taxes. The basic structure is for preferred stock to be issued by a trust subsidiary of the bank holding company, the proceeds of which are used to purchase deeply subordinated debt of the bank holding company. The terms of the subordinated debt mirror the terms of the trust preferred in terms of payment, redemption, etc., so that the payments on the subordinated debt by the bank holding company fund the payments by the trust on the trust preferred.

purchase common shares). However, in the case of convertible preferred, the holder must give up the fixed return in order to acquire the common stock.

(7) U.K. Transactions. The U.K. government purchased a combination of ordinary shares (the equivalent of common shares in the U.S.) and preference shares. The ordinary shares were offered at a discount of approximately 8.5% to the market price immediately prior to the announcement. The amount of ordinary shares purchased by the U.K. government depended on the extent to which existing shareholders took up the open offers. (The open offer structure is similar to a rights offering, which is more common in the U.K. than in the U.S.) The U.K. government may have preferred this approach as a means to encourage private investors to invest and, in theory, to minimize the extent to which the U.K. government had to acquire shares. In practice, however, very few shareholders subscribed to the offers, which made it necessary for the U.K. government to purchase almost all of the shares. The structure and terms of the U.K. government transactions may have also been driven by the requirements of the European Commission, whose approval was needed. In particular, the transactions had to be structured so as not to violate European Commission rules regarding impermissible state aid to private companies.[37]

The Barclays transaction involved the issuance of three securities: reserve capital instruments (RCIs), which are perpetual instruments that pay a fixed coupon and are similar to the most senior preferred stock in the capital structure, warrants to acquire ordinary shares, and mandatorily convertible notes (MCNs) which pay a fixed coupon but which must be converted into ordinary shares in less than a year.

B. Dividend Rights.

As noted above, the senior preferred securities purchased by Treasury carry a priority over common stock (and junior preferred stock) regarding payment of dividends. The Public QFI Form provides for cumulative compounding dividends unless the QFI is not a subsidiary of a bank holding company. Cumulative dividends mean that if the issuer fails to declare a dividend, the dividend still accrues or accumulates and must

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[37] The EC Decision found that the U.K. government's three part program involved state aid and that the aid complied with three criteria for compatibility under Article 87(3) of the EC Treaty, "appropriateness", "necessity" and "proportionality". In reaching that conclusion with respect to the recapitalization program, the EC Decision highlighted several terms that were presumably also designed to meet the U.K. government's policy objectives. These included the fact that the program was limited to solvent companies and limited in scope and time. The EC also found that although no private investor could be expected to provide financing on the stated terms, the terms did provide for "an adequate return on investment". The EC Decision also noted "behavioral safeguards" which were the covenants on executive compensation, mortgage lending and small business lending, regulating the rate of growth of the entity's balance sheet, and requiring a restructuring plan. *See* EC Decision supra note 21, at 8-10.

ultimately be paid (or is added to the holder's liquidation preference); noncumulative dividends are paid only if declared. In addition, under the Public QFI Form, unpaid dividends compound at the dividend rate then in effect, which is unusual and also to the investor's advantage (particularly given that dividends are paid quarterly). The Public QFI Form provides for noncumulative preferred in the case of banks that are not subsidiaries of holding companies because the preferred would have to be issued by the bank itself and would have to be noncumulative in order to be Tier 1 capital under existing capital requirements applicable to banks. (If the funds are invested as cumulative preferred at a bank holding company level, then the holding company can invest the proceeds in subsidiary banks as Tier 1 (or Tier 2) capital.)

The CPP forms provide for an initial dividend rate of 5% per annum payable quarterly, which increases significantly to 9% per annum after five years. The step-up should give the issuer an incentive to replace the Treasury investment, assuming the stepped-up rate represents a higher cost of capital than what would otherwise be available at the time.

The preferred stock acquired by Treasury in the second Citigroup investment and the third Bank of America investment pays a cumulative dividend of 8% per annum, and that acquired in the November AIG investment pays a cumulative dividend of 10% per annum. The AIG transaction gives Treasury the unusual power unilaterally to change the dividend rate. Treasury does not have this power in the CPP transactions or the second Citigroup or third Bank of America investment (nor is it a term one would expect to see in a transaction between private parties).

As noted earlier, of the four comparative U.S. transactions in which preferred stock was issued, only one provided for cumulative dividends (the Goldman Sachs—Berkshire Hathaway transaction, at a rate of 10%). The three others provided for noncumulative dividends at rates of 7% (Citigroup—GIC), 9% (Merrill Lynch—Korea/Kuwait) and 10% (MS—Mitsubishi UFJ). The unit/trust preferred securities transactions have fixed rates of 11% and 9%. The preference shares issued in the U.K. government transactions pay noncumulative dividends at a fixed rate of 12% per annum for five years, and thereafter at a variable rate of LIBOR plus 7%. Preference shares represent less than 25% of the amount invested by the U.K. government in the two banks; the rest is in ordinary shares. In the Barclays transaction, the RCIs pay a 14% coupon until June 2019, and then pay at a rate of 13.4% above three-month sterling LIBOR. The payments are effectively cumulative but can be deferred without accruing interest, and the issuer may pay with ordinary shares instead of cash.

C. **Warrants.**

The Public QFI form provides that Treasury receives warrants to purchase common shares equal to 15% of the total preferred stock investment. Thus, if Treasury invests $10 billion in preferred stock, it receives warrants to purchase a number of common shares having an aggregate value, at the exercise or strike price, of $1.5 billion. By comparison, the Goldman Sachs—Berkshire Hathaway deal provided warrants for common shares equal to the value of the investment. The exercise price of the warrants

is essentially equal to the market price of the common stock at the time Treasury agrees to invest. Technically, it is equal to the 20-day trailing average market price of the common stock ending on the day the application of the QFI is accepted by Treasury. Using a 20-day trailing average to establish an exercise price is common. The fact that the end date is the date the application is approved means that the QFI has risk from the time it submits the application until the approval date. Warrant exercise prices are often set at a premium to the existing market price, which is less advantageous to the investor than if at the existing market price because the stock must appreciate more before the investor can realize a return. By contrast, however, the exercise price in the Goldman Sachs—Berkshire Hathaway deal, the only U.S. comparative transaction in which warrants were issued, was below the market price at the time of closing.

The number of warrants in the SSFI/TIP investments were not determined by the same formula. In the AIG investment, Treasury received warrants to acquire 2% of AIG's outstanding common shares at an exercise price equal to par value. In the September rescue of AIG, the Federal Reserve was entitled to get convertible preferred stock that would represent 79.9% of the vote and dividends of the common shares, and this was amended in November to be for 77.9%. In the second Citigroup investment and third Bank of America investment, Treasury received warrants for common shares at an aggregate exercise price equal to 10% of the preferred stock investment; this does not include the additional warrants received as a fee for the guarantee arrangement in each deal.

The CPP warrants also permit cashless exercise: Treasury need not actually pay the exercise price; it simply "cashes in" or gives up some of the warrants as consideration for exercising its right to acquire shares.

The warrants are immediately exercisable, although only in part for a limited initial period in light of an unusual reduction feature as discussed below. Immediate exercisability is to the advantage of an investor as compared to a delayed exercise period. The warrants also have a relatively long term of 10 years, which gives Treasury a potentially long period of time to realize an upside (and may be particularly useful given the significant declines in the common stock prices of the largest recipients of CPP funds since mid-October when the exercise prices were set). The Goldman Sachs—Berkshire Hathaway warrants are immediately exercisable in full and have a five year life.

The warrants are subject to anti-dilution adjustments, which means that the exercise price is adjusted in accordance with specified formulas upon the occurrence of certain events. Anti-dilution provisions are designed to protect the investor in the event of certain issuances of securities or changes to the capital structure that would otherwise diminish the value of the underlying shares. The adjustments in the CPP forms are generally customary except in a few respects. First, Treasury did not obtain a provision that increases the number of shares obtained if the financial institution is a party to a cash merger (known as a "make-whole adjustment") or if certain other changes in control occur (a "fundamental change adjustment"). These provisions are an add-on to standard anti-dilution provisions for mergers (which the CPP forms contain). They have

become increasingly common recently but are not always included. It should be noted that the warrants issued in the Goldman Sachs—Berkshire Hathaway transaction, which appear to have been the basis for the Treasury form of warrant, did not include such additional merger-related provisions. Second, the CPP form provides that the QFI's board of directors will make such adjustments not otherwise covered by the provisions that are "reasonably necessary . . . to protect the purchase rights of Warrantholders". This is an unusual feature that is in Treasury's interest. It is not included in the Goldman Sachs—Berkshire Hathaway form of warrant.

Under the Public QFI Form, the QFI has the right to reduce the number of shares underlying the warrants by half if it raises 100% of the issue price of the Preferred Stock in "Qualified Equity Offerings" before December 31, 2009. A Qualified Equity Offering means a sale for cash of perpetual preferred stock or common stock qualifying for Tier 1 capital, other than pursuant to an arrangement or agreement that existed prior to October 13, 2008 in the case of the Public QFI Form. (Note that the 50% reduction is applied only to the warrants held by Treasury; if Treasury had already transferred half the warrants, the formula would have the effect of reducing the remaining underlying shares to zero.) This term is very unusual and would be very disadvantageous to an investor in a private transaction as it may eliminate much of the "upside" in the investment. Perhaps it was included to serve a public policy objective of Treasury insofar as it gives a QFI an incentive to raise capital which could be used to replace the Treasury investment. However, there is no requirement to actually redeem the preferred stock with the proceeds of the Qualified Equity Offering in order to be able to reduce the warrant shares.[38] The warrants issued in the SSFI/TIP investments do not provide for a reduction in the warrant shares. The warrants issued in the Goldman Sachs—Berkshire Hathaway transaction also do not provide for a reduction in the warrant shares.

The number of shares for which the warrants may be exercised can trigger a requirement for stockholder approval for entities listed on the NYSE or NASDAQ. This is generally true if the warrant shares would represent 20% or more of the outstanding common shares.[39] This was addressed in the CPP form by including not only a covenant to seek such approval if necessary, but also a provision that the exercise price of the warrants would decline periodically if such approval was not obtained. This created a substantial economic incentive for shareholders to grant such approval (although it may run afoul of the rules of the exchanges).

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[38] *See* discussion of redemption in Section E.

[39] There is an exception to the approval requirement under the NYSE and NASDAQ rules if "the delay in securing stockholder approval would seriously jeopardize the financial viability of the enterprise". *See* NYSE Listed Company Manual, Section 312.05 and NASDAQ Stock Market Rules, Section IM-4350(i)(1)(D).

The warrants also provide that if the common stock is not listed on a national securities exchange at any time, it must be exchanged for another instrument of equivalent value that qualifies as Tier 1 capital.

As noted above, the Non-Public QFI form provides for Treasury to receive warrants to purchase an additional series of preferred stock paying a 9% dividend. There is no provision for reduction of the warrants, and Treasury said it would exercise the warrants immediately.[40] The Non-Public QFI form of warrant differs in other respects from the Public QFI form in light of the private company status. For example, standard anti-dilution adjustments are not included, but there is a provision as in the Public QFI form that provides for the board to make adjustments as it shall determine are necessary.

The Barclays transaction also involves the issuance of warrants at an exercise price equal to the market price at announcement. The warrants are exercisable for five years.

D. Term or Maturity.

The Senior Preferred is perpetual, meaning it has no maturity or date when the QFI must redeem it. This is necessary for it to qualify as Tier 1 capital. (See discussion of redemption and dividend step-up provision below.) The warrants have a 10-year life but the number of warrant shares may be reduced by up to 50% during the first year, as discussed above. By contrast, the warrants issued in the Goldman Sachs—Berkshire Hathaway deal have a five-year life (with no potential reduction feature). A longer term gives an investor a longer period in which it may realize upside.

E. Redemption and Repurchases of Securities.

(1) Redemption. Redemption provisions consist of "mandatory redemption", which means the issuer must redeem the shares, and "optional redemption", which gives the issuer the right to do so. Because the Preferred Stock is perpetual as required for Tier 1 purposes, there is no mandatory redemption. From an investor's viewpoint, this raises the issue of how does the investor exit the investment, since the principal means of exiting an investment in a security are selling it to a third party, having it mature or having the issuer redeem or repurchase it.[41] The Treasury structure

[40] Treasury's most recent transactions report indicates that it has exercised the warrants in the non-public QFI investments made as of January 23, 2009. Troubled Asset Relief Program Transaction Report, Department of Treasury, January 27, 2009, *available at* http://www.ustreas.gov/initiatives/eesa/docs/transaction_report_01272009.pdf.

[41] Redemption and repurchase differ in that if an issuer exercises a right to redeem a security, the holder of the security must give it up; if an issuer seeks to repurchase a security, then normally the issuer makes an offer to the holder which the holder can accept or decline. The CPP forms provide the issuer with a right to repurchase the warrants that the holder must accept, as discussed in this Section.

relies on certain terms that may create incentives for the issuer to redeem or repurchase the stock—such as the increase in the dividend rate and potentially the covenant restricting dividends, as discussed below. Treasury also has flexibility in its ability to sell the Preferred Stock, as discussed below.

With respect to optional redemption, the CPP form provides that the preferred shares cannot be redeemed prior to the third anniversary of the investment unless the QFI has received proceeds from a Qualified Equity Offering equaling at least 25% of the issue price, in which case the redemption can be in an amount up to the amount of such proceeds.[42] After the third anniversary, the issuer can redeem at any time. The redemption price is 100% of liquidation preference (plus accrued and unpaid dividends) at all times.

When an investor purchases a security paying a fixed return like a preferred stock, it usually prefers that the issuer not be able to redeem for some period of time or that the issuer's right to redeem be at a premium—*i.e.*, above 100% of the price. Such terms help the investor protect its rate of return and avoid the risk of having to redeploy the funds at possibly a lower rate. The Goldman Sachs―Berkshire Hathaway deal provides for optional redemption at any time at a 10% premium, for example. The absence of a premium on optional redemption in the CPP forms is therefore less advantageous from a valuation standpoint. However, Treasury may have provided for optional redemption without a premium in order to encourage the replacement of its investment with private capital. The structure of the dividend rate, which starts at 5% and increases after five years, suggests this also. Presumably, this favors those financial institutions that are stronger and more able to redeem the preferred stock quickly from a Qualified Equity Offering within the first three years or otherwise before the dividend step-up after the fifth anniversary. This again raises the issue of whether the standardized terms were designed to be appropriate primarily for the stronger institutions.

The second Citigroup investment and third Bank of America investment include redemption provisions that are similar to those in the CPP forms, except that Citigroup and Bank of America cannot redeem the preferred shares until the preferred shares issued in the CPP investment are redeemed. The AIG investment provides that AIG cannot redeem the preferred shares until such time as the trust for the benefit of Treasury that holds the convertible preferred stock beneficially owns less than 30% of the aggregate voting power of AIG's securities and no holder of the preferred stock controls AIG.

(2) <u>Repurchase Rights.</u> Another feature of the Public QFI form is that once the preferred shares are redeemed or transferred by Treasury, the issuer has the right to repurchase any equity securities held by Treasury at fair market value; Treasury must sell if the issuer exercises that right. Fair market value is determined by the issuer's

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[42] *See* definition of Qualified Equity Offering in the discussion of warrants in Section V(A).

board of directors in the first instance and is subject to an appraisal process if Treasury disagrees. This right applies to the warrants and any common shares acquired upon exercise of the warrants. The SSFI/TIP investments contain a similar provision. This would be highly unusual in a transaction between private parties, and there is no similar provision in any of the U.S. comparative transactions. Although I do not know Treasury's rationale for including this provision, the provision may have been influenced by the experience in previous U.S. government bailouts. In the 1979 Chrysler bailout, the government made loans to Chrysler and received warrants for Chrysler common stock. After Chrysler recovered a few years later and repaid the loans, it sought to get the warrants back. There was controversy as to whether the government should simply give them back—it was seen by some as improper for the government to profit on its investment—or realize a profit. The government ultimately auctioned the warrants, and Chrysler bought them through Salomon Brothers Inc. Treasury may have decided to provide that the financial institution can buy back the warrants at fair market value in order to set the ground rules now for what could happen later, and avoid the potential for similar controversy. (Establishing fair market value of the securities of a large, actively traded institution is easier than with the securities of an institution that has only a limited trading market, however.) In addition, this provision may serve a public policy objective of encouraging replacement of Treasury's investment with private capital. Note that there is no requirement that such repurchase be funded by Tier 1 capital. There is no such provision in the Non-Public QFI Form, where the warrants are for preferred shares paying a 9% dividend, and Treasury exercised the warrants immediately.

In the U.K. government transactions, the preference shares have redemption terms that are similar to those in the Treasury investments. The preference shares may be redeemed after five years at a price equal to liquidation preference (without any premium) plus accrued dividends.

F. Covenants.

The Panel requested that the legal analysis review the covenants included in the TARP investments from the standpoint of not only how they compared to what was found in the comparative transactions, but also from the standpoint of whether there were provisions that addressed the public policy purposes of the investments.

(1) General. In corporate contracts such as securities purchase agreements, loan agreements and merger agreements, the parties frequently make agreements or "covenants" to do, or not do, something over a particular period of time. It is generally the case that the less well known or credit-worthy the issuer is, the more restrictive are the covenants imposed on it by investors. Well-known, investment grade issuers generally face fairly light covenants when raising funds in normal circumstances.

Although market practice covers a wide range when it comes to covenants, typically there are few covenants in a securities purchase agreement related to a preferred stock investment or in the certificate of designation itself (at least for a healthy company), other than those that provide for priority of dividends and voting rights in certain circumstances. What covenants may exist in such an agreement may depend on factors

such as, in addition to credit-worthiness of the issuer, the size of the investment (*i.e.*, investors taking a large stake have leverage and may get certain control or observation rights as well as access to information) and nature of the transaction (*i.e.*, if the transaction is a private placement, an investor may get registration rights to facilitate resale; if there is a need to obtain shareholder approval, there would be a covenant requiring the issuer to obtain it). This can be contrasted with covenants in credit agreements and in debt securities which are typically much more extensive and may include affirmative covenants to take certain actions (*i.e.*, pay taxes, comply with laws), negative covenants to not take certain actions (*i.e.*, restrictions on mergers, sales of assets, investments, transactions with affiliates, etc.) and financial covenants to meet certain financial ratios or tests (*i.e.*, net worth, leverage, cash flow, etc.). The extensiveness of the covenants in debt transactions depends primarily on the creditworthiness of the borrower. For example, in the high-yield market, one sees very restrictive covenants on dividends, investments, asset sales, other indebtedness, affiliate transactions and other areas. In addition, covenants are more typical in debt agreements because the remedy for violation is to declare a default and accelerate the maturity of the debt. Even if the remedy is not exercised, it can be a powerful threat. In the case of a preferred stock investment, once the investment is made, the holder has few remedies to enforce a contractual obligation, other than to bring a lawsuit. Occasionally, holders of preferred shares receive the right to elect two directors (as in the case when dividends are missed for a period of time) if covenants are breached.

The CPP forms contain the customary covenants found in the U.S. comparative transactions, which include those pertaining to restrictions on dividends and stock repurchases as noted below, plus a few others. They include very few specific provisions directed at the public policy objectives of EESA.

The U.K. government transactions include similar customary covenants as well as more covenants directed at public policy objectives. These include covenants regarding maintaining lending levels, executive compensation and other matters, as discussed below. It should be kept in mind that these covenants were negotiated (along with the other terms) before it was determined what percentage of each company the UK government would own. Because the UK government has acquired a majority of the stock and therefore control of RBS and owns 43.4% of Lloyds TSB—HBOS, the specifics of the covenants have less significance in practice than they would if the UK government were a minority investor. However, they are nevertheless summarized here.

Set forth below is a summary of covenants contained in the Treasury deals and the comparative transactions. This also summarizes whether there were covenants or other provisions addressing the public policy purposes of the investments. Whether the covenants in any particular area, including those pertaining to dividends, executive compensation, lending and use of proceeds, are appropriate or adequate in light of the public nature of the investment is a matter for the policy debate. That debate should consider in particular whether covenants should be more restrictive if the economics of the investments provide less than fair value to Treasury, and whether the use of standard forms created an inherent risk of covenants that were too lenient for some, as discussed earlier.

(2) Restrictions on Dividends. There are two types of dividend restrictions in the CPP forms. The first is a standard restriction for preferred stock, which is that dividends cannot be paid on common stock or junior preferred stock for any period if accrued dividends on the senior stock have not been paid, subject to certain exceptions. This ensures the priority of the preferred as to dividends.

The second type of restriction is not typical and is very favorable to an investor. It caps the amount of dividends that the QFI can pay on its common stock for a limited period of time. The Public QFI form sets the cap at the level of the last quarterly cash dividend per share declared (or announced), and it applies until the earlier of the third anniversary of the closing and the date on which the preferred shares have been redeemed or transferred by Treasury. The Non-Public QFI form contains a similar provision. In addition, for the period from the third anniversary until the tenth anniversary, the Non-Public QFI form prohibits any increase in per share or aggregate dividends of more than 3% above the prior year. After the tenth anniversary, no dividends are permitted if the preferred shares are still outstanding. Treasury has said that it did not prohibit dividends outright in the CPP form because the purpose of the investment is to help healthy banks, and Treasury wants to enable the banks to continue to attract private capital (though this again raises the issue of whether the covenant was set for stronger banks that can realistically replace the Treasury investment in the short term but is too lenient for those that cannot.) Treasury has stated it sought a cap on dividends to ensure that the QFI did not pay an excessive dividend. This approach can be contrasted with the U.K. government approach and Treasury's approach in the case of the automotive loans noted below.

The SSFI/TIP investments contain harsher restrictions, presumably in light of the fact that they are for institutions experiencing greater difficulty compared to the CPP which is intended for healthy banks. In the second Citigroup and third Bank of America investments, Citigroup and Bank of America were prohibited from paying common stock dividends in excess of $0.01 per share per quarter without the consent of Treasury until the earlier of the third anniversary or the date the preferred is redeemed or transferred by Treasury. (Citigroup's dividend prior to that transaction was $0.16/share/quarter, Bank of America cut its dividend from $0.64/per share to $0.32/per share in October, 2008).) At the time of the AIG transaction, AIG had already eliminated its common stock dividend, and the agreement provides that it cannot increase its common stock dividend for five years without Treasury consent.

All of the U.S. comparative transactions and the Barclays transaction RCIs have a restriction of the first type—that is, a provision to ensure priority of dividends. None has a restriction of the second type; that is, they do not regulate the level of common stock dividends.

By contrast, in the U.K. government transactions, the U.K. government prohibited the payment of any dividends on the ordinary shares for as long as the preference shares were outstanding. In addition, Treasury prohibited all common stock dividends in the loans to the automotive companies.

(3) Restrictions on Repurchases of Stock. A repurchase of stock is, from an economic standpoint, the equivalent of a dividend payment as a means to distribute money to common shareholders. Consequently, it is customary to include restrictions on repurchases of common stock and other junior securities that mirror the restrictions on dividends. The CPP forms are drafted in this way in parallel with their restrictions on common stock dividends. That is, the forms prohibit repurchases of common stock and other junior securities (including trust preferred) if preferred dividends have not been paid, subject to a number of exceptions. They also prohibit such repurchases for the same period during which dividends are capped, subject to certain exceptions. The SSFI/TIP investments also restrict stock repurchases in a manner similar to the dividend restrictions.

All six U.S. comparative transactions and the Barclays transaction prohibit repurchases if dividends on the preferred securities have not been paid in full. There are no further restrictions, however, which is consistent with the absence of further restrictions on the payment of common stock dividends in these transactions.

By contrast, the UK government transactions prohibit repurchases of common stock at any time while the preference shares are outstanding. The TARP automotive loans have similar restrictions.

(4) Access to Information. The Public QFI form requires the QFI to permit Treasury, acting through the Federal regulatory agency that regulates such QFI, to examine the QFI's books and to review any information material to Treasury's investment that has been provided by the QFI to such regulatory agency. The provision does not appear to expand the information rights of the government overall; it simply insures that Treasury has access to the information that the regulator otherwise receives. Although Treasury's rationale in drafting this provision is not known, there has been speculation the access rights are through the appropriate Federal regulatory agency because information provided to the regulator is generally exempt from Freedom of Information Act requests. (The Non-Public QFI form actually phrases this right more broadly so that Treasury is not limited to acting through the principal regulator. The form also requires the QFI to deliver periodic financial statements since the same would not be available publicly.)

Only the Goldman Sachs—Berkshire Hathaway transaction provides that Goldman Sachs must make its chief financial officer available to discuss the business with Berkshire Hathaway. None of the other U.S. comparative transactions or the Barclays transaction contain explicit undertakings regarding access to or provision of information (at least based on the documents made available publicly).

In the U.K. government transactions, the issuers agree to provide reports and information, as well as access to their books and records and management, as may be required to allow the UK government to comply with applicable legal and regulatory requirements as a result of its ownership of shares.

(5) Lending/Foreclosure Mitigation/Use of Proceeds. Because the TARP investments were made with public funds to achieve certain policy objectives, one must consider whether there were covenants directed at those policy objectives. The CPP Securities Purchase Agreement contains recitals that state that the QFI "agrees to expand the flow of credit to U.S. consumers and businesses on competitive terms to promote the sustained growth and vitality of the U.S. economy" and "agrees to work diligently, under existing programs, to modify the terms of residential mortgages to strengthen the health of the U.S. housing market". Recitals are introductory statements included at the beginning of an agreement to reflect the parties' intentions or purposes in entering into an agreement. They do not have the operative effect of covenants, which are set forth later in the contract in the form of an explicit undertaking by one party to another to do or not do something over a period of time. In the CPP forms, there are no covenants or other provisions that address or implement the agreements stated in the recitals, nor is there any specific reporting obligation pertaining to them.

There is no use of proceeds provision in the CPP forms—that is, no covenant or other provision mandating that the funds be used in a certain way, or prohibiting certain uses—nor is there any requirement to report to Treasury as to how the institution used the funds. There are no covenants requiring the issuer to take actions with respect to the problems that may have led to the need for the Treasury investment, such as covenants to develop a restructuring plan (as in the U.K. transactions and the automotive investments), to sell certain assets, to not engage in or limit particular types of business, etc.

After the initial transactions were completed, Treasury added a covenant to the CPP forms that an issuer that was a bank holding company or a savings and loan holding company must maintain that status. This covenant insures that the U.S. government will continue to have power over the institution as a regulator but does not mandate any changes to operations.

Except for the other matters noted in this section, there were generally no other covenants or provisions in the CPP investments that imposed restrictions on, or required changes to, operations or business practices or that were directed at the specific public policy objectives cited by Treasury for making the investments. Clearly, the use of standard forms meant Treasury could not include customized covenants that required particular institutions to take particular actions that Treasury felt were desirable to improve strength and stability. Beyond that, this report can only speculate as to why Treasury chose not to include general covenants directed at policy objectives. It may reflect a view that in October 2008 it was more important to get large numbers of institutions to participate in the program and such covenants would have discouraged participation. It may reflect a general contract approach in which Treasury is a passive investor (which approach, as noted earlier, was also evidenced by having only limited voting rights, not voting the warrant shares, and not having board seats or board observers). This approach could reflect a view that it is best for the government to exercise its authority as a regulator rather than as a shareholder. (As noted earlier, Treasury included a covenant after the first nine transactions were signed requiring recipients who were bank holding companies or savings and loan holding companies to

maintain such status, which preserves the government's regulatory role.) Alternatively, the absence of such covenants may reflect a view that contractual covenants cannot address the policy objectives effectively. In any event, these issues pertain to the policy objectives of the investments which the Panel may wish to consider.

In the AIG investment, the use of proceeds issue was addressed because the funds were applied at closing to pay in part the loans provided by the Federal Reserve Bank of New York (that is, AIG never received the funds). There was also a prohibition on using the purchase price of the preferred shares or the proceeds of the Federal Reserve credit facility to pay annual bonuses or other awards to executives or senior partners. There were no covenants on operations in the preferred stock purchase agreement beyond those noted in "Other" below. However, the credit agreement provided by the Federal Reserve Bank of New York to AIG imposes substantial covenants on AIG with respect to operation of its business, and a trust for the benefit of Treasury holds almost 80% of the voting equity of AIG which gives the trust power to direct management.

In the second Citigroup and third Bank of America investments, there is no covenant restricting the use of proceeds but there is a covenant requiring the institution to account for its use of the purchase price, establish internal controls with respect to requirements pertaining to use of the purchase price, and report to Treasury on a quarterly basis until all of the purchase price has been accounted for. A senior officer must certify the accuracy of such reports. The institution must also set up internal controls and provide reporting regarding certain other covenants including the restrictions on dividends, stock repurchases and executive compensation. There were no specific covenants on lending. The documents for the guarantee of the $301 billion pool of assets in the second Citigroup investment include obligations related to implementing the FDIC's mortgage modification program with respect to such assets.

None of the U.S. comparative transactions or the Barclays transaction contains provisions restricting the use of the proceeds of the investment or generally restricting or requiring a restructuring of operations.

In the U.K. government transactions, the banks were required to make certain undertakings in respect of lending. These were to restore and maintain, for the next three years, mortgage lending and lending to small and medium enterprises ("SMEs") to at least the respective levels in 2007, although this was subject to the exception that the bank was not required to "engage in uncommercial practices" (in the case of RBS) or take action in the "nonconforming market " (in the case of Lloyds—HBOS). The banks were required to provide certain reports on SME lending. There were also undertakings in regard to shared equity housing projects. The banks were also required to submit restructuring plans to the government.

Treasury's approach can also be contrasted with what it did in the case of the loans to the automotive companies, where extensive covenants restricting the companies were imposed. These covenants include the typical covenants imposed in the high-yield bond market as well as additional covenants designed to achieve the public policy purposes of the loans. These included affirmative covenants with respect to

financial and other reporting to the Treasury (including compliance with certain expense policies and executive privilege and compensation requirements), use of proceeds, divestment of corporate aircraft, restrictions on executive privileges and compensation, requiring approval of the auto "czar" to be designated by the President for material transactions outside the ordinary course of business and other matters. The negative covenants restrict transactions with affiliates and fundamental changes, prohibit all dividends and other distributions (with minimal exceptions), restrict investments and prepayments of other indebtedness and other matters. There are also financial covenants. The agreements also require the companies to develop a restructuring plan for long-term viability, international competitiveness and energy efficiency.[43]

As discussed earlier, it is more common to have restrictive covenants in debt agreements than in preferred stock transactions. However, the use of preferred stock for the financial institution investments was presumably driven by the need to satisfy capital requirements, not to realize higher equity returns. One can argue that the difference in covenants between the automotive transactions and AIG credit facility on the one hand versus the banking institution investments on the other should not have been driven by the place of the investment in the capital structure. The differences between the covenants may have been driven more by the overall design of the CPP--that is, it was a program intended for large numbers of "healthy" banks, not a rescue of a single institution, and it was for institutions which the government already regulates.

(6) Executive Compensation. The CPP form contains a covenant to implement the executive compensation provisions required under Section 111(b) of the EESA. The covenant says that the QFI shall "take all necessary action to ensure that its Benefit Plans with respect to its Senior Executive Officers comply in all respects with Section 111(b) of the EESA as implemented by any guidance or regulation thereunder that has been issued and is in effect as of the Closing Date, and shall not adopt any new Benefit Plan with respect to its Senior Executive Officers that does not comply therewith." Senior Executive Officers are generally the chief executive officer, the chief financial officer and the three most highly compensated officers. The CPP forms do not impose any more detailed restrictions, however. They also do not impose any specific reporting requirement on the issuer, and thus it has been not clear how Treasury will determine if the issuer is in compliance. Treasury has recently published rules to require

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[43] General Motors Corporation, Current Report on Form 8-K filed January 7, 2009, *available at* http://idea.sec.gov/Archives/edgar/data/40730/000095015209000103/0000950152-09-000103-index.idea.htm. The loan agreement for Chrysler Holding LLC is not available publicly because the company does not make filings with the SEC; however, the term sheet released by Treasury sets forth similar covenants. Term Sheet attached to Press Release, Treasury Releases Term Sheet for Automotive Plan, Department of Treasury, December 19, 2008, *available at* http://www.treas.gov/press/releases/reports/chrysler%20final%20term%20&%20appendix.pdf.

certain reports and certifications. In addition, the senior executive officers were required to deliver at closing written waivers of claims that might arise as a result of compliance with such provisions.[44]

The SSFI/TIP investments contain more stringent executive compensation provisions. In the case of AIG, the restrictions on executive compensation apply to a broader group of individuals (which includes the top 70 executives according to the Treasury statement) and cover a wider range of payments. They include limits (for such larger group of executives) on golden parachutes and the size of the bonus pool for 2008 and 2009. There is also a prohibition on using the purchase price (and loans by the Federal Reserve) to pay certain bonuses and other awards and an agreement that this restriction be auditable—meaning that Treasury can require AIG to show it did not use the funds for such purpose. In the case of the second Citigroup investment, the covenant applies to a larger group of executives and covers a wider range of payments, including (for such larger group of executives) a limit on golden parachutes, a limit on the size of the bonus pool for the specified group in 2008 and 2009 (based on the prior year), a requirement that a portion of 2008 bonuses be payable as deferred stock or cash awards and that a portion be subject to performance based vesting, and a clawback on payments made in violation of the provisions. Citigroup also agreed to certain reporting requirements in regard to this covenant. The Bank of America restrictions are quite similar to that in the second Citigroup investment.

In the U.K. government transactions, the banks gave undertakings to the U.K. government that they would restrict bonuses for directors, link remuneration to long-term value creation and avoid encouraging excessive risk-taking, and provide that any severance package for a dismissed director be reasonable and perceived as fair. No specific reporting on implementation is required, however.

(7) Affiliate Transactions. The Non-Public QFI Form has a covenant that requires that any transaction with an affiliate or related person be on terms no less favorable to the company than could be obtained from an unaffiliated third party and have been approved by the audit committee of the Board of Directors or comparable body of independent directors of the company. This provision is not in the Public QFI Form. (SEC rules require a public company to disclose related party transactions and to disclose its policies and procedures regarding related party transactions, and the listing requirements of the national securities exchanges require companies to appropriately review and oversee related party transactions.) There is a wide range of practice with respect to affiliate transaction covenants. They are often found in debt financings

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[44] *See* Section 4.10 of CPP Securities Purchase Agreement. The implementing regulations are found at 31 C.F.R. 30. *See also* Department of Treasury Notice 2008--PSSFI, *available at* http://www.treas.gov/initiatives/eesa/docs/Exec%20Comp%20PSSFI%20Notice.pdf, for regulations applicable to financial institutions in the Systemically Significant Failing Institutions program.

involving riskier credits, such as high yield bond offerings, and very infrequently found with investment grade issuers. Neither the U.S. comparative transactions nor the U.K. transactions contain specific covenants on affiliate transactions.

(8) Other. All the SSFI/TIP investments contain additional covenants requiring the issuer to maintain and implement its comprehensive policies on (i) lobbying, governmental ethics and political activity and (ii) corporate expenses, and to obtain prior consent of Treasury to any material amendments to such policies. These covenants also set forth certain details as to the minimum requirements of such policies.

G. Voting and Control Rights.

Holders of preferred stock generally do not have the right to elect directors or vote with the common stock on general matters brought before shareholders. It is common for holders of preferred stock to have limited voting rights, however, with respect to matters that may adversely affect their rights and preferences. That is, they are typically entitled to vote as a class to approve certain amendments to the corporate charter and certain transactions where their interests could be adversely affected. Such rights are typically afforded by state law and are also frequently set forth in the certificate of designation for a preferred stock. The CPP form provides that the preferred stock carries such limited, customary voting rights. The preferred stocks issued in the SSFI/TIP investments have the same rights. In the four comparative U.S. transactions in which preferred stock was issued, the preferred carries voting rights on such matters similar to those in the CPP form. The preference shares in the U.K. government transactions also have similar rights.

In addition, the CPP form provides that if dividends are not paid for six quarters, whether or not consecutive, holders have a right to vote as a class (together with other preferred stockholders having similar rights) to elect two directors until such time as the failure to pay dividends is cured. In the SSFI/TIP investments, the trigger is set earlier at the failure to pay dividends for four quarters.[45]

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[45] In the November AIG investment considered here, Treasury acquired nonconvertible preferred stock that has essentially the same terms as in the CPP forms. In the September 2008 rescue of AIG, which was not funded with monies under the EESA and is not an investment reviewed in this report, the government acquired the right to receive 79.9% of the voting rights represented by the outstanding common shares. This was achieved by issuing convertible preferred stock (which is now held by a trust for the benefit of Treasury) that is entitled to vote with AIG's common stock on all matters as if it had been converted.

The right to elect two directors upon a failure to pay dividends is a term that is very frequently, though not always, found in preferred stock investments.[46] Such rights were granted in the Citi-GIC and Morgan Stanley—MUFJ transactions but not in the Goldman Sachs—Berkshire Hathaway or Merrill—Korea/Kuwait transactions. In the U.K. government transactions, the preference shares are entitled to vote generally on all matters if dividends are not paid in full. There are no voting rights in the Barclays transaction except those which an investor acquires upon exercise of the warrants or conversion of the MCNs into ordinary shares.

Investors sometimes get the right to designate board directors or observers, particularly when their ownership interest is significant (such as above 10% or 20%), although investors acquiring large stakes in banks and bank holding companies frequently do not obtain such rights (and limit their percentage ownership) so as to avoid the risk of being deemed and regulated as a bank holding company. In the Morgan Stanley–MUFJ transaction, Mitsubishi acquired a 21% ownership interest and received the right to designate one director for as long as it beneficially owned at least 10% of the common stock, as well as the right to one observer at board of directors meetings. The Federal Reserve order approving the investment indicates that Mitsubishi was limited to one director so that it was not deemed to control Morgan Stanley and the order also states that Mitsubishi made commitments that it would be a passive investor.[47]

In the U.K. government transactions, the U.K. banks agreed to consult with the U.K. government regarding the appointment of independent directors (up to three in the case of RBS and two in the case of Lloyds TSB–HBOS). (This covenant was negotiated before it was clear how much of the ordinary shares the government would acquire. It is presumably not as relevant now because the U.K. government acquired a majority of the common stock of RBS and will control the company and acquired 43.4% of Lloyds–HBOS which may give it effective control.[48]) No rights to designate directors or observers exist in the Treasury investments (other than in AIG as noted above) or in the other U.S. comparative transactions or the Barclays transaction.

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[46] For example, although not applicable to the CPP preferred stock because it is not required to be listed (unless Treasury requests listing), the rules of the national securities exchanges provide that preferred stock that is listed must have such rights.

[47] Federal Reserve System, Mitsubishi UFJ Financial Group Inc., available at http://www.federalreserve.gov/newsevents/press/orders/orders20081007a1.pdf.

[48] The UK government has stated its investments "will be managed on a commercial basis by a new arm's length company" which will be wholly owned by the Government but which will have a board that includes private sector representatives. *See* HM Treasury press release, New company to manage Government's shareholdings in banks, November 3, 2008. http://www.hm-treasury.gov.uk/press_114_08.htm.

There can be stockholder approval and regulatory issues with respect to investing in equity that carries voting rights. These were not an issue with respect to the preferred stock issued to Treasury and generally are not issues for nonconvertible preferred shares, because voting rights are usually limited to what is described above. However, there can be a need to obtain stockholder approval if convertible preferred shares are being issued or if an investor is otherwise acquiring a security that has, or could in the future provide, full voting rights equivalent to those of common shares. Stockholder approval is generally required under the requirements of the NYSE or the NASDAQ for issuances of voting shares (or securities convertible into or exchangeable for voting shares) representing 20% or more of the voting shares outstanding.[49] (There can also be regulatory issues in holding voting equity of a financial institution, although these presumably did not concern Treasury.)[50]

Another issue with respect to voting rights is what is the percentage of the common stock, and thus of the total voting power, that would be acquired upon exercise of the warrants. This varies among the Treasury investments as noted earlier.

Treasury also agreed in the CPP purchase agreement as well as in the SSFI/TIP investments not to exercise voting rights with respect to any common shares it may acquire upon exercise of the warrants. This is a very unusual term for a private investor to agree to, and appears to reflect the general passive investor approach in the forms discussed earlier. However, it should be noted that if Treasury were to sell the warrants, or exercise the warrants and sell the stock, to a third party, the third party would be entitled to exercise voting rights attached to the common stock. As a result, the undertaking by Treasury does not affect the realizable value of the warrants or the underlying common stock.

The issue of voting rights and influence over management raises important policy issues in light of the fact that these are investments made with taxpayer funds. Such issues include, among others, whether it is appropriate for the government to have more influence since public funds are being used or not appropriate given the nature of our private enterprise system, whether the government should exercise influence only as a regulator and not as a shareholder, the extent to which the purpose of the investment is to change behavior, and so forth. While the voting rights obtained by Treasury in the CPP investments are customary for preferred stock investments, the question of whether

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[49] *See* also discussion of warrants and exigent circumstances exception at note 39 and accompanying text.

[50] An entity owning 10% or more of any class of the voting equity of a bank holding company can under certain circumstances be presumed to be a bank holding company and will be a bank holding company if it owns 25% or more of any class of voting equity. The Treasury is exempt from this provision; and while it would be relevant to a transferee, I doubt that concern was a principal factor in the Treasury's decision not to acquire voting equity.

the arrangements were appropriate in light of public policy purposes is one which the Panel may wish to consider.

H. Transfer Restrictions.

The TARP investments were sold to Treasury in private placements of securities, as opposed to public offerings. Securities issued in private placements are subject to restrictions on resale pursuant to the U.S. Securities Act of 1933 and the regulations thereunder. In addition, issuers of securities in private placements often want investors to agree not to transfer the securities for some period of time, so as to avoid downward pressure on the price of their securities and to ensure that the investor is a long-term investor. Investors often resist such provisions, or seek to limit the duration of such provisions, to maximize the optionality of their investment.

Treasury did not agree to any contractual transfer restrictions on the preferred stock. It did agree in the Public QFI form that it would not transfer more than one-half of the warrants prior to the earlier of the date when the QFI receives 100% of the investment amount as proceeds of a Qualified Equity Offering or December 31, 2009. This is related to the warrant reduction provision discussed earlier, which provides that in the event the QFI receives such proceeds of a Qualified Equity Offering, the number of shares for which the warrants are exercisable is reduced by 50%, so that Treasury would only be able to transfer one-half of the shares anyway. The SSFI/TIP investments do not contain the warrant reduction provision or this restriction on transferability of warrants. The Non-Public QFI form also does not contain a similar restriction on transferability of the warrants. It also contains differences in light of the private company status of the QFI, including that Treasury agrees not to make a transfer if it would cause the QFI to become a reporting company under the Securities Exchange Act of 1934.

All of the U.S. comparative transactions contained restrictions on transfer of securities, most of which were one year; Berkshire Hathaway agreed to a five year restriction. In addition, these restrictions extended to hedging transactions in some cases. Hedging transactions are often prohibited as part of transfer restrictions because an investor can effectively transfer the economic risk of an investment through a hedging arrangement without transferring the actual security. There are no restrictions on the ability of Treasury (or a transferee holder) to enter into hedging transactions.

In addition, Treasury obtained registration rights in the Public QFI Form as well as right to require the listing on a national securities exchange of the preferred stock. Registration rights facilitate the ability of an investor to resell securities to a third party. They refer to registering the sale of the securities under the Securities Act of 1933 so that the investor can make a public offering of the securities. Without such rights, the manner in which an investor can resell securities is limited to transactions that are exempt from or not subject to the registration requirements of the Securities Act, such as private placements, which may adversely affect the depth of the market for resale and therefore the price the investor can realize. Registration rights are typically only granted by issuers that are already publicly held companies, because the cost and burden of registration with the SEC would be too great otherwise. This is the reason that the Non-Public QFI form

provides for registration rights only if the issuer becomes a public company. Treasury also obtained registration rights and the right to require listing of the preferred stock in the SSFI/TIP investments. Registration rights were granted in only three of the U.S. comparative transactions (Citi–Abu Dhabi, Merrill–Korea/Kuwait and Morgan Stanley–MUFJ).

I. Standstill Provisions and Preemptive Rights.

When an issuer sells a private investor a significant equity interest, the issuer often wants the investor to agree not to purchase additional securities of the issuer without the consent of the issuer, and not to take actions to control or influence the management of the company. These provisions are known as standstill provisions. In addition, investors who acquire significant equity ownership of a company sometimes wish to have contractual rights to maintain their percentage ownership of the equity in the event of future sales of securities by the company. These provisions are known as preemptive rights. There are no standstill provisions or preemptive rights in the Treasury investments, but this is not surprising assuming that Treasury does not wish to purchase shares in the market and does not wish to be a long-term investor. There are standstill restrictions in all of the U.S. comparative transactions and preemptive rights in three of them (Merrill–Korea/Kuwait, Morgan Stanley–CIC and Morgan Stanley–MUFJ).

J. Repricing.

Some of the U.S. comparative transactions contain provisions that require repricing in the event the financial institution subsequently sells securities to another party at better terms. (See Citi–Abu Dhabi, Citi–GIC, Merrill–Korea/Kuwait, Morgan Stanley–CIC.) These provisions are typically obtained only when an investor has significant leverage in the negotiations. They typically apply only in certain limited circumstances such as a subsequent large block transaction and only for a limited period of time such as one year. For example, in the Merrill–Korea/Kuwait transaction, the investors purchased convertible preferred that has a repricing feature. If Merrill Lynch sold common stock or securities convertible into or exchangeable for common stock for more than $1 billion at a purchase or conversion price below the conversion price received by the investors within one year of the closing, then the conversion feature is reset in light of that lower price, meaning that the investor would receive more shares on conversion than it otherwise would have. Treasury did not include a repricing provision in the CPP forms or in the SSFI/TIP investments. Repricing provisions are advantageous to a typical private investor seeking to protect its return. However, because such provisions can increase the cost of raising funds from future investors, they may not further the public policy objectives of Treasury insofar as it wants to make it easier for recipients of CPP funds to attract private capital.

K. Exit Rights.

Any investor must consider how it will exit its investment. This analysis has already discussed the provisions that affect Treasury's ability to exit its investment, and that discussion is summarized here. First, there is no mandatory redemption of the

Preferred Stock and thus no assurance that the preferred shares will be redeemed or repurchased. However, the dividend step-up provision, the right to repurchase the warrants and underlying common shares at fair market value following redemption (or transfer) of the preferred stock, and the restrictive covenants on dividends may create incentives for issuers to redeem or repurchase the Preferred Stock. The warrant reduction feature also creates an incentive to raise Tier 1 capital which can be used to redeem the preferred stock. (In addition, some commentators have suggested that issuers may wish to not be restricted by the executive compensation covenants as well, which may lead them to redeem or repurchase the securities.) Second, Treasury is not restricted in its ability to transfer the securities (or engage in hedging). It also has registration rights, which facilitate resale. See the more detailed discussion under Sections V(B) (Dividends), V(E) (Redemption and Repurchases of Securities) and V(H) (Transfer Restrictions).

L. Representations and Warranties.

Representations and warranties in agreements serve a few purposes. First, they assist the parties in performing due diligence and in allocating risk. If a representation turns out to be inaccurate and it is discovered before closing, Treasury would have a right not to purchase the securities. If the inaccuracy is discovered after the closing, Treasury may have a claim for damages, although the value to an equity investor of such a claim against the issuer is limited since in most circumstances any recovery reduces the value of the issuer. The CPP forms contain extensive representations and warranties by the QFI. These include all the representations contained in the Goldman Sachs—Berkshire Hathaway agreement (such as validity of the issuance of the securities, accuracy of financial statements and SEC filings and no recent material adverse effect), in most cases word-for-word. The CPP forms also contain numerous representations that are not contained in the Goldman Sachs—Berkshire Hathaway agreement, including representations on disclosure controls, undisclosed liabilities, litigation, compliance with laws, employee benefits, taxes, property and leases, environmental liabilities, risk management instruments, agreements with regulatory agencies and insurance. The SSFI/TIP investments contained substantially the same representations and warranties as the CPP form.

The extensive representations found in the CPP form are much more than what investors typically receive in securities sales by investment grade issuers or most well-known seasoned issuers. These extensive representations are more typical in securities transactions involving smaller and less well-known issuers (such as issuers in initial public offerings who would be required to give extensive representations to the underwriters) or in credit agreements.

In the two Morgan Stanley transactions, the representations and warranties were not as extensive as those in the CPP form and were closer to those in the Berkshire

Hathaway transaction. (Purchase agreements are not publicly available for the other U.S. comparative transactions or the Barclays transaction.)[51]

The U.K. government transactions contain extensive representations and warranties, similar to (and in some areas more detailed than) those in the CPP forms.

M. Conditions to Closing.

A securities purchase agreement typically provides that the investor's obligation to purchase the securities is conditioned on certain actions to be taken by the issuer or certain other requirements, such as validly issuing the shares, obtaining necessary approvals and delivering certain closing documents. Such conditions are for the protection of the investor.

The CPP form imposes typical conditions to the obligations of the investor to purchase the securities and is more rigorous in this respect than the GS—Berkshire Hathaway agreement. In addition to delivering proper stock certificates, for example, the QFI must deliver an officers' certificate (in which the officers confirm accuracy of the representations and warranties and compliance with certain other conditions) and a legal opinion. These are not unusual conditions and should not be difficult to meet. However, these conditions are not always obtained by an investor, and they were not included in the U.S. comparative transactions for which purchase agreements are publicly available. In addition, the CPP form imposes conditions related to executive compensation which are quite unusual and are designed to fulfill the requirements of Section 111 of the EESA, as discussed above. Specifically, the QFI must deliver evidence of compliance with the provisions and waivers of certain officers to claims they might have as a result of compliance with such provisions. The SSFI/TIP investments had similar requirements, and more executives were required to deliver waivers.

N. Amendments.

The CPP forms and the SSFI/TIP investments contain a very unusual proviso to the amendments provision in Section 5.3 of the Securities Purchase Agreement which gives Treasury the unilateral right to amend any provision of the agreement "to the extent required to comply with any changes after the Signing Date in applicable federal statutes". This is potentially very favorable to Treasury and could be used, for example, to remedy deficiencies in reporting requirements.

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[51] In addition, the Goldman Sachs—Berkshire Hathaway agreement and the Morgan Stanley transactions required the investor to make certain customary representations for purchasers in private placements, which pertain to the investor's status, its authorization of the transaction and certain matters that help ensure that the transaction qualifies as a private placement. Treasury was not required to make any representations in any of its investments.

Annex I to Report to the Congressional Oversight Panel for Economic Stabilization

Legal Analysis of the Investments by the U.S. Department of the Treasury in Financial Institutions under the Troubled Asset Relief Program

by Timothy G. Massad
January 27, 2009

The following chart sets forth a summary comparison of the terms of (i) the Treasury standard forms used for the Treasury's Capital Purchase Program (CPP), (ii) the actual documentation used in several of the largest transactions under the CPP as well as the AIG , second Citigroup and third Bank of America investments, (iii) the U.S. comparative transactions described in the report and (iv) the U.K. comparative transactions described in the report. The chart is organized by transaction. The terms of the CPP forms for Public Qualified Financial Institutions (QFIs) and Non-Public QFIs excluding S corporations and mutual organizations are given first, followed by the terms of (i) the specific Treasury investments, (ii) the U.S. comparative transactions and (iii) the U.K. comparative transactions.

This is only a summary. Not all terms are included, and in describing provisions, certain exceptions, definitions and other details are not included. Readers should review the report for discussion of these terms and the definitive documents for the investments for a complete understanding of the terms. All information is based on publicly available documents. In some cases, not all the documents for a transaction have been made publicly available, in which case the summary may be incomplete.

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	Treasury Form for Public QFIs	Treasury Form for Non-Public QFIs (excluding S Corporations and Mutual Organizations)
Size	Not less than 1% of its risk-weighted assets and not more than the lesser of (i) $25 billion and (ii) 3% of its risk weighted assets.	Same as Public QFI Form.
Securities Issued	1) Senior Preferred, liquidation preference $1,000 per share. 2) Warrant to purchase number of shares of common stock having an aggregate price equal to 15% of senior preferred on date of investment. Number of warrant shares **will be reduced by 50%** if QFI receives net proceeds equal to liquidation preference of Preferred Stock from Qualified Equity Offerings by December 31, 2009.	1) Senior Preferred, liquidation preference $1,000 per share. 2) Warrant to purchase number of net shares of senior preferred stock ("Warrant Preferred") having a liquidation preference equal to 5% of the preferred amount on the date of investment. (Treasury may elect not to require this in certain small investments.)
Senior Preferred Dividend Rights	5% for five years and then 9% (per annum, paid quarterly). Dividends are cumulative compounding except for banks that are not subsidiaries of bank holding company.	**Preferred Stock:** 5% for five years and then 9% (per annum, paid quarterly). Dividends are cumulative except for banks that are not subsidiaries of bank holding company. **Warrant Preferred**: 9% per annum, cumulative.
Warrant Exercise Terms and Price	**Exercise price:** Market price on day of Treasury approval (20-day trailing average); (declining by 15% every six-month anniversary, subject to max decrease of 45% if the consent of the QFI stockholder for the issue of shares is not received). **Exercise Right:** The warrants are immediately exercisable, **(but only up to 50% in first year due to reduction feature**).	**Exercise Price:** $0.01 per share or greater amount as charter may require. **Exercise Right:** Immediately exercisable in whole or in part. Treasury intends to immediately exercise the Warrant Preferred.
Term	1) **Preferred Stock –** Perpetual life 2) **Warrant –** 10 years	Same as Public QFI Form

	Treasury Form for Public QFIs	Treasury Form for Non-Public QFIs (excluding S Corporations and Mutual Organizations)
Redemption	1) **Preferred Stock –** May not be redeemed for three years except with proceeds from Qualified Equity Offering equaling at least 25% of issue price; thereafter at the option of the QFI (with approval of the QFI's primary federal bank regulator). Redemption at 100% of liquidation amount plus any accrued and unpaid dividends. Qualified Equity Offering means the sale by the QFI after the date of this investment of Tier 1 qualifying perpetual preferred stock or common stock for cash. 2) **Warrant –** Following redemption of the Preferred Stock, the **QFI may repurchase any other equity security** held by Treasury at fair market value.	**Preferred Stock –** Same as Public QFI Form. **Warrant Preferred –** May only be redeemed after all the preferred stock has been redeemed. No right to repurchase equity securities at fair market value after redemption of Preferred, as in Public QFI Form.
Restrictions on Dividends	Preferred Stock carries customary priority over common stock and junior preferred stock as to payment of dividends. In addition, prior to the earlier of (a) the third anniversary of the closing date, and (b) the date on which the Preferred Shares have been redeemed in whole or the Treasury has transferred all of the Preferred Shares to a third party, the QFI cannot declare or pay any dividend or make any distribution on the common stock other than regular quarterly cash dividends of not more than the amount of the last quarterly cash dividend per share prior to October 14, 2008. Subject to exceptions and adjustments.	Similar to Public QFI Form. In addition, after the third anniversary and prior to the tenth anniversary, Treasury's consent is required for an increase in per share or aggregate dividends greater than 3% per annum. From and after the tenth anniversary, the QFI shall be prohibited from paying common dividends until all equity securities held by Treasury are redeemed or transferred to a third party.
Restrictions on Repurchase	Repurchases and redemptions of capital stock and equity securities (including trust preferred) are prohibited if accrued dividends have not been paid on the Senior Preferred, subject to certain exceptions. In addition, repurchases and redemptions are prohibited	Repurchases and redemptions of capital stock and equity securities (including trust preferred) are prohibited if accrued dividends have not been paid on the Preferred Stock, subject to certain exceptions. In addition, repurchases and redemptions are prohibited

	Treasury Form for Public QFIs	Treasury Form for Non-Public QFIs (excluding S Corporations and Mutual Organizations)
	without consent of Treasury for same period as dividend cap, subject to exceptions.	without consent of Treasury until tenth anniversary, subject to exceptions (and after tenth anniversary, without exception) unless equity securities held by Treasury are redeemed or transferred in full.
Executive Compensation	Must implement changes with respect to Senior Executive officers so as to comply with Section 111(b) of the EESA for as long as the Treasury holds debt or equity securities of the QFI acquired pursuant to agreement or warrant. The Senior Executive officers must also deliver written waivers of claims.	Same as Public QFI Form.
Voting Rights	**Preferred Stock –** No voting rights except: (a) preferred stockholders acting as a class must approve (by 2/3): (i) authorization of senior stock, (ii) amendment to charter that adversely affects rights, or (iii) share exchange, merger or reclassification which would adversely affect rights, and (b) non-payment of dividend for 6 quarterly periods (whether or not consecutive) will enable holders to elect 2 directors until all accrued and unpaid dividends are paid. **Warrant –** No voting rights. The Treasury also agrees not to exercise voting power with respect to any shares of common stock of the QFI issued to it upon exercise of the warrants.	**Preferred Stock:** Same as Public QFI Form. **Warrant Preferred:** Entitled to the same voting rights as the Preferred Stock.
Transfer Restrictions	**Preferred Stock –** No contractual restrictions on transfer or hedging. **Warrant –** Treasury may only transfer or exercise one half prior to earlier of (i) QFI receiving 100% of proceeds from a Qualified Equity Offering or (ii) Dec. 31, 2009. **Registration Rights:** contains customary registration	**Preferred Stock and Warrant Preferred:** No contractual restrictions on transfer provided that the Treasury and its transferees do not effect any transfer of the Preferred Stock and Warrant Preferred which would require the QFI to become subject to the periodic reporting requirements of Section 13 or 15(d) of the Exchange Act. If the QFI otherwise becomes subject to

	Treasury Form for Public QFIs	Treasury Form for Non-Public QFIs (excluding S Corporations and Mutual Organizations)
	rights. Treasury can require listing of preferred also.	such reporting requirements, Treasury has registration rights.
Representations and Warranties	QFI makes extensive representations and warranties in purchase agreement including as to (1) organization, authority and significant subsidiaries, (2) capitalization, (3) valid issue of the Preferred Shares and Warrants, (4) anti-takeover provisions and rights plans, (5) no material adverse effect, (6) financial statements and reports, (7) no undisclosed liabilities, (8) no litigation or cease-and-desist orders/agreements with regulatory agencies, (9) compliance with laws, (10) no registration requirements under the Securities Act, (11) employee benefit matters, (12) taxes, (13) properties and leases, (14) environmental liability, (15) risk management instruments and insurance and (16) intellectual property.	Same as Public QFI Form.
Stockholder Approval	Obtain approval of stockholders if required as promptly as practicable. Include a proposal once every six months until obtained. Warrant exercise price declines if approval not obtained promptly as noted above.	N/A
Other Terms	Section 5.3 gives Treasury unilateral right to amend Securities Purchase Agreement to comply with changes in federal statutes. Recitals state agreements of QFI regarding expanding credit and modifying mortgages, but there are no other provisions addressing such subjects. No requirements regarding use of funds or reporting of use of funds.	For as long as the Treasury holds any equity securities of the QFI, the QFI may not enter into related party transactions unless such transactions are on terms no less favorable than could be obtained from an unaffiliated third party and have been approved by the audit committee or comparable body of independent directors of the QFI.

Treasury Form for Public QFIs	Treasury Form for Non-Public QFIs (excluding S Corporations and Mutual Organizations)
	Same provision regarding amendments in Section 5.3 as in Public QFI Form. Same issue on recitals as in Public QFI Form.

	American International Group ("AIG") – Treasury (11/25/2008)
Size	$40 Billion (To be used to repay loans under credit facility provided by Federal Reserve Bank of New York (September 22, 2008).
Securities Issued	1) 4,000,000 shares of Series D Fixed Rate Cumulative Perpetual Preferred Stock, and 2) Warrant to purchase up to 53,798,766 shares of common stock equal to 2% of the issued and outstanding shares of Common Stock on the date of investment. In connection with the issuance of the Warrant, the number of shares into which the Series C Preferred Stock (issued to Treasury on September 16, 2008) will be convertible will be reduced from 79.9% to 77.9% of the outstanding shares of Common Stock.
Senior Preferred Dividend Rights	10% per annum payable quarterly and cumulative. The dividend rate is subject to adjustment in the sole discretion of the Treasury in light of prevailing economic conditions and the financial condition of AIG, with the objective of protecting the U.S. taxpayer.
Warrant Exercise Price	The initial exercise price for the Warrant shall be $2.50 per share, subject to customary anti-dilution adjustments. The initial exercise price per share of Common Stock shall be adjusted to the par value per share of the Common Stock following the amendments to AIG's Restated Certificate of Incorporation to reduce the par value per share of the Common Stock.
Term	**Senior Preferred:** Perpetual life **Warrant:** 10 years
Redemption	**Senior Preferred:** At any time that (i) the AIG Credit Facility Trust beneficially owns less than 30% of the aggregate voting power of AIG's voting securities and (ii) no holder of the Senior Preferred controls AIG, AIG may redeem the Senior Preferred in whole or in part at a redemption price equal to 100% of its liquidation preference, plus accrued and unpaid dividends. **Warrant:** Following the redemption of the Senior Preferred held by Treasury or the transfer by Treasury of the Senior Preferred to one or more unaffiliated third parties, AIG may repurchase the Warrant and underlying shares at fair market value so long as no holder of the Warrant controls AIG.
Restrictions on Dividends	Similar to Public QFI Form: the Senior Preferred carries customary priority over common stock and junior preferred as to dividends, and there is a prohibition on increasing dividends on common stock. The principal differences are that (i) AIG had eliminated its common stock dividend as of closing date and (ii) prohibition on increasing dividends runs until the fifth anniversary of the investment (unless Preferred Shares have been redeemed or transferred by Treasury to third parties), rather than the third anniversary as in Public QFI Form.

	American International Group ("AIG") – Treasury (11/25/2008)
Restrictions on Repurchase	Similar to the Public QFI Form, repurchases and redemptions of junior equity securities are prohibited if accrued dividends have not been paid on the Senior Preferred. Also, prior to the earlier of (a) the fifth anniversary of the closing date and (ii) the date on which the Preferred Shares have been redeemed or transferred in whole by Treasury, Treasury's consent is required for repurchases of any common shares, other capital stock, trust preferred securities or other equity securities (subject to certain exceptions).
Executive Compensation	Contains same requirements as Public QFI Form and the following additional requirements for the time period that Treasury owns debt or equity securities of AIG acquired pursuant to agreement or warrant: (i) limits on golden parachute payments for all employees who participate in AIG's Senior Partners Plan to amounts permitted by the CPP program (except for equity denominated awards settled solely in equity); (ii) for any such Senior Partner, limits on 2009 annual bonus, retention payments for any period ending prior to March 31, 2010 and amounts payable in connection with termination of employment prior to such date (provided that the obligations in clauses (i) and (ii) are on a best efforts basis for non-US Senior Partners); (iii) limits on 2008 and 2009 annual bonus pools for Senior Executive Officers and Senior Partners to amounts not in excess of average bonus pools for 2006 and 2007 (subject to adjustments); and (iv) an agreement not to use the purchase price of the Preferred Shares or funds under the Fed credit agreement to pay annual bonuses or other awards to executives or Senior Partners and an agreement that this requirement be auditable. Also contains reporting obligations regarding implementing these provisions. Related conditions to closing are more extensive also (such as waivers from U.S. Senior Partners).
Voting Rights	**Senior Preferred:** Similar to Public QFI Form with respect to class voting rights and with respect to right to elect directors if dividends are not paid, except that (i) right is to elect greater of 2 directors or 20% of total directors and (ii) this right is triggered by failure to pay dividends for four periods (whether or not consecutive) rather than six periods as in Public QFI form. **Warrant:** Similar to Public QFI Form, Treasury agrees not to exercise voting rights on common shares acquired upon exercise of the Warrants.
Transfer Restrictions	Senior Preferred, Warrant and the Common Stock underlying the Warrant are not subject to any contractual restrictions on transfer or hedging. Registration Rights: contains registration rights which are generally similar to those in the Public QFI Form.
Representations and Warranties	Extensive representations and warranties issued to Treasury in September as per Public QFI Form.
Stockholder Approval	Stockholder approval required to amend AIG's Restated Certificate of Incorporation to allow the Senior Preferred to rank senior to the convertible preferred stock issued to Treasury in September.

	American International Group ("AIG") – Treasury (11/25/2008)
Special Terms	Until such time as Treasury no longer owns Preferred Stock, AIG agrees to maintain and implement its comprehensive policies on (i) lobbying, governmental ethics and political activity and (ii) corporate expenses, and to obtain prior consent of Treasury to any material amendments to such policies. These covenants also set forth certain details as to the minimum requirements of such policies. Until such time as Treasury no longer owns Preferred Stock or any other debt or equity securities of AIG, AIG agrees to establish and maintain a risk management committee of the Board of Directors. In addition to the purchase of preferred stock, the following actions were taken: 1) The existing credit facility provided by the New York Fed was modified so as to reduce the interest rate spread above three-month LIBOR from 850 basis points ("bp") to 300 bp and to reduce the fee on undrawn funds from 850 bp to 75 bp. 2) the New York Fed provided two additional lending facilities consisting of: (i) loans of $22.5 billion to a newly formed limited liability company to fund the purchase of residential mortgage-backed securities from AIG's U.S. securities lending collateral portfolio. AIG will make a subordinated loan of $1 billion to the LLC and will bear the risk of the first $1 billion of losses. (ii) loans of up to $30 billion (six-year term, at one-month LIBOR plus 1%) to a newly formed LLC to fund the purchase of multi-sector collateralized debt obligations on which AIG Financial Products has written credit default swap contracts. AIG contributed $5 billion for an equity interest in the LLC, which accrues distributions at LIBOR plus 300 basis points (subordinated to the loan payments). AIG is not liable for losses except to the extent of its equity contribution. In both facilities, the loans are secured by the assets of the relevant LLC. New York Fed and AIG share in any residual cash flows from assets after loans and equity interest are repaid.

	Citigroup – Treasury (First Investment – CPP) (announced 10/14/2008, closed 10/28/2008)
Size	$25 Billion
Securities Issued	1) 25,000 shares of Fixed Rate Cumulative Perpetual Preferred Stock, Series H, having a liquidation value of $1,000,000 per share, and 2) Warrant to purchase 210,084,034 shares of common stock (subject to reduction by 50% as per Form term). Equal to $3.75 billion at exercise price (or 15% of Preferred).
Senior Preferred Dividend Rights	Same as Public QFI Form.
Warrant Exercise Price	$17.85
Term	Same as Public QFI Form.
Redemption	Same as Public QFI Form.
Restrictions on Dividends	Same as Public QFI Form (Last regular dividend was $0.16 per share). But see later Treasury investment which restricts quarterly dividend to $0.01 per share.
Restrictions on Repurchase	Same as Public QFI Form.
Executive Compensation	Same as Public QFI Form.
Voting Rights	Same as Public QFI Form.
Transfer Restrictions	Same as Public QFI Form.
Representations and Warranties	Same as Public QFI Form.
Stockholder Approval	No stockholder approval needed.
Special Terms	Issuance causes reset of exercise price of securities issued to GIC described below. See Citigroup Form 10-Q (10/31/08) (p. 58). Original price was $31.62. If the reset were effected currently, the maximum purchase price per share would be $27.6958. The actual reset will be determined and effected within 90 days after January 23, 2009. The reset purchase price cannot be less than $26.3517 per share.

	Citigroup – Treasury (Second Investment – TIP) (announced 11/24/2008, closed 12/3/2008)
Size	$20 Billion.
Securities Issued	1) 20,000,000 shares of Fixed Rate Cumulative Perpetual Preferred Stock Series I, having a liquidation preference of $1,000. 2) Warrant to purchase 188.5 million shares of common stock (not subject to reduction as per Form term). Equal to 10% of value of preferred issued to U.S. government. An additional $7 billion of preferred issued to Treasury ($4 billion) and FDIC ($3 billion) as fee for U.S. government guarantee of $301 billion asset pool together with warrants for an additional 66.5 million shares of common stock. Terms substantially the same as those described herein.
Senior Preferred Dividend Rights	8% per annum quarterly and cumulative.
Warrant Exercise Price	$10.61
Term	Same as Public QFI Form.
Redemption	In stock or cash as agreed between Treasury and Citi. Otherwise as per Public QFI Form except no redemption prior to date when preferred stock issued to Treasury pursuant to CPP is redeemed.
Restrictions on Dividends	Prohibition on paying common stock dividends in excess of $0.01 per share per quarter for three years without Treasury consent.
Restrictions on Repurchase	Same as Public QFI Form.
Executive Compensation	Contains same requirements as Public QFI Form and the following additional requirements for the time period that Treasury owns debt or equity securities of Citigroup acquired pursuant to purchase agreement or warrant: i) limits on golden parachute payments for Senior Executive Officers and all Senior Leadership Committee members (except for equity denominated awards settled solely in equity); (ii) aggregate amount of bonus compensation (as defined) that may be paid to Senior Executive Officers and members of Senior Leadership Committee in 2008 and 2009 is limited to 60% of prior year bonus compensation, provided that 2009 bonus pool cap may be increased with consent of Treasury; (iii) a requirement that at least 60% of bonus compensation for 2008 for Executive Committee members (consisting of defined Senior Executive Officers and ten next most senior executive officers) be payable in deferred stock or cash awards and that at least 40% be granted subject to performance based vesting; and (iv) a clawback on payments made in violation of these provisions. Also contains requirement for quarterly certification of compliance and requirement for a report on review of compensation arrangements with Citigroup's senior risk officers.

	Citigroup – Treasury (Second Investment – TIP) (announced 11/24/2008, closed 12/3/2008)
	Conditions to closing require waivers from Senior Leadership Members.
Voting Rights	Same as Public QFI Form.
Transfer Restrictions	Same as Public QFI Form, except no restrictions on warrants.
Representations and Warranties	Same as Public QFI Form.
Stockholder Approval	No stockholder approval needed.
Special Terms	Until such time as Preferred Shares are redeemed or transferred by Treasury, Citigroup agrees to maintain and implement its comprehensive policies on (i) lobbying, governmental ethics and political activity and (ii) corporate expenses, and to obtain prior consent of Treasury to any material amendments to such policies. These covenants also set forth certain details as to the minimum requirements of such policies and require quarterly certification of compliance. Covenant to provide reports regarding use of funds and compliance with restrictions on dividends, stock repurchases and executive compensation. .

	Bank of America – Treasury (announced 10/14/2008, closed 10/28/2008)	Merrill Lynch – Treasury (only a summary of the agreement is available) (announced 10/14/2008, signed 10/26/2008)
Size	$15 Billion	$10 Billion Note: transaction was agreed to but not closed due to merger with Bank of America
Securities Issued	(i) 600,000 shares – Fixed Rate Cumulative Perpetual Preferred Stock, Series N (per share liquidation preference of $25,000) and (ii) a warrant to purchase 73,075,674 shares of common stock (subject to reduction by 50% as per Form term). Equal to approximately $2.25 billion at exercise price or 15% of Preferred. (Additional shares and warrants were issued upon consummation of the merger with Merrill – see special terms below).	New series of ML preferred stock and warrants to purchase 64,991,334 shares of Merrill Lynch Common Stock
Senior Preferred Dividend Rights	Same as Public QFI Form.	Not Available
Warrant Exercise Price	$30.79	$23.08
Term	Same as Public QFI Form.	Not Available
Redemption	Same as Public QFI Form.	Not Available
Restrictions on Dividends	Same as Public QFI Form. Last regular dividend was $0.32 per share	Not Available
Restrictions on Repurchase	Same as Public QFI Form.	Not Available
Executive Compensation	Same as Public QFI Form.	Not Available
Voting Rights	Same as Public QFI Form.	Not Available
Transfer Restrictions	Same as Public QFI Form.	Not Available

	Bank of America – Treasury (announced 10/14/2008, closed 10/28/2008)	Merrill Lynch – Treasury (only a summary of the agreement is available) (announced 10/14/2008, signed 10/26/2008)
Representations and Warranties	Same as Public QFI Form.	Not Available
Stockholder Approval	No stockholder approval needed.	Not Available
Special Terms	Treasury agreed to invest an additional $10 billion in BoA upon consummation of merger with Merrill Lynch for (i) 400,000 additional shares of the Series N Preferred Stock (with substantially identical terms) and (ii) warrants to purchase 48,717,116 additional shares of Common Stock with an exercise price of $30.79 and substantially identical terms to the original warrants. Merger closed January 1, 2009 and this additional investment was closed January 9, 2009.	In view of the pending merger agreement with Bank of America, ML determined that it would not sell securities to the Treasury at the time, but reserved the right to do so in the future under certain circumstance if the merger with Bank of America was not closed. Because the merger was closed on January 1, 2009, the $10 billion was invested in Bank of America.

	Bank of America – Treasury (Third Investment – TIP) (closed 1/16/2009)
Size	$20 Billion.
Securities Issued	1) 800,000 shares of Fixed Rate Cumulative Perpetual Preferred Stock Series R, having a liquidation preference of $25,000. 2) Warrant to purchase 150.4 million shares of common stock (not subject to reduction as per Form term). Equal to 10% of value of preferred issued to U.S. government. An additional $4 billion of preferred will be issued to Treasury and FDIC as fee for U.S. government guarantee of $118 billion asset pool together with warrants with an aggregate exercise value of 10% of preferred issued. Fee is subject to adjustment. No documentation other than the term sheet has been provided for those additional shares of preferred stock and warrants, but is expected to have same terms as the preferred and warrants described herein.
Senior Preferred Dividend Rights	8% per annum quarterly and cumulative.
Warrant Exercise Price	$13.30
Term	Same as Public QFI Form.
Redemption	In stock or cash as agreed between Treasury and BoA. Otherwise as per Public QFI Form except no redemption prior to date when preferred stock issued to Treasury pursuant to CPP is redeemed.
Restrictions on Dividends	Prohibition on paying common stock dividends in excess of $0.01 per share per quarter for three years without Treasury consent.
Restrictions on Repurchase	Same as Public QFI Form.
Executive Compensation	Contains same requirements as Public QFI Form and the following additional requirements for the time period that Treasury owns debt or equity securities of BoA acquired pursuant to purchase agreement or warrant: i) limits on golden parachute payments for Senior Executive Officers and other senior managers specified on a schedule (except for equity denominated awards settled solely in equity); (ii) aggregate amount of bonus compensation (as defined) that may be paid to Senior Executive Officers and other senior managers in 2008 and 2009 is limited to 60% of prior year bonus compensation, provided that 2009 bonus pool cap may be increased with consent of Treasury; (iii) a requirement that at least 60% of bonus compensation for 2008 for certain of such persons be payable in deferred or restricted stock awards or deferred cash awards and that at least 40% be awarded based on performance or be awarded in deferred or restricted stock awards; and (iv) a clawback on payments made in violation of these provisions. Also contains requirement for quarterly certification of compliance and requirement for a report on review of compensation

	arrangements with BoA's senior risk officers. Conditions to closing require waivers from other senior managers also.
Voting Rights	Same as Public QFI Form.
Transfer Restrictions	Same as Public QFI Form, except no restriction on warrants.
Representations and Warranties	Same as Public QFI Form.
Stockholder Approval	No stockholder approval needed.
Special Terms	Until such time as Preferred Shares are redeemed or transferred by Treasury, BoA agrees to maintain and implement its comprehensive policies on (i) lobbying, governmental ethics and political activity and (ii) corporate expenses, and to obtain prior consent of Treasury to any material amendments to such policies. These covenants also set forth certain details as to the minimum requirements of such policies and require quarterly certification of compliance. Covenant to provide reports regarding use of funds and compliance with restrictions on dividends, stock repurchases and executive compensation.

	Bank of New York Mellon – Treasury (announced 10/14/2008, closed 10/28/2008)	Goldman Sachs – Treasury (announced 10/14/2008, closed 10/28/2008)
Size	$3 Billion	$10 Billion
Securities Issued	1) 3,000,000 shares of Fixed Rate Cumulative Perpetual Preferred Stock, Series B, having a liquidation value of $1,000 per share, and 2) Warrant to purchase 14,516,129 shares of common stock (subject to reduction by 50% as per Form term). Equal to $450 million at exercise price (or 15% of Preferred).	1) 10,000,000 Fixed Rate Cumulative Perpetual Preferred Stock, (Series H) (Per Share liquidation preference of $1,000), and 2) a Warrant to purchase 12,205,045 common stock subject to reduction by 50% as per Form term. Equal to $1.5 billion at exercise price or 15% of Preferred.
Senior Preferred Dividend Rights	Same as Public QFI Form.	Same as Public QFI Form.
Warrant Exercise Price	$31.00	$123
Term	Same as Public QFI Form.	Same as Public QFI Form.
Redemption	Same as Public QFI Form.	Same as Public QFI Form.
Restrictions on Dividends	Same as Public QFI Form. (Last regular dividend was $0.24 per share).	Same as Public QFI Form. Last regular dividend was $0.35 per share.
Restrictions on Repurchase	Same as Public QFI Form.	Same as Public QFI Form.
Executive Compensation	Same as Public QFI Form.	Same as Public QFI Form.
Voting Rights	Same as Public QFI Form.	Same as Public QFI Form.
Transfer Restrictions	Same as Public QFI Form.	Same as Public QFI Form.
Representations and Warranties	Same as Public QFI Form.	Same as Public QFI Form.
Stockholder Approval	No stockholder approval needed.	No stockholder approval needed.
Special Terms		

	JPMorgan – Treasury (announced 10/14/2008, closed 10/28/2008)	Morgan Stanley – Treasury (announced 10/14/2008, closed 10/28/2008)
Size:	$25 Billion	$10 Billion
Securities Issued	1) 2,500,000 shares of Fixed Rate Cumulative Perpetual Preferred Stock, Series K, par value $1, having a liquidation value of $10,000 per share, and 2) Warrant to purchase 88,401,687 shares of the common stock (subject to reduction by 50% as per Form term). Equal to $3.75 billion at exercise price (or 15% of Preferred).	1) 10,000,000 shares of Series D Fixed Rate Cumulative Perpetual Preferred Stock, having a liquidation preference of $1,000 per share, and (2) a warrant to purchase up to 65,245,759 shares of common stock, subject to reduction by 50% as per Form term. Equal to approximately $1.5 billion at exercise price (or 15% of Preferred).
Senior Preferred Dividend Rights	Same as Public QFI Form.	Same as Public QFI Form.
Warrant Exercise Price	$42.42	$22.99
Term	Same as Public QFI Form.	Same as Public QFI Form.
Redemption	Same as Public QFI Form.	Same as Public QFI Form.
Restrictions on Dividends	Same as Public QFI Form. (Last regular dividend was $0.38 per share).	Same as Public QFI Form. Last regular dividend was $0.27 per share.
Restrictions on Repurchase	Same as Public QFI Form.	Same as Public QFI Form.
Executive Compensation	Same as Public QFI Form.	Same as Public QFI Form.
Voting Rights	Same as Public QFI Form.	Same as Public QFI Form.
Transfer Restrictions	Same as Public QFI Form.	Same as Public QFI Form.
Representations and Warranties	Same as Public QFI Form.	Same as Public QFI Form.
Stockholder Approval	No stockholder approval needed.	No stockholder approval needed.
Special Terms		

	The PNC Financial Services Group, Inc. – Treasury (announced 10/24/2008, closed 12/31/2008)	State Street Corp. – Treasury (announced 10/14/2008, closed 10/28/2008)
Size:	$7.579 Billion	$2 Billion
Securities Issued	(1) 75,792 shares of Fixed Rate Cumulative Perpetual Preferred Stock, Series N, having a liquidation preference of $100,000 per share, and (2) warrants to purchase 16,885,192 shares of common stock, subject to reduction by 50% as per Form term. Equal to approximately $1.1 billion at exercise price (or 15% of Preferred).	1) 20,000 shares of Fixed Rate Cumulative Perpetual Preferred Stock, Series B, having a liquidation value of $100,000 per share, and 2) A warrant to purchase 5,576,208 common shares (subject to reduction by 50% as per Form term). Equal to $300 million at exercise price (or 15% of Preferred).
Senior Preferred Dividend Rights	Same as Public QFI Form.	Same as Public QFI Form.
Warrant Exercise Price	$67.63	$53.80
Term	Same as Public QFI Form.	Same as Public QFI Form.
Redemption	Same as Public QFI Form.	Same as Public QFI Form.
Restrictions on Dividends	Same as Public QFI Form. (Last regular dividend was $0.66 per share.)	Same as Public QFI Form. (Last regular dividend $0.23 per share).
Restrictions on Repurchase	Same as Public QFI Form.	Same as Public QFI Form.
Executive Compensation	Same as Public QFI Form.	Same as Public QFI Form.
Voting Rights	Same as Public QFI Form.	Same as Public QFI Form.
Transfer Restrictions	Same as Public QFI Form.	Same as Public QFI Form.
Representations and Warranties	Same as Public QFI Form.	Same as Public QFI Form.
Stockholder Approval	No stockholder approval needed.	No stockholder approval needed.
Special Terms		

	U.S. Bancorp—Treasury (announced 11/3/2008, closed 11/14/2008)	Wells Fargo – Treasury (announced 10/14/2008, closed 10/28/2008)
Size:	$6.6 Billion	$25 Billion
Securities Issued	(1) 6,599,000 shares of Series E Fixed Rate Cumulative Perpetual Preferred Stock, having a liquidation preference of $1,000 per share, and (2) warrants to purchase up to 32,679,102 shares of common stock, subject to reduction by 50% as per Form term. Equal to $990 million at exercise price (or 15% of Preferred).	1) 25,000 shares of Fixed Rate Cumulative Perpetual Preferred Stock, Series D, without par value, having a liquidation value of $1,000,000 per share, and 2) Warrant to purchase 110,261,688 shares of common stock (subject to reduction by 50% as per Form term). Equal to $3.75 billion at exercise price (or 15% of Preferred).
Senior Preferred Dividend Rights	Same as Public QFI Form.	Same as Public QFI Form.
Warrant Exercise Price	$30.29	$34.01
Term	Same as Public QFI Form.	Same as Public QFI Form.
Redemption	Same as Public QFI Form.	Same as Public QFI Form.
Restrictions on Dividends	Same as Public QFI Form. (Last regular dividend was $0.425 per share.)	Same as Public QFI Form. (Last regular dividend was $0.34 per share.)
Restrictions on Repurchase	Same as Public QFI Form.	Same as Public QFI Form.
Executive Compensation	Same as Public QFI Form.	Same as Public QFI Form.
Voting Rights	Same as Public QFI Form.	Same as Public QFI Form.
Transfer Restrictions	Same as Public QFI Form.	Same as Public QFI Form.
Representations and Warranties	Same as Public QFI Form.	Same as Public QFI Form.
Stockholder Approval	No stockholder approval required.	No stockholder approval needed.
Special Terms		

	Citigroup – $6.88 billion investment from Government of Singapore Investment Corporation Pte Ltd, as well as investments from Capital Research Global Investors; Capital World Investors; Kuwait Investment Authority; New Jersey Division of Investment; HRH Prince Alwaleed bin Talal bin Abdulaziz Alsaud; and Sanford I. Weill and the Weill Family Foundation (1/15/2008)
Size	$12.5 Billion
Securities Issued	250,000,000 depositary shares representing 250,000 shares of Convertible Preferred Stock ($12.5 billion aggregate liquidation preference), with each share of Convertible Preferred Stock having a liquidation preference of $50,000 per share. Each depositary share represents 1/1000th interest in a share of the convertible preferred stock (equivalent to $50 liquidation preference per depositary share).
Senior Preferred Dividend Rights	7.00%, non-cumulative, payable quarterly, subject to adjustment in certain limited circumstances
Warrant Terms	Not applicable.
Term	Perpetual life
Redemption	After seventh anniversary at any time.
Restrictions on Dividends	Preferred stock carries customary priority over common stock and junior preferred stock as to payment of dividends. No other restrictions on common stock dividends.
Restrictions on Repurchase	Cannot repurchase any shares unless dividends on Convertible Preferred, as of last dividend payment date, were fully paid.
Executive Compensation	No restrictions disclosed.
Voting Rights	Similar to Public QFI Form: right to elect two directors if Citi fails to pay dividends for six quarters (whether or not consecutive). Voting rights cease once Citi pays dividends for at least four consecutive quarters thereafter on the Convertible Preferred and any other preferred ranking equally.
Transfer Restrictions	Six month transfer restrictions, thereafter transfer subject to certain manner of sale restrictions. No registration rights.
Conversion Terms	Preferred Stock is convertible into common shares at holder's option at any time at a conversion premium of 20% (initial conversion rate of $31.62), subject to standard anti-dilution adjustments and to: i) make whole premium on certain acquisitions (if a person acquires 50% or more or if Citi merges, sells substantially all assets, etc.) unless 90% or more of consideration is listed equity (in US or Europe); and ii) fundamental change – if reference price in a make whole transaction is less than conversion price, may convert at greater of reference price or a base price. Convertible at Citigroup's option after February 13, 2013 if stock price exceeds 130% of conversion price.

	Citigroup – $6.88 billion investment from Government of Singapore Investment Corporation Pte Ltd, as well as investments from Capital Research Global Investors; Capital World Investors; Kuwait Investment Authority; New Jersey Division of Investment; HRH Prince Alwaleed bin Talal bin Abdulaziz Alsaud; and Sanford I. Weill and the Weill Family Foundation (1/15/2008)
Repricing	Conversion price adjusted if Citi issues within one year certain securities in excess of $5 billion for which reference or conversion price is lower.
Representations and Warranties	None disclosed, but no purchase agreement was filed.
Stockholder Approval	None required.
Special Terms	Each private investor agreed to cap ownership level at specific levels based on bank regulatory and foreign ownership provisions and other considerations. Note 8-K contains a description of the Convertible Preferred that appears to be part of an offering memorandum. No purchase agreement was filed.

	Citigroup – Abu Dhabi Investment Authority (11/26/2007)
Size	$7.5 Billion
Securities Issued	Upper DECS Equity Units, consisting of a contract to purchase common stock at different purchase dates, and trust preferred securities. Between 201,390,000 and 235,627,500 common shares to be issued. Trust preferred securities constitute four series of capital securities backed by four series of Citi junior subordinated debt securities, maturing 2041 or 2042 (35 years).
Fixed Payment	11% annual rate paid quarterly consisting of a payment on trust preferred securities and a contract payment on the purchase contracts. (Note, as contract dates occur the stated amount of each purchase contract declines and payment declines.) Both payments are deferrable under certain circumstances.
Warrant Terms	Not applicable.
Term	Trust preferred: perpetual life (but effectively not longer than 2041 or 2042 unless underlying securities are extended).
Redemption	Trust preferred securities are effectively redeemable at Citigroup's option after 6-7 years (i.e., 2013 or 2014 depending on series). Although they have no stated maturity, they must be redeemed upon maturity of corresponding series of junior subordinated debt securities (which is either 2041 or 2042 depending on series). However, Citigroup may elect at any time but on one occasion only with respect to each series to change the stated maturity of such series to any date (but not before 2013 or 2014), and to specify a date (not before 2013 or 2014) on and after which such series will be redeemable at Citigroup's option; right is subject to limitations if Citigroup is deferring interest on such series. Also redeemable upon changes in law that may result in loss of tax benefits, loss of Tier 1 capital status or result in trusts being considered investment companies.
Restrictions on Dividends	Citigroup may defer interest payments, but not in excess of five years. During any period of deferred payment, Citi will be restricted from making certain payments, including dividends or distributions on, or redeeming, purchasing, acquiring or making a liquidation payment with respect to, shares of Citigroup capital stock.
Restrictions on Repurchase	See dividend restriction.
Executive Compensation	No restrictions disclosed.
Voting Rights	No voting rights.

	Citigroup – Abu Dhabi Investment Authority (11/26/2007)
Transfer Restrictions	The investor may not transfer, sell or hedge the Upper DECS Equity Units or its exposure to the underlying shares for at least 2 years following the settlement date. After 2 years following the settlement date, until 3 years after the final stock conversion date, the investor is subject to certain manner of sale restrictions. Furthermore, the investor is not permitted to transact in any securities of Citi for one year from issue date of the Upper DECS Equity Units, subject to certain exceptions. Investor is entitled to customary registration rights.
Common Share Purchase Terms	Shares are to be purchased on four semi-annual settlement dates between Mar. 15, 2010 and Sept 15, 2011, subject to deferral up to Sept. 15, 2012. Aggregate number of common shares to be issued depends on Citi stock price as follows: i) if above $37.24/share: 201,390,000 shares; ii) if below $31.83/share: 235,627,500 shares; if between those prices, number of shares is between amounts above (amounts are equivalent to $7.5 billion).
Repricing	If Citi issues in excess of $5 billion of equity or equity-linked securities at a sale price below $31.83, or additional upper DECS Equity Units with a payment rate higher than 11% or a conversion premium below that of this security, during one year period following issuance, the maximum conversion price may be reduced but not to less than $31.83.
Representations and Warranties	None disclosed, but no purchase agreement was filed.
Stockholder Approval	None required.
Special Terms	ADIA has agreed not to own more than a 4.9% stake in Citi and will have no special rights of ownership or control and no role in the management or governance of Citi, including no right to designate a member of the Citi Board of Directors. Note 8-K contains a description of the Upper DECS Equity Units that appears to be part of an offering memorandum. No purchase agreement was filed.

	Goldman Sachs – Berkshire Hathaway Inc. (Buffett Investment) (09/28/2008)
Size	$5 Billion
Securities Issued	(1) 50,000 shares – 10% Cumulative Perpetual Preferred Stock, Series G, (having a liquidation value of $100,000 per share) and (2) a Warrant to purchase 43,478,260 common stock, (par value $0.01 per share) (exercisable for approximately 9.0% of the post-exercise outstanding Common Stock as of the date of issue). At the exercise price, the warrant is equal to $5 billion.
Senior Preferred Dividend Rights	10% per annum payable quarterly and cumulative.
Warrant Price	$115 (the closing price on 09/26/2008 was $ 137.99. Lowest closing price prior to deal was $108 on 9/18/08.)
Term	1) **Preferred Stock** – Perpetual life. 2) **Warrant** – Five years (exercisable at any time, from time to time.)
Redemption	The Series G Preferred Stock may be redeemed by the Company at any time, in whole or in part, at a redemption price of 110% of the liquidation value to be redeemed plus any accrued, unpaid dividends (subject to the approval of the Board of Governors of the Federal Reserve System and a minimum redemption of the lesser of 10,000 shares or the remaining shares).
Restrictions on Dividends	Customary prohibition on paying dividends on common stock or any of the Company's outstanding preferred stock of any series if the Preferred Stock dividends have not been paid.
Restrictions on Repurchase	The Company is not permitted to repurchase any of the outstanding Common Stock or any of the Company's outstanding preferred stock of any series as long as dividends on the Preferred Stock are not paid in full
Executive Compensation	No restrictions.
Voting Rights	Non-voting except for voting rights mandated under law and as long as at least 10,000 shares of the Preferred Stock remain outstanding, the Preferred Stock, voting as a separate class, will have the right to approve (with the consent of at least 66 2/3% in certain cases and 50.1% in others) any future issuance of preferred stock ranking senior to the Preferred Stock, any amendment of the certificate of incorporation, any share exchange or merger, reclassification or similar event in which the rights and other terms of the Preferred Stock are substantially modified. No right to elect directors upon failure to pay dividends.

	Goldman Sachs – Berkshire Hathaway Inc. (Buffett Investment) (09/28/2008)
Transfer Restrictions	Subject to certain limited exceptions, the Preferred Stock and the Warrant are not transferable for five years. Thereafter, investor may transfer Preferred if at least $1 billion (or amount held, if less) to any transferee and transferee agrees to be bound by transfer restrictions (which is then $500m or amount held, if less). The shares of Common Stock issuable on exercise of the Warrant may be transferred at any time but only in public offerings and other public market sales, or in private transactions, that do not involve the transfer to any single purchaser or group of more than 3.5% of the outstanding Common Stock. The Investor may not engage in any Hedging Transaction with respect to the Preferred Stock, Warrant or Warrant Shares. No registration rights.
Exchange Rights	1) **Preferred Stock –** So long as BH owns at least 10,000 shares of Preferred Stock, in the event of a spin-off of a business by the Company, a portion of the Preferred Stock owned by the Investor would have to be exchanged for preferred stock in the spun-off business, based on the relative value of the Company and the spun-off business. 2) **Warrant –** In case of any Business Combination or reclassification of Common Stock BH's right to receive Shares upon exercise of this Warrant shall be converted into the right to acquire the relatable number of shares of stock or other securities or property (including cash).
Representations and Warranties	Limited representations and warranties including (1) organization, authority and significant subsidiaries, (2) capitalization, (3) valid issue of the Preferred Shares and Warrants, (4) no MAE and (5) Financial Statements and Reports.
Stockholder Approval	None required.
Special Terms	Standstill – investor ownership cannot exceed 14.9%.

	Merrill Lynch – with each of Korean Investment Corporation, Kuwait Investment Authority, Mizuho Corporate Bank, TPG-Axon Capital, The New Jersey Division of Investment, The Olayan Group and T. Rowe Price Associates Inc., acting on behalf of various clients (separate agreements pursuant to a common term sheet summarized here) (01/15/2008)
Size	$ 6.6 Billion
Securities Issued	66,000 shares of newly issued 9.00% Non-Voting Mandatory Convertible Non-Cumulative Preferred Stock, Series 1 with a liquidation preference $100,000 per share, at a price of $100,000 per share.
Senior Preferred Dividend Rights	9% per annum non-cumulative payable quarterly.
Warrant Terms	Not applicable.
Term	**Maturity** – 2 3/4 years
Redemption	Not redeemable. **Mandatory conversion** into common shares at maturity (October 15, 2010) at conversion rates determined as follows – (1) if the Company's common share price on the conversion date is equal to or greater than 117% of the Initial Common Share Price (the "Threshold Price"), the conversion rate equals $100,000 divided by the Threshold Price (also known as the Minimum Conversion Rate), (2) if the Company's share price on such date is less than the Threshold Price but greater than the Initial Common Share Price, the conversion rate equals $100,000 divided by the current share price and (3) if the Company's share price on such date is less than or equal to the Initial Common Share Price, the conversion rate equals $100,000 divided by the Initial Common Share Price. Initial Common Share Price is $52.40 (subject to reset on a "full ratchet" basis if the Company sells common stock or securities convertible into or exchangeable for common stock for more than $1 billion at a price below $ 52.40 within one year of the closing of the purchase). Subject to customary dilution adjustments. **Regulatory conversion:** At the option of the issuer at any time at the same rate as for mandatory conversion upon the occurrence of a Regulatory Event, which means where the issuer is subject to regulations pertaining to Tier 1 capital, has elected to qualify Preferred as Tier 1 without sub-limit pursuant to such regulations and there is more than an insubstantial risk that it will not be entitled to treat full liquidation preference as Tier 1.
Restrictions on Dividends	Customary prohibition on paying dividends on common stock or any of the Company's other junior securities if dividends on the Series 1 Preferred have not been paid.
Restrictions on Repurchase	Same as dividend restrictions

	Merrill Lynch – with each of Korean Investment Corporation, Kuwait Investment Authority, Mizuho Corporate Bank, TPG-Axon Capital, The New Jersey Division of Investment, The Olayan Group and T. Rowe Price Associates Inc., acting on behalf of various clients (separate agreements pursuant to a common term sheet summarized here) (01/15/2008)
Executive Compensation	No restrictions.
Voting Rights	Similar to Public QFI Form with respect to voting on charter amendments, mergers etc. (majority vote). No right to elect directors upon failure to pay dividends.
Transfer Restrictions	Investors are not permitted to sell, transfer or hedge, directly or indirectly, their preferred stock (or underlying common stock) at any time during the one-year period following the closing. Each Investor is entitled to customary registration rights.
Conversion Rights	Preferred Stock convertible into common shares at the option of the holder at any time at the Minimum Conversion Rate (see clause (1) of Mandatory Conversion under Redemption. See also Mandatory Conversion and Regulatory Conversion under Redemption.
Repricing	See above under Redemption.
Representations and Warranties	No representations and warranties disclosed.
Stockholder Approval	None required.
Special Terms	(1) Customary two-year standstill that, among other things, prohibits (i) acquisitions of additional voting securities (or securities convertible into voting securities) that would cause an investor to own more than 9.9% of the Company's outstanding common stock (or securities convertible into common stock). (2) Pre-emptive rights to purchase common stock or securities convertible into common stock (for public or private offerings in excess of $ 1 billion) which rights terminate upon the earlier of (x) the conversion of the investor's preferred stock into common stock and (y) such time as the investor no longer owns at least 75% of the preferred stock it purchased, including as a result of hedging transactions.

	Morgan Stanley – Best Investment Corporation (wholly owned subsidiary of China Investment Corporation) (12/19/2007)
Size	$5,579,143,000
Securities Issued	PEPS Units consisting of a contract to purchase common stock and trust preferred securities. The maximum number of shares to be issued upon settlement of the stock purchase contracts is 116,062,911 or 9.9 percent or less of the Company's total shares outstanding.
Fixed Payment	6% per annum on trust preferred securities and 3% per annum on common share contracts.
Warrant Terms	Not applicable.
Term	The Equity Units convert to common stock on August 17, 2010.
Redemption	Not applicable to common stock purchase contract. The trust preferred securities will be mandatorily redeemable for their liquidation amount upon the redemption or maturity of the related junior subordinated debentures (initially February 17, 2042, but can be as early as August 2012). Also redeemable upon changes in law that may result in loss of tax benefits or loss of Tier 1 capital status, or result in trusts being considered investment companies, or upon certain ratings related events or bankruptcy of property trustee.
Restrictions on Dividends	MS is restricted from paying dividends if at such time MS has given notice of its election to defer interest payments on junior subordinated debentures (which would result in deferral of payment under trust preferred).
Restrictions on Repurchase	Similar to dividend restriction.
Executive Compensation	No restrictions.
Voting Rights	CIC was to be a passive financial investor with no special rights of ownership and no role in the management of the Company, including no right to designate a member of the Company's Board of Directors.
Transfer Restrictions	Investor agrees not to transfer any of the securities or the common stock or hedge its exposure prior to first anniversary. Thereafter until the first anniversary of the last date on which Investor receives common stock, it shall not transfer or hedge, in one transaction or a series of transactions, more than $2.5 billion (other than to affiliates or as required by governmental entity).
Common Share Purchase Terms	Holder is obligated to purchase Company common stock on August 17, 2010 (or earlier in certain circumstances) at prices between $48.0700 and $57.6840. Number of shares issued depends on market price at time (if market price is less than reference price of $48.07, then divide stated amount by reference price; if market price is equal to or greater than 120% of reference price, then divide by 120% of reference price; if in between, then divide by market price).

	Morgan Stanley – Best Investment Corporation (wholly owned subsidiary of China Investment Corporation) (12/19/2007)
Repricing	If MS receives gross proceeds of $1 billion or more from the sale of common stock or securities convertible into or exchangeable for common stock at a price below $48.07 within 12 months, price is reset.
Representations and Warranties	**Issuer:** Customary representations and warranties including (1) organization, authority and significant subsidiaries, (2) capitalization, (3) enforceability of Transaction Documents (4) no MAE, (5) financial statements and reports, (6) litigation, (7) compliance with laws, (8) authorization of the trusts, indentures, debt securities, registration rights agreement, guarantee agreements, pledge agreements, purchase contracts, etc., (9) SEC reports and (10) sub-prime exposure. **Investor:** Customary representations as to status, private offering, authorization, ownership of securities, etc.
Stockholder Approval	None required.
Special Terms	1) Pre-emptive rights: Entitled to preemptive rights in certain kinds of equity offerings (unless proceeds are less than $500 million). Rights terminate if the Investor transfers any securities or hedges its exposure except to affiliates or as required by governmental entity. An amendment to the pre-emptive rights provision was executed simultaneously to the TARP investment into MS clarifying that convertible instruments would be included in the denominator determining the Investor Percentage Interest and that, in the case of a qualified offering of a package of securities which includes the covered securities and other securities, the Investor would to be entitled to a pro-rata acquisition of covered securities and other securities offered. 2) Standstill: Investor agrees to a standstill so that ownership does not exceed 9.90% of voting securities.

	Morgan Stanley – Mitsubishi UFJ Financial Group (10/13/2008)
Size	$9 Billion
Securities Issued	(i) 7,839,209 shares of Series B Non-Cumulative Non-Voting Perpetual Convertible Preferred Stock, at a purchase price of $1,000.00 per share) and (ii) 1,160,791 shares of 10% Series C Non-Cumulative Non-Voting Perpetual Preferred Stock at a purchase price of $1,000 per share).
Senior Preferred Dividend Rights	At the rate per annum of 10% non-cumulative payable quarterly on both the Series B and C. Dividend rate on Series B will increase to 13% on February 17, 2009 if stockholder approval for conversion is not obtained by such date.
Warrant Terms	Not applicable.
Term	Series B and C Preferred Stock – Perpetual
Redemption	Series B Preferred Stock – not redeemable by the Company. Series C Preferred Stock – may not be redeemed prior to October 15, 2011 and thereafter may be redeemed at $1,100 per share plus accumulated and unpaid dividends.
Conversion	Mandatory Conversion – one-half of the Series B Preferred Stock, subject to certain ownership limits on MUFJ and its affiliates, will mandatorily convert into Common Stock when, at any time on and after the first anniversary of the closing, the market price of the Common Stock exceeds one hundred fifty percent (150%) of the Conversion Price (which is initially $25.25 per share) for twenty (20) trading days within any period of thirty (30) consecutive trading days beginning after such first anniversary. Each share of Series B Preferred Stock is convertible into 39.604 shares of Common Stock subject to customary anti-dilution adjustments and adjustments upon the occurrence of certain make-whole merger or acquisition transactions and fundamental changes. The remainder of the Series B Preferred Stock will mandatorily convert on the same basis following the second anniversary of the Closing. Optional Conversion – Series B Preferred Stock is convertible at the option of the holder into a number of shares of Common Stock equal to the Conversion Rate.
Restrictions on Dividends	Each of Series B and C contain customary prohibition on paying any dividend with respect to shares of common stock or other junior securities or repurchasing or redeeming any shares of common stock or other junior securities in any quarter unless full dividends are paid on such Preferred Stock in such quarter.
Restrictions on Repurchase	The Company cannot repurchase any shares as long as any dividends are payable on any of the outstanding Preferred Stock other than the senior preferred or shares in connection with a benefits plan. Some customary exceptions such as purchases in the ordinary course of business (for market making), purchases as part of stockholders rights plans, etc. are provided.

	Morgan Stanley – Mitsubishi UFJ Financial Group (10/13/2008)
Executive Compensation	No restrictions.
Voting Rights	Similar to Public QFI Form: no voting rights except (a) limited voting rights with respect to matters affecting the rights and privileges of such Series of Preferred Stock (including right to approve *pari passu* preferred if it does not meet certain criteria), (b) right to elect two additional members of the Board if dividends have not been declared and paid for the equivalent of six or more quarters, whether or not consecutive, until dividends on such Series have been fully paid for at least four quarters. Under a separate Investor Agreement, the Company has agreed, for so long as MUFJ beneficially owns at least 10% of the outstanding common stock on a fully diluted basis (assuming conversion of all Series B) to take all lawful action to cause one of MUFJ's senior officers or directors to be a member of the Board and has granted MUFJ the right to one Board observer.
Transfer Restrictions	Subject to limited exceptions, MUFJ cannot transfer the Preferred Stock (or common stock acquired on conversion) or hedge its exposure to the common stock for one year after the issuance. Thereafter, subject to limited exceptions, MUFJ may not transfer the Preferred Stock or common stock, or hedge its exposure to the common stock, in one transaction or a series of transactions, having an aggregate value exceeding $2.5 billion in any three month period until the third anniversary of the Closing. Subject to certain exceptions, MUFJ cannot knowingly offer, sell, pledge or otherwise transfer Preferred Stock or common stock to any person if the transfer would result in such person beneficially owning in excess of 5% of the then outstanding shares of common stock. MUFJ has registration rights including five demand registrations (one of which may be a shelf registration) with respect to common stock acquired on conversion of the Series B Preferred Stock. Such registration rights apply only to demands of at least $500,000,000 and are not available until after the first anniversary of the Closing.
Representations and Warranties	**Issuer:** Customary representations and warranties including (1) organization, authority and significant subsidiaries, (2) capitalization, (3) enforceability of Transaction Documents (4) no MAE, (5) financial statements and reports, (6) litigation, (7) compliance with laws, (8) SEC reports, (9) taxes and (10) sub-prime exposure. **Investor:** Customary representations as to status, private offering, authorization, ownership of securities, etc.
Stockholder Approval	Company is required to use best efforts to obtain stockholder approval for issuance of common stock issuable upon conversion of Series B.

	Morgan Stanley – Mitsubishi UFJ Financial Group (10/13/2008)
Special Terms	1) Company and MUFJ also agreed to establish a global strategic alliance, with particular focus on corporate and investment banking (targeting June 30, 2009 as the date by which the definitive documents for the alliance will be executed). 2) Pre-emptive rights: MUFJ is entitled to preemptive rights on offerings of securities resulting in proceeds equal to or exceeding $500,000,000 for 30 months following the date of the Closing. 3) Standstill – customary restrictions until fifth anniversary or date when MUFJ ceases to hold at least 10% of common stock, including agreement not to acquire an economic interest in excess of 20%.

	U.K. Government Investment in RBS	U.K. Government Investment in Lloyds TSB and HBOS
Size	Commitment to purchase up to £15 billion of ordinary shares to extent not purchased by existing shareholders in open offer. Actual purchase was approximately £15 billion for a 57.9% stake. U.K. government also agreed to purchase £5 billion in preference shares.	Commitment to purchase up to £17 billion of ordinary shares (from both banks in the aggregate) to extent not purchased by existing shareholders in open offers. Actual purchase was approximately £17 billion for 43.4% ownership in combined equity. U.K. government also agreed to purchase £4 billion in preference shares.
Securities Issued	Ordinary shares, priced at a 8.6% discount to market price immediately prior to announcement. Preference Shares, £1,000 liquidation preference.	Ordinary shares, priced at 8.5% discount to market price immediately prior to announcement. Preference Shares, £1,000 liquidation preference.
Preference Share Dividend Rights	12% for five years and then at a variable rate equal to LIBOR plus 7%, payable quarterly. Non-cumulative (but mandatorily payable in certain limited circumstances as with other outstanding classes of preferred).	12% for five years and then at a variable rate equal to LIBOR plus 7%, payable quarterly. Non-cumulative (but mandatorily payable in certain limited circumstances as with other outstanding classes of preferred).
Warrant Terms	Not applicable.	Not applicable.
Term	Ordinary shares and preference shares – perpetual.	Ordinary shares and preference shares – perpetual.
Redemption	Preference Shares may be redeemed after five years at liquidation preference plus accrued dividends. No restrictions on repurchases.	Preference Shares may be redeemed after five years at liquidation preference plus accrued dividends. No restrictions on repurchases. Lloyds TSB stated in the prospectus that in light of the restrictions on dividends, it intends (with U.K. government approval) to repurchase the preference shares in 2009.
Restrictions on Dividends	Preference shares carry priority as to dividends except that they rank for dividend after existing cumulative preference shares. In addition, no dividends may be paid on ordinary shares while preference shares are outstanding.	Preference shares carry priority as to dividends [except that they rank for dividend after existing cumulative preference shares – check if applicable to Lloyds]. In addition, no dividends may be paid on ordinary shares while preference shares are outstanding
Restrictions on Repurchase	No repurchases of ordinary shares while preference shares are outstanding.	No repurchases of ordinary shares while preference shares are outstanding.

	U.K. Government Investment in RBS	U.K. Government Investment in Lloyds TSB and HBOS
Executive Compensation	RBS has given undertakings to U.K. government that no bonus will be awarded to any director in 2008 and any bonuses earned by directors in 2009 will be paid in ordinary shares; that it will comply with ABI industry best practice code on remuneration, and that remuneration will be linked to long-term value creation and not encourage excessive risk-taking; that reward for board members will take into account perceived fairness in current climate; and that directors who are dismissed will receive a severance package which is reasonable and perceived as fair.	Lloyds has given undertakings to U.K. government that 2008 bonuses will be paid in ordinary shares; that it will comply with ABI industry best practice code in remuneration and that remuneration will be linked to long-term value creation and not encourage excessive risk-taking; that reward for board members will take into account perceived fairness in current climate; and that directors who are dismissed will receive a severance package which is reasonable and perceived as fair.
Voting Rights	Preference Shares have no voting rights except (a) holders of preference shares must approve as a class (by 75%) (i) proposals to vary or abrogate the rights and restrictions attached to the preference shares or (ii) to authorize, create or increase shares ranking in priority to the preference shares and (b) if at the date when notice of a general meeting is given dividends have not been paid in full, holders may vote on all resolutions presented at the general meeting. In addition, the U.K. government will work with the Board on its appointment of three new independent directors.	Preference Shares have no voting rights except (a) holders of preference shares must approve as a class (by 75%) (i) proposals to vary or abrogate the rights and restrictions attached to the preference shares or (ii) to authorize, create or increase shares ranking in priority to the preference shares and (b) if at the date when notice of a general meeting is given dividends have not been paid in full, holders may vote on all resolutions presented at the general meeting. In addition, the U.K. government will work with the Board on its appointment of two new independent directors. If U.K. government's holding falls below 25% the government would only expect to be consulted on the appointment of one independent director.
Transfer Restrictions	No restrictions disclosed. The U.K. government has informed RBS that it is not a permanent investor in U.K. banks and its intention is to, over time, dispose of its shares in an orderly way and it would normally expect to consult RBS prior to any disposal.	No restrictions disclosed. The U.K. government has informed Lloyds TSB that it is not a permanent investor in U.K. banks and its intention is to, over time, dispose of its shares in an orderly way and it would normally expect to consult RBS prior to any disposal.

	U.K. Government Investment in RBS	U.K. Government Investment in Lloyds TSB and HBOS
Representations and Warranties	Extensive.	Extensive.
Stockholder Approval	None required.	Required for merger.
Special Terms	1) Commitment to restore and maintain the availability and active marketing of competitively priced mortgage lending (but RBS is not required to engage in uncommercial practices) and SME lending until the end of 2011 at a level at least equivalent to that of 2007; to make available a sum to be agreed upon for the next twelve months for shared equity/shared ownership schemes to help people struggling with mortgage payments to stay in their homes; to publish an annual report containing specified information relating to SME lending; and to increase its support to shared equity projects. 2) Commitment to present a restructuring plan to the U.K. government within six months. 3) Growth of company to be limited to a certain extent unless unrelated to provision of aid as per EC Decision.	1) commitment to restore and maintain the availability and active marketing of competitively priced mortgage lending (other than in the non-conforming market) and SME lending until the end of 2011 at a level at least equivalent to that of 2007; to make available a sum to be agreed upon for the next twelve months for shared equity/shared ownership schemes to help people struggling with mortgage payments to stay in their homes; to publish an annual report containing specified information relating to SME lending. 2) Commitment to present a restructuring plan to the U.K. government within six months. (3) Growth of company to be limited to a certain extent unless unrelated to provision of aid as per EC Decision.

	Barclays Bank PlC – Qatar Holding LLC and entities representing the beneficial interests of HH Sheik Mansour Bin Zayed Al Nahyan, a member of the Royal Family of Abu Dhabi (announced 10/31/2008)
Size	£7.05 Billion
Securities Issued	1) £3 billion of Reserve Capital Instruments (RCIs), which are perpetual securities paying quarterly interest. Subordinate to debt. 2) Warrants to purchase approximately 1.5 billion ordinary shares at an aggregate exercise price equal to the amount of the RCI investment. Issue price of 0.01 pence per 100,000 warrants, and 3) £4.05 billion 9.75% Mandatorily Convertible Notes due 2009, (MCNs) convertible into ordinary shares in Barclays plc (holding company).
Interest Rates	1) RCIs: quarterly interest at 14% per annum to June 2019; interest rate is reset quarterly thereafter at 13.4% above three-month sterling LIBOR. Interest payments can be deferred, and no interest accrues on deferred payments. Interest can also be paid in the form of common shares. Payments in respect of RCIs (including by means of ordinary shares) are conditional on issuer solvency. 2) MCNs: 9.75% per annum until conversion.
Warrant Exercise Price	197.775 pence per share. The exercise price equals the average market price on the two days prior to announcement.
Term	1) RCIs: perpetual. 2) Warrants: five years 3) MCNs: mandatory conversion into ordinary shares June 2009.
Redemption	1) RCIs: issuer may redeem in whole but not in part at principal amount plus any outstanding payments on June 15, 2019 or any quarterly payment date thereafter, subject to certain conditions. Issuer may also redeem upon change of law that may result in loss of tax benefits or change in capital treatment. 2) Warrants: not applicable. 3) MCNs: none; but MCNs are subject to acceleration upon certain limited events of default. See also conversion.
Conversion	MCNs mandatorily convertible into ordinary shares on June 30, 2009 at an initial price that represents a 22.5% discount to market price. Also convertible at option of holder prior to such time. Conversion rate subject to anti-dilution adjustments.
Restrictions on Dividends	Dividends on ordinary shares, preference shares or other securities ranking pari passu or junior to RCIs cannot be paid if payments have been deferred on RCIs.

	Barclays Bank PlC – Qatar Holding LLC and entities representing the beneficial interests of HH Sheik Mansour Bin Zayed Al Nahyan, a member of the Royal Family of Abu Dhabi (announced 10/31/2008)
Restrictions on Repurchase	Similar to dividend restriction
Executive Compensation	No restrictions.
Voting Rights	None.
Transfer Restrictions	None disclosed.
Representations and Warranties	Not disclosed.
Stockholder Approval	Approval needed.