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## Issues to Consider in Authorizing and Issuing Preferred Stock for Louisiana Bank Holding Companies and Banks in Connection with the TARP Capital Purchase Program

*The Capital Purchase Program under the Troubled Asset Relief Program established by the United States Department of the Treasury ("TARP Capital Purchase Program") permits participating banks and bank holding companies to issue preferred stock and warrants for common stock to the Department of the Treasury. The following are certain issues and procedures to be considered by banks and their holding companies organized under Louisiana law that are contemplating participating in the TARP Capital Purchase Program. This list is not intended to be exhaustive and institutions should consult with their legal counsel in connection with the matters discussed below.*

- Under the TARP Capital Purchase Program, the ultimate parent company is the entity that must apply for participation in the program. Therefore, if the bank is in a holding company structure, the applicant will be the bank holding company, and it will apply to the Federal Reserve Bank that supervises the holding company. A copy of the application must also be filed with the primary federal regulator of the largest bank subsidiary of the applicant, which in the case of a state-chartered nonmember bank, would be the FDIC, with a copy to the Louisiana Office of Financial Institutions (OFI). If the bank is a stand-alone financial institution, the bank will be the applicant and will file the application as follows: (i) with the FDIC, with a copy to the OFI, if it is a state-chartered nonmember bank, (ii) with the appropriate Federal Reserve Bank, with a copy to the OFI, if it is a state-chartered member bank, or (iii) with the OCC, if it is a national bank.
- In addition to a complete application, the applicant should file a September 30, 2008 historical and pro forma capital table for the bank, including capital ratios, reflecting the new capital injection. Large bank holding companies should also include historical and pro forma consolidated capital tables (with capital ratios) for the holding company.
- Under Louisiana law, preferred stock may only be authorized in the articles of incorporation of the bank holding company or the bank. If the articles of the applicant do not currently authorize "blank check" preferred stock (pursuant to which the board can establish the terms of the preferred stock, without additional shareholder approval), the articles must be amended to do so.
- An amendment to the company's or the bank's articles of incorporation to authorize "blank check" preferred stock must be adopted by a vote of at least two-thirds (or such larger or smaller vote, not less than a majority, as is set forth the articles of incorpora-

tion) of the voting power present (or of the total voting power as the articles may require), at a shareholders meeting called for such purpose. If the applicant is a stand-alone bank that will be amending its articles to authorize preferred stock, the proposed amendment should be submitted immediately to the OFI for its review and approval.

- Notice of the shareholders' meeting must be mailed to each shareholder of record within the time period prescribed in the company's or bank's, as applicable, articles or bylaws, but, in any event, not less than 10 days prior to the meeting.
- The company or the bank should be careful to comply with all applicable laws and regulations under Louisiana and federal law, as applicable, in conducting a special meeting and soliciting proxies.
- If the shareholders approve the amendment, the bank holding company's articles of amendment must be filed with the Louisiana Secretary of State. If the bank is the entity that amended its articles, the articles of amendment must be filed with the OFI. In either case, the amendment is not effective until the articles of amendment are filed with the appropriate state agency.
- If the company or the bank applies to participate in the program, and the application is accepted by Treasury, under the current timetable, the

applicant will have 30 days to determine whether it wants to go forward. If it decides to do so, the board of directors will then have to adopt appropriate resolutions amending the articles of incorporation once again, setting forth the exact terms and conditions of the preferred stock to be issued to Treasury. This amendment does not require the approval of the shareholders; however, the amendment must be filed with the Secretary of State (for bank holding companies) or the OFI (for state banks).

- A multiple original or a certified copy of the articles of amendment for both amendments should also be filed for record in the office of the recorder of mortgages of the parish in which the company or the bank, if the bank is the filer, has its registered office.
- When reviewing its articles, the holding company or the bank, as the case may be, should also make certain that sufficient shares of common stock are authorized to accommodate the warrants that must be issued in the program. If the company or the bank does not have sufficient authorized, but unissued shares of common stock, it will need to amend its articles of incorporation to authorize additional shares of common stock.
- For those institutions that are S corporations, under current law, an S corporation cannot have outstanding

a second class of stock, such as preferred stock. Nonetheless, the mere authorization of "blank check" preferred stock does not adversely affect the institution's S corporation status. Therefore, S corporations should consider taking the steps to authorize the preferred shares, even if the board of directors has not yet determined that the institution will participate in the program.

- Keep in mind that any redemption of the preferred shares after they are issued may require additional regulatory approval under both federal and state law.

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*The selected issues above were prepared with the assistance of Zonnie Breckinridge at Hunton & Williams, LLP (zbreckinridge@hunton.com) at the request of the Louisiana Office of Financial Institutions to assist Louisiana bank holding companies and banks that are considering applying for participation in the Capital Purchase Program under the Department of the Treasury's Troubled Asset Relief Program established by the Emergency Economic Stabilization Act of 2008. This list is not comprehensive and should not be interpreted as legal advice to any person. Legal advice and conclusions can differ based upon different factual circumstances and events, and an attorney should be consulted on any issue related to the issuance of preferred stock, whether in connection with the TARP Capital Purchase Program or otherwise.*