

## *Treasury Issues Initial Guidance on Contracting Procedures for the Hiring of Asset Managers Under the Emergency Economic Stabilization Act*

BY LAWRENCE D. KAPLAN

The United States Department of the Treasury ("Treasury") issued guidance on Monday, October 6, 2008, implementing the Emergency Economic Stabilization Act of 2008 ("EESA") with respect to the engagement of private sector firms to act as asset managers under EESA. Many parties have expressed an interest in being designated an asset manager under EESA, and the guidance describes an initial attempt to set forth the procedures Treasury will use to solicit and evaluate private-sector offers, including steps to be taken to mitigate potential conflicts of interest. Copies of the initial guidance are available at:

### Asset Management

[http://www.treas.gov/press/releases/reports/asset\\_managers.pdf](http://www.treas.gov/press/releases/reports/asset_managers.pdf)

### Conflicts of Interest

<http://www.treas.gov/press/releases/hp1180.htm>

### Procurement

<http://www.treas.gov/press/releases/hp1179.htm>

### **SOLICITATION FOR PORTFOLIO INFRASTRUCTURE AND ASSET MANAGEMENT SERVICES.**

The Treasury also posted three solicitations for financial agents to Treasury.

Responses to each of these portfolio infrastructure solicitations are due to Treasury no later than **5:00 p.m. on WEDNESDAY, OCTOBER 8th.**

### Custodian, Accounting, Auction Management, and Other Infrastructure Services

[http://www.treas.gov/initiatives/eesa/docs/notice\\_custodian-services.pdf](http://www.treas.gov/initiatives/eesa/docs/notice_custodian-services.pdf)

### Securities Asset Management Services

[http://www.treas.gov/initiatives/eesa/docs/notice\\_securities-asset-mgr.pdf](http://www.treas.gov/initiatives/eesa/docs/notice_securities-asset-mgr.pdf)

### Whole Loan Asset Management Services

[http://www.treas.gov/initiatives/eesa/docs/notice\\_whole-loan-asset-mgr.pdf](http://www.treas.gov/initiatives/eesa/docs/notice_whole-loan-asset-mgr.pdf)

## Executive Summary of Asset Manager Selection Guidance

### Asset Management

Treasury is seeking asset managers in two areas:

*Securities:* Prime, Alt-A, and Subprime residential mortgage backed securities ("MBS"), commercial MBS, and MBS collateralized debt obligations, and possibly other types of securities acquired to promote market stability; and

*Whole Loans:* Residential first mortgages, home equity loans, second liens, commercial mortgage loans, and possibly other types of mortgage loans acquired to promote market stability.

Asset managers can be any institution, including, but not limited to, any bank, savings association, credit union, security broker or dealer, or insurance company, established and regulated under the laws of the United States or any State or U.S. territory, having significant operations in the United States, but excluding any central bank of, or institution owned by, a foreign government.

Treasury will post qualifications and rules for selection of asset managers on its website. After reviewing initial responses, Treasury will have a second phase of submissions and evaluations and then will invite selected potential managers for further review prior to final selection.

### Conflicts of Interest

The Conflicts Of Interest ("COI") guidance recognizes that potential COIs may arise with respect to private sector firms serving as asset managers. For example, a potential contractor's judgment or objectivity may be impaired due to the fact that the substance of the contractor's performance has the potential to affect other interests of the contractor. Moreover, a contractor may face potential COIs if it obtains access to sensitive, non-public information (belonging to Treasury or to third parties) while performing the contract.

To address these potential COIs, the Treasury has issued interim guidelines for dealing with EESA contractors and the process for evaluating COIs during the asset manager selection process. The guidance addresses specific items that must be addressed in offers to Treasury for private sector firms to become an asset manager under the EESA and include:

- Disclosure of any actual or potential COIs (including those associated with an affiliate, consultant, or subcontractor) that could arise from performance of the contract.
- Submission of a conflicts mitigation plan as part of an offeror's initial proposal; if Treasury requires that the mitigation plan will address certain specific issues, offerors will be advised in the solicitation.
- Mitigation plans will be required to be submitted with an offeror's initial proposal. Treasury's evaluators, source selection personnel, and legal counsel will examine the proposed mitigation plans to determine the extent to which those plans provide sufficient protection against actual or potential COIs.
- The severity of a COI will be dependent upon the circumstances of the case and the nature of the contractual action. Treasury personnel will not assume that a mitigation plan which is acceptable under one situation would also be acceptable under different circumstances.
- COIs may exist which cannot be effectively neutralized or mitigated, notwithstanding the filing of a mitigation plan. An offeror with an unacceptable mitigation plan will not be eligible for award unless conflicts are waived by the agency head or designee. A COI may be waived by the agency head or a designee. Any request for such a waiver should first be coordinated with the Treasury Senior Procurement Executive.

- Upon award of the contract, the successful offeror's mitigation plan will be formally incorporated into the contract, making the mitigation plan a contractually binding obligation. Moreover, asset management contracts will require formal oversight and enforcement by Treasury of any mitigation plan.
- Non-disclosure provisions which, at a minimum, will apply to a prime contractor; Treasury may also include provisions

requiring that the prime contractor obtain comparable non-disclosure and/or COI agreements from subcontractors or individual employees.

## Procurement Authorities

Treasury is appointing each asset manager as a fiscal agent of the Treasury, although it reserves the right to obtain supplies or services under the standard Federal Acquisition Regulations.



*Paul Hastings lawyer are available to assist you to understand this new guidance; prepare offers to the Treasury; and develop COI mitigation plans.*

*Moreover, Paul Hastings also will be holding a teleconference for clients and friends to discuss enactment of EESA and its implications on Friday October 10, 2008 at 12:00 p.m. ET. Interested parties should contact Meredith Gordon at 212-318-6918 or [meredithgordon@paulhastings.com](mailto:meredithgordon@paulhastings.com).*

*If you have any questions concerning these developing issues, please do not hesitate to contact:*

### Washington, D.C.

Lawrence D. Kaplan  
202-551-1829  
[lawrencekaplan@paulhastings.com](mailto:lawrencekaplan@paulhastings.com)

18 Offices Worldwide

Paul, Hastings, Janofsky & Walker LLP

[www.paulhastings.com](http://www.paulhastings.com)

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