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BANKING LAW

NEWSLETTER OF THE BANKING AND SPECIALTY FINANCE PRACTICE GROUP OF MANATT, PHELPS & PHILLIPS, LLP

So You Have Applied to Treasury under the Capital Purchase Program . . . Now What Do You Have to Do?

[T.J. Mick Grasmick](#)

The 5:00 EDT November 14 deadline has now passed for applications under the Treasury Capital Purchase Program (CPP) by publicly traded banks and bank holding companies to receive up to 3% of risk-weighted assets in new Tier 1 capital by issuing nonvoting preferred stock and warrants to the Treasury. A separate Term Sheet and an extended application deadline for private banks¹ is expected to be posted on the Treasury website soon.

Applicants are to have 30 days from receipt of Treasury preliminary approval to satisfy all conditions to closing the Treasury investment. Treasury has indicated that over 30 applications have received preliminary approval and that, while an expected avalanche of applications must be processed, all CPP capital investments are still targeted for completion by December 31st. Therefore, many banks and holding companies may need to be prepared on short notice to take all action and complete all required documentation in order to close the transaction with Treasury and receive their CPP capital infusions.

Once you receive preliminary Treasury approval, what documentation and actions are required to get the CPP capital into your bank and what follow up steps are required? Below are issues and action items that publicly traded and private banks need to consider as applicable.

1. Applicants' Charters and Regulators Dictate the Next Steps. Is the bank state or nationally chartered? (DFI, OCC, OTS). Is there a bank holding company or financial holding company? (California, Delaware?) This will determine the

NEWSLETTER EDITORS

[Katerina Hertzog Bohannon](#)

Partner

kbohannon@manatt.com
650.812.1364

[Harold P. Reichwald](#)

Partner

hreichwald@manatt.com
310.312.4148

OUR PRACTICE

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entities for which applicable filings are required and with which agencies. Treasury must authorize an alternate investment vehicle (such as notes) for Subchapter S corporations which are currently restricted by the Internal Revenue Code from having two classes of stock outstanding.

2. Bank and/or Holding Company Resolutions are Required. Board action is required, as it was to apply for CPP, to: authorize the issuance of the preferred stock and warrants (and common stock underlying the warrants); adopt necessary amendments to compensation and benefit plans; terminate or suspend any stock repurchase or dividend reinvestment programs; and authorize management to make all necessary corporate, securities, bank regulatory filings and other notices or disclosures to register and issue the preferred stock and warrants. The resolutions should also cover post-capital raise securities filings, including the filing of a Form S-3 registration statement for qualifying institutions.

3. Thorough Board Minutes are Advised. The discussion of the need for and expected use of the CPP capital should be carefully and correctly summarized. Improving liquidity and increased lending are the goals of the CPP. Usage of the CPP capital to continue or increase dividends or meet executive compensation commitments is discouraged.

4. Is Shareholder Action Required? Does the bank or holding company have sufficient preferred shares authorized? If not, consider seeking shareholder written consent if permissible as an alternative to the cost and time required to call a special shareholders meeting.

5. What Securities Permits, Registrations or other Filings are Required? California state banks need a DFI stock permit or may seek an exemption for the issuance of both the preferred shares and the warrants. Following the CPP capital infusion, publicly traded applicants should be ready to proceed with any back-end registration, including the filing of a Form S-3, and, if applicable, shareholder approval to authorize sufficient shares to accommodate the exercise of the warrants.

6. There will be Differences in Certain Representation and Covenant Provisions, and in Applicants' Responses, between the Stock Purchase Agreement Form for Publicly Traded Applicants and the Form Yet to be Provided for Private Applicants. For example, private banks cannot make covenants about their warrants regarding future exchange listing if their common stock is not currently listed. Also, the DFI has no shelf registration process for

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warrants.

7. Compensation and Benefit Plans Must be Amended and Senior Executives Must Consent. Consider adopting a form of global amendment and seek consents from employees who may potentially qualify as senior executive officers later, as well as from the CEO, CFO and the three other most highly compensated senior executive officers who must execute the Treasury standard form of waiver.

8. Management and Investment Relations Need to Coordinate Press Releases and Public Comments and Consider Situations such as the Following:

- Applicant statements about the expected use of the new CPP capital are being closely monitored by regulators, as per their recent guidance, and by Congress as well.
- Should disclosures to shareholders address the possibility that taking CPP capital may impact the dividends they are accustomed to receiving?
- What if you have announced that you have applied for CPP capital and you are then advised to withdraw your application or you do not get the full 3% of risk-weighted assets amount? Applicants subject to informal or formal regulatory enforcement actions may be denied CPP capital or might be asked to first line up matching private equity capital? Applicants should be prepared to disclose and/or address why they withdrew their applications or did not get the maximum amount they sought.
- Might you decide not to accept CPP capital after receiving preliminary approval? Many over-capitalized de novo banks with insufficient loan demand may reconsider their need for additional capital after being encouraged by their regulators to get a CPP application on file.

For questions on this newsletter or assistance with CPP applications or meeting the CPP closing requirements, call [Mick Grasmick](#) in Los Angeles (310-312-4369); [Craig Miller](#) in San Francisco (415-291-7415); [Josh Dean](#) in Orange County (714-371-2526); or [Elizabeth Mundinger](#) in Washington, D.C. (202-985-6516).

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¹ Thousands of banks and bank holding companies initially were not eligible for CPP unless their stock traded on a

national exchange (NYSE or NASDAQ).



T.J. Mick Grasmick Mr. Grasmick's practice focuses on mergers and acquisitions, non-banking activities, formation of new banks, interstate and other expansion by banks, bank holding companies and other financial institutions and the requirements and restrictions on expansion of state and federal bank regulatory agencies; bank supervision and examination, and general banking corporate matters and regulatory and legislative developments.