

## Management Alert

# Treatment of Conflicts of Interest in the Congressional Bailout Bill

On Wednesday night the Senate passed the legislation known as the Emergency Economic Stabilization Act of 2008 (the "Act"), a bill intended to bring relief to the troubled credit markets. Although the House declined to pass an earlier version of the bill on Monday, many observers expect that the revised version passed by the Senate will be approved by the House shortly and quickly signed into law by the President. We wanted to highlight certain aspects of the Act relating to how the Treasury Department will handle conflicts of interest arising from its administration of the troubled asset relief program (the "Program") established by the Act.

Section 108 of the Act provides that the Secretary of the Treasury (the "Secretary") shall, as soon as is practicable after the passage of the Act, "issue regulations or guidelines necessary to address and manage or to prohibit conflicts of interest that may arise in connection with the administration and execution of the authorities provided" under the Act. Certain specific examples are referenced including conflicts arising in the selection or hiring of contractors or advisors, conflicts relating to the purchase of troubled assets, the management of troubled assets and post employment restrictions on employees. No guidance other than making these references was provided.

### *Minimal Guidelines on Conflicts of Interest*

The Act offers almost no guidelines to the Secretary as to how to determine what constitutes a conflict of interest or what steps might be taken to prevent one. By way of comparison, the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), which established the Resolution Trust Corporation (the "Corporation") in the wake of the Savings and Loan crisis of the 1980s, also provided that the Corporation and its Oversight Board would "promulgate rules and regulations governing conflict of interest, ethical responsibilities and post-employment restrictions applicable to members, officers and employees of the Oversight Board and the corporation." It went on to provide, however, that any such rules and regulations "shall be no less stringent than those applicable to the Federal Deposit Insurance Corporation." FIRREA also had much more detailed provisions regarding post employment opportunities for the chief executive officer of the Corporation and provides that "directors, officers and employees of the Oversight Board and the Corporation who are also subject to the ethical rules of another agency or government corporation shall file with the Corporation a copy of any financial disclosure statement required by such other agency or corporation."

### *Restrictions Regarding Use of Contractors*

Similarly, the Act provides very few restrictions regarding contractors hired by the Secretary. Indeed, rather than imposing restrictions on what contractors the Secretary may use in its administration of the Program, the Act provides that the Secretary may waive specific provisions of the Federal Acquisition Regulation (the "Regulation"), the primary regulation for use by all federal executive agencies in their acquisition of supplies and services with appropriated funds. The Secretary may waive such provisions upon his determination that "urgent and compelling circumstances make compliance with such provisions contrary to the public interest." Any such determination must be submitted to the Committees on Oversight and Government Reform and Financial Services of the House of Representatives and the Committees on Homeland Security and Governmental Affairs and Banking, Housing and Urban Affairs of the Senate within seven days. The Act does not provide, however, that these committees have the right to approve or disapprove any such determination. The only restriction on the Secretary's right to waive provisions of the Regulation is that if any provisions pertaining to minority contracting are waived, the secretary must develop and implement standards and procedures to ensure the inclusion and utilization of minorities and women as well as minority- and women-owned businesses in that solicitation or contract.

FIRREA also contained a general provision regarding the implementation of rules governing the use of contractors. It states that the Oversight Board "shall prescribe regulations establishing procedures for ensuring that any individual who is performing directly or indirectly any function or service on behalf of the Corporation meets minimum standards of competence, experience, integrity and fitness." Again, however, FIRREA went further than just these generic future requirements. FIRREA specified that persons who did not meet these standards could not enter into contracts with or be employed by the Corporation and also provided certain classes of individuals who would be deemed not to meet the standards, such as convicted felons and individuals who had had a negative impact on insured depository institutions in the past.

### *Procedures at the Discretion of the Secretary*

The Act leaves the procedures to be used to limit such conflicts and indeed the methods for determining whether such conflicts exist almost entirely to the discretion of the Secretary. This may have been the result of a desire to limit disagreements over particular provisions of the Act and to move it quickly through Congress.

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