# The Emergency Economic Stabilization Act of 2008: an Overview

On October 3, 2008, President Bush signed into law the Emergency Economic Stabilization Act of 2008 (the "Act")[1] authorizing governmental intervention in the financial markets. The Act's central feature is its authorization of the Secretary of the Treasury (the "Secretary") to purchase up to $700,000,000,000 of mortgages, securities based on or related to mortgages and such other financial instruments as the Secretary, after consultation with the Chairman of the Board of Governors of the Federal Reserve System (the "Board"), deems fit to purchase to promote financial market stability -- broadly defined as "troubled assets." Selected provisions of the Act are summarized below.

## Troubled Asset Relief Program (Section 101)

The Act authorizes the Secretary of the Treasury to establish the Troubled Asset Relief Program ("TARP") to purchase, and to make and fund commitments to purchase, troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary, and in accordance with the Act and the policies and procedures developed and published by the Secretary.

## Authorized Funding for the Purchase of Troubled Assets (Section 115)

The Act limits the Secretary's purchase authority upon enactment to $250,000,000,000. Upon the President's submission to Congress of a written certification of need for additional funds, the Secretary may access an additional $100,000,000,000. After such written certification has been made, an additional $350,000,000,000 may be accessed if the President transmits a written report to Congress detailing the plan of the Secretary to use such additional funds. These additional funds will become available to the Secretary 15 days after transmission of the President's report unless during such 15-day period Congress passes a joint resolution disapproving such additional funds. Any such joint resolution must be introduced by Congress within 3 calendar days after the President's report is received by Congress, must follow the text set forth in the Act and may not contain any preamble or other extraneous language and the House and Senate procedures for consideration of such a resolution are strictly limited by the Act.

In total, the Secretary's authority to purchase troubled assets under the TARP is limited to $700,000,000,000 outstanding at any one time. The amount of troubled assets purchased at any time will be determined by aggregating the purchase price of all troubled assets held.

## Definition of Eligible Financial Institution (Section 3(5))

With respect to eligibility for participation in the TARP, "financial institution" is defined as "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, territory, or possession of the United States, the District of Columbia, Commonwealth of Puerto Rico, Commonwealth of Northern Mariana Islands, Guam, American Samoa, or the United States Virgin Islands, and having significant operations in the United States, but excluding any central bank of, or institution owned by, a foreign government."

[1] The Act was part of a bill (H.R. 1424) which, when enacted, had three major divisions: Division A -- Emergency Economic Stabilization; Division B -- Energy Improvement and Extension Act of 2008; Division C -- Tax Extenders and Alternative Minimum Tax Relief. Only Division A is summarized in this memorandum.

## Definition of Troubled Assets (Section 3(9))

The term "troubled assets" is defined as "residential or commercial mortgages and any securities, obligations, or other instruments that are based on or related to such mortgages, that in each case was originated or issued on or before March 14, 2008, the purchase of which the Secretary determines promotes financial market stability." In addition, "troubled assets" includes any other financial instrument that the Secretary, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, determines the purchase of which is necessary to promote financial market stability, but only upon transmittal of such determination, in writing, to the appropriate committees of Congress.

## Implementation of the TARP

**Departmental Structure (Section 101(a)(3)).** The TARP will be implemented through an Office of Financial Stability (to be established for such purpose within the Office of Domestic Finance of the Department of the Treasury) headed by an Assistant Secretary of the Treasury.

**Duty to Consult (Section 101(b)).** In exercising its authority under the TARP, the Secretary must consult with the Board, the Federal Deposit Insurance Corporation ("FDIC"), the Comptroller of the Currency, the Director of the Office of Thrift Supervision, the Chairman of the National Credit Union Administration Board and the Secretary of Housing and Urban Development ("HUD").

**Asset Managers and Financial Agents (Section 101(c)).** The Act provides the Secretary with authority to appoint third-party asset managers and to designate financial institutions as financial agents of the Federal Government. The Act requires the Secretary to publish, within two business days after the first purchase of troubled assets and no later than 45 days after enactment of the Act, procedures for selecting asset managers. The Act specifies that the FDIC is eligible for, and must be considered in, the selection of asset managers for residential mortgage loans and residential mortgage-backed securities.

***Interim Guidelines Regarding Potential Conflicts of Interest***

On October 6, 2008, the Treasury issued interim guidelines regarding the process for reviewing and addressing actual or potential conflicts of interest ("COIs") among contractors performing services in conjunction with the Act. The interim guidelines provide a list procedures that should be followed by the Treasury in connection with the solicitation process.

The interim guidelines refer to two types of COIs:

- "impaired objectivity", defined as COIs where the 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; and

- COIs which may arise if contractors obtain access to sensitive, non-public information (belonging to the Treasury or to third parties) while performing the contract

and the interim guidelines indicate that, in order to address the second type of COI, use of "firewalls" at the contractor's organization may be necessary.

The Act requires Treasury to develop guidelines for addressing COIs as soon as practicable after enactment of the law. The interim guidelines will remain in effect until final guidelines are developed.

**Identification, Purchase, Pricing and Valuation of Troubled Assets (Sections 101(d) and (e))**. The Act requires the Secretary to publish, within two business days after the first purchase of troubled assets and no later than 45 days after enactment of the Act, guidelines concerning criteria for identifying troubled assets for purchase, mechanisms for purchasing troubled assets and methods for pricing and valuing troubled assets. In purchasing troubled assets, the Secretary must take steps to prevent unjust enrichment, including by preventing the sale of a troubled asset to the Secretary at a higher price than the seller paid to purchase the asset. The duty to take steps to prevent unjust enrichment does not apply to troubled assets acquired in a merger or acquisition, or a purchase of assets from a financial institution in conservatorship or receivership, or that has initiated bankruptcy proceedings under title 11, United States Code.

**Oversight and Audits.** The Act establishes several layers of oversight of the TARP.

***The Financial Stability Oversight Board (Section 104)***

The Act establishes a Financial Stability Oversight Board responsible for:

- reviewing the Secretary's exercise of authority under the Act (including the appointment of financial agents, the designation of asset classes to be purchased, and plans for the structure of vehicles used to purchase troubled assets);
- reviewing the effect of actions taken by the Secretary under the Act in assisting American families in preserving home ownership, stabilizing financial markets, and protecting taxpayers;
- making recommendations, as appropriate, to the Secretary regarding use of the authority under the Act; and
- reporting any suspected fraud, misrepresentation, or malfeasance to the Special Inspector General for the TARP or the Attorney General of the United States, consistent with section 535(b) of title 28, United States Code.

Additionally, the Financial Stability Oversight Board may appoint a credit review committee for the purpose of evaluating the exercise of the purchase authority provided under the Act and the assets acquired through the exercise of such authority.

The Financial Stability Oversight Board is comprised of the Chairman of the Board, the Secretary, the Director of the Federal Housing Finance Agency (the regulator/conservator of Fannie Mae and Freddy Mac), the Chairman of the Securities and Exchange Commission (the "SEC") and the Secretary of HUD.

***The Comptroller General (Section 116)***

The Act requires ongoing oversight over the TARP by the Comptroller General of the United States and bi-monthly reports to Congress and the Special Inspector General for the TARP. The Comptroller General must also conduct an annual audit of the TARP.

***Special Inspector General (Section 121)***

The Act establishes an Office of the Special Inspector General for the TARP responsible for conducting, supervising, and coordinating audits and investigations of the purchase, management, and sale of assets by the Secretary under the TARP and the management by the Secretary of any guarantee program established. Not later than 60 days after the confirmation of the Special Inspector General, and every calendar quarter thereafter, the Special Inspector General is required to submit to the appropriate committees of Congress a report summarizing the activities of the Special Inspector General during the 120-day period ending on the date of such report. Each report must include, for the period covered by such report, a detailed statement of all purchases, obligations, expenditures and revenues associated with the TARP and any guarantee program established. The Act allocates $50,000,000 to be made available to the Special Inspector General to carry out the contemplated supervisory function.

***Congressional Oversight Panel (Section 125)***

The Act establishes a Congressional Oversight Panel responsible for reviewing the current state of the financial markets and the regulatory system and submitting the following reports to Congress:

- Regular reports within 30 days of the first purchase or guarantee of troubled assets and monthly thereafter. Regular reports must include:
    - The use by the Secretary of authority under the Act, including with respect to the use of contracting authority and administration of the program.
    - The impact of purchases made under the Act on the financial markets and financial institutions.
    - The extent to which the information made available on transactions under the program has contributed to market transparency.
    - The effectiveness of foreclosure mitigation efforts, and the effectiveness of the program from the standpoint of minimizing long-term costs to the taxpayers and maximizing the benefits for taxpayers.
- A special report on regulatory reform by January 20, 2009 analyzing the current state of the regulatory system and its effectiveness at overseeing the participants in the financial system and protecting consumers, and providing recommendations for improvement, including recommendations regarding whether any participants in the financial markets that are currently outside the regulatory system should become subject to the regulatory system, the rationale underlying such recommendation, and whether there are any gaps in existing consumer protections.

The Congressional Oversight Panel is to be comprised of five members: one member each appointed by the Speaker of the House, the minority leader of the House, the majority leader of the Senate and the minority leader of the Senate, and one member appointed by the Speaker of the House and the majority leader of the Senate after consultation with the minority leaders of the House and Senate.

## Requirement for Receipt of Warrants or Debt Instruments (Section 113(d))

The Secretary may not purchase, or make any commitment to purchase, any troubled asset, unless the Secretary receives from the financial institution from which such assets are to be purchased:

(A) in the case of a financial institution the securities of which are traded on a national securities exchange, a warrant giving the right to the Secretary to receive nonvoting common stock or preferred stock in such financial institution, or voting stock with respect to which the Secretary agrees not to exercise voting power, as the Secretary determines appropriate; or

(B) in the case of any financial institution other than one described in (A) above, a warrant for common or preferred stock, or a senior debt instrument from such financial institution.

The terms and conditions of any warrant or senior debt instrument must, at a minimum, be designed:

- to provide for reasonable participation by the Secretary, for the benefit of taxpayers, in equity appreciation in the case of a warrant or other equity security, or a reasonable interest rate premium, in the case of a debt instrument; and
- to provide additional protection for the taxpayer against losses from sales of assets by the Secretary under the Act and the administrative expenses of the TARP.

Warrants must provide that if, after such warrants are received by the Secretary, the underlying equity securities of the financial institution that issued such warrants are no longer listed or traded on a national securities exchange or securities association, such warrants will convert to senior debt, or contain appropriate protections for the Secretary to ensure that the Treasury is appropriately compensated for the value of the warrants, in an amount determined by the Secretary.

Warrants must also contain antidilution provisions of the type employed in capital market transactions, as determined by the Secretary. Such provisions must protect the value of the securities from market transactions such as stock splits, stock distributions, dividends, and other distributions, mergers and other forms of reorganization or recapitalization.

The exercise price for any warrant will be set by the Secretary in the interest of the taxpayers.

The Act contains a de minimis exception from the requirement for warrants or debt instruments, based on the size of the cumulative transactions of troubled assets purchased from any one financial institution for the duration of the program, at not more than $100,000,000. Additionally, the Act requires the Secretary establish an exception to the requirement and appropriate alternative requirements for any participating financial institution that is legally prohibited from issuing securities and debt instruments.

## Guarantee Program (Section 102)

If the TARP is established, the Secretary is required to establish a program to guarantee, upon request from financial institutions, the timely payment of principal and interest on troubled assets originated or issued prior to March 14, 2008, including mortgage-backed securities. The Secretary must collect premiums for such guarantees from any participating financial institution. The Secretary may provide for variations in premiums according to the credit risk associated with the particular troubled asset that is being guaranteed. The Secretary is required to set premiums at a level necessary to create reserves sufficient to meet anticipated claims, based on an actuarial analysis, and to ensure that taxpayers are fully protected. Guarantees under the Act do not appear to reduce the amount available by the Secretary to purchase troubled assets, and the requirement that the Secretary receive warrants from participating financial institutions would apparently not apply in the case of the guarantee program. In addition, the limits on executive compensation referred to below would not apply to financial institutions participating solely through the guarantee program.

## Termination of Authority (Section 120)

Authorization under the Act to purchase and to guarantee troubled assets terminates on December 31, 2009. The Secretary, upon submission of a written certification to Congress, may extend such authorization to October 3, 2010. Such certification must include a justification of why the extension is necessary to assist American families and stabilize financial markets, as well as the expected cost to the taxpayers for such an extension.

## Market Transparency (Section 114)

The Secretary is required to make available to the public, in electronic form, a description, amounts and pricing of assets acquired, within 2 business days of each purchase, trade or other disposition.

For each type of financial institution that sells troubled assets to the Secretary, the Secretary is required to determine whether the public disclosure required for such type of financial institution with respect to off-balance sheet transactions, derivatives instruments, contingent liabilities, and similar sources of potential exposure is adequate to provide to the public sufficient information as to the true financial position of such type of financial institution. If such disclosure is not adequate for that purpose, the Secretary shall make recommendations for additional disclosure requirements to the relevant regulators.

## Use of Revenues (Section 106(c))

Revenues of, and proceeds from the sale of troubled assets purchased, or from the sale, exercise or surrender of warrants or senior debt instruments acquired must be paid into the general fund of the Treasury for reduction of the public debt.

## Recoupment (Section 134)

The Director of the Office of Management and Budget, in consultation with the Director of the Congressional Budget Office, must submit a report to the Congress on the net amount within the TARP as of October 3, 2013. If there is a shortfall, the President must submit a legislative proposal that recoups from the financial industry an amount equal to the shortfall in order to ensure that the TARP does not add to the deficit or national debt.

## Contracting Procedures (Section 107)

For purposes of the Act, the Secretary may waive specific provisions of the Federal Acquisition Regulation upon a determination that urgent and compelling circumstances make compliance with such provisions contrary to the public interest. Any such determination, and the justification for 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 7 days.

## Foreclosure Mitigation (Section 109)

To the extent that the Secretary acquires mortgages, mortgage backed securities, and other assets secured by residential real estate, including multifamily housing, the Secretary must implement a plan that seeks to maximize assistance for homeowners and use the authority of the Secretary to encourage the servicers of the underlying mortgages, considering net present value to the taxpayer, to take advantage of the HOPE for Homeowners Program under section 257 of the National Housing Act or other available programs to minimize

foreclosures. In addition, the Secretary may use loan guarantees and credit enhancements to facilitate loan modifications to prevent avoidable foreclosures.

The Secretary must coordinate with Federal Government entities that hold troubled assets to attempt to identify opportunities for the acquisition of classes of troubled assets that will improve the ability of the Secretary to improve the loan modification and restructuring process.

Upon any request arising under existing investment contracts, the Secretary must consent, where appropriate, and considering net present value to the taxpayer, to reasonable requests for loss mitigation measures, including term extensions, rate reductions, principal writedowns, increases in the proportion of loans within a trust or other structure allowed to be modified, or removal of other limitation on modifications.

## Assistance to Homeowners from Federal Property Managers (Section 110)

Not later than December 3, 2008, the Federal Housing Finance Agency, the FDIC, and the Board (each a "Federal property manager") are each required to develop and begin implementation of a plan that seeks to maximize assistance for homeowners and use its authority to encourage servicers of the underlying mortgages, and considering net present value to the taxpayer, to take advantage of the HOPE for Homeowners Program and other available programs to minimize foreclosures. With respect to residential mortgage loans, modifications may include: (i) reduction in interest rates; (ii) reduction of loan principal; and (iii) other similar modifications.

In developing such plan, the Federal property managers must consult with one another and, to the extent possible, utilize consistent approaches.

Each Federal property manager must, not later than December 3, 2008 and every 30 days thereafter, report to Congress specific information on the number and types of loan modifications made and the number of actual foreclosures occurring during the reporting period.

## Executive Compensation and Corporate Governance (Section 111)

Each financial institution participating in the TARP through the direct sale of troubled assets to the Secretary where no bidding process or market prices are available and where the Secretary receives a meaningful equity or debt position in such financial institution as a result of the transaction, is required to meet appropriate standards for executive compensation and corporate governance. The standards required will be effective for the duration of the period that the Secretary holds an equity or debt position in such financial institution.

The standards must include:

- limits on compensation that exclude incentives for senior executive officers of a financial institution to take unnecessary and excessive risks that threaten the value of the financial institution during the period that the Secretary holds an equity or debt position in the financial institution;

- a provision for the recovery by the financial institution of any bonus or incentive compensation paid to a senior executive officer based on statements of earnings, gains or other criteria that are later proven to be materially inaccurate; and

- a prohibition on the financial institution making any golden parachute payment to its senior executive officers during the period that the Secretary holds an equity or debt position in the financial institution.

''Senior executive officer'' means an individual who is one of the top five highly paid executives of a public company, whose compensation is required to be disclosed pursuant to the Securities Exchange Act of 1934, and any regulations issued thereunder, and non-public company counterparts.

Where the Secretary buys troubled assets at an auction and a financial institution sells more than $300,000,000 in the aggregate (including direct purchases), the Secretary must prohibit, for such financial institution, any new employment contract with a senior executive officer that provides a golden parachute in the event of an involuntary termination, bankruptcy filing, insolvency, or receivership.

## Coordination with Foreign Authorities and Central Banks (Section 112)

The Secretary must coordinate, as appropriate, with foreign financial authorities and central banks to work toward the establishment of programs similar to the TARP by such authorities and central banks. To the extent that such foreign financial authorities or banks hold troubled assets as a result of extending financing to financial institutions that have failed or defaulted on such financing, such troubled assets qualify for purchase under the TARP.

## Judicial Review (Section 119)

The Act provides standards for judicial review to ensure that the actions of the Secretary are not arbitrary, capricious, an abuse of discretion or not in accordance with law.

However, the scope of judicial review is limited by the Act. The Act provides that no injunction or other form of equitable relief shall be issued against the Secretary for actions in purchasing, insuring, managing or foreclosing on troubled assets "other than to remedy a violation of the Constitution." The Act also prohibits participating financial institutions from bringing any action or claim against the Secretary with respect to their participation in a program under the Act on any additional theories of law unless expressly provided for in a written contract with the Secretary.

## Reports

- Within 60 days of the first purchase or guarantee of troubled assets pursuant to the TARP and in each 30-day period thereafter, the Secretary is required to report to the appropriate committees of Congress. The reports must include an overview of the actions taken by the Secretary, funds expended and the expected expenditure of funds in the subsequent period and a detailed financial statement which must include, *inter alia*, all guarantees entered into, the nature of the assets purchased, all projected costs and liabilities, operating expenses (including compensation for financial agents), the valuation or pricing method used for each transaction and a description of the vehicles established to exercise authority under the TARP. (Section 105(a))
- Within 7 days after commitments to purchase troubled assets under the TARP first reach an aggregate of $50,000,000,000 and not later than 7 days after each $50,000,000,000 increment of such commitments is reached thereafter, the Secretary is required to provide a written report to the appropriate committees of Congress. Such report must include:
    - a description of all of the transactions made during the reporting period;
    - a description of the pricing mechanism for the transactions;

- a justification of the price paid for and other financial terms associated with the transactions;
- a description of the impact of the exercise of such authority on the financial system, supported, to the extent possible, by specific data;
- a description of challenges that remain in the financial system, including any benchmarks yet to be achieved; and
- an estimate of additional actions under the authority provided under the Act that may be necessary to address such challenges. (Section 105(b))

- Not later than April 30, 2009, the Secretary is required to provide a written report to the appropriate committees of Congress analyzing the current state of the regulatory system and its effectiveness at overseeing the participants in the financial markets, including the over the-counter swaps market and government-sponsored enterprises, and providing recommendations for improvement, including:
  - recommendations regarding (A) whether any participants in the financial markets that are currently outside the regulatory system should become subject to the regulatory system and (B) enhancement of the clearing and settlement of over-the-counter swaps; and
  - the rationale underlying such recommendations. (Section 105 (c))
- Not later than June 1, 2009, the Comptroller General must submit a report regarding the extent to which leverage and sudden deleveraging of financial institutions was a factor behind the current financial crisis to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives. (Section 117)
- Within 60 days of the first purchase of troubled assets under the TARP, but in no case later than December 31, 2008, and semiannually thereafter, the Office of Management and Budget must report to the President and the Congress the estimate of the cost of the troubled assets, and guarantees of the troubled assets. Within 45 days of receipt by the Congress of each report from the Office of Management and Budget, the Congressional Budget Office must report to the Congress the Congressional Budget Office's assessment of such report. (Section 202)

## Certain Standstill, Confidentiality and Other Agreements Deemed Unenforceable (Section 126 (c))

The Act provides that no provision contained in any existing or future standstill, confidentiality or other agreement that:

- affects or limits the ability of a person to offer to acquire or acquire,
- prohibits any person from offering to acquire or acquiring, or
- prohibits any person from using any previously disclosed information in connection with an offer to acquire or acquisition of,

all or any part of an institution insured by the FDIC, shall be enforceable or impose liability on such person as such enforcement or liability shall be contrary to public policy. This provision is made applicable in the case of any insured depository institution to which the FDIC may decide to make loans to, to make deposits in, to purchase the assets or securities of, to assume the liabilities of, or to make contributions to, or any transaction in which the FDIC exercises its authority as the insurer of deposits in depository institutions.

## Authority to Suspend Mark-to-Market Accounting (Section 132)

The Act authorizes the SEC to suspend, by rule, regulation or order, the application of Statement Number 157 of the Financial Accounting Standards Board for any issuer or with respect to any class or category of transaction if the SEC determines that is necessary or appropriate in the public interest and is consistent with the protection of investors.

## Study on Mark-to-Market Accounting (Section 133)

The Act requires the SEC, in consultation with the Board and the Secretary, to conduct a study on mark-to-market accounting standards as provided in Statement Number 157 of the Financial Accounting Standards Board, as such standards are applicable to financial institutions, including depository institutions. Such study must consider at a minimum:

(1) the effects of such accounting standards on a financial institution's balance sheet;

(2) the impacts of such accounting on bank failures in 2008;

(3) the impact of such standards on the quality of financial information available to investors;

(4) the process used by the Financial Accounting Standards Board in developing accounting standards;

(5) the advisability and feasibility of modifications to such standards; and

(6) alternative accounting standards to those provided in Statement Number 157.

The SEC must submit to Congress a report of such study before January 3, 2009 containing the findings and determinations of the SEC, including such administrative and legislative recommendations as the SEC determines appropriate.

## Tax Provisions of the Act

## Gain or Loss from Sale or Exchange of Certain Preferred Stock (Section 301)

Gain or loss from the sale or exchange of any applicable preferred stock by any applicable financial institution will be treated as ordinary income or loss. The term ''applicable preferred stock'' is defined as any preferred stock in either Fannie Mae or Freddy Mac which was held by the applicable financial institution on September 6, 2008 or was sold or exchanged by the applicable financial institution on or after January 1, 2008, and before September 7, 2008. The term ''applicable financial institution'' means either a financial institution referred to in section 582(c)(2) of the Internal Revenue Code of 1986 (i.e. banks, mutual savings banks, cooperative banks, domestic building and loan associations, small business investment companies and business development corporations), or a depository institution holding company (as defined in section 3(w)(1) of the Federal Deposit Insurance Act (12 U.S.C.1813(w)(1))).

## Special Rules for Tax Treatment of Executive Compensation of Employers Participating in the TARP

**Limitation on Deduction for Executive Remuneration and Deferred Deduction Executive Remuneration (Section 302(a))**

The Act amends Section 162(m) of the Internal Revenue Code of 1986 to provide that an "applicable employer" may not deduct compensation in excess of $500,000 for any "covered executive" for any taxable year while the TARP is in effect. This $500,000 limit on deductible compensation for "covered executives" also applies to compensation for an applicable taxable year which is deferred to a later taxable year (even if the TARP has ended), but the $500,000 limit for the taxable year the deferred compensation is paid is reduced by the sum of the compensation paid in the taxable year the deferred compensation was earned and prior payments of compensation deferred from that year. For the purpose of this $500,000 limit, there is no exception for performance-based compensation. An "applicable employer" is an employer from whom one or more troubled assets are acquired pursuant to the TARP if the aggregate amount of troubled assets so acquired exceeds $300,000,000. If an employer only sells troubled assets through direct purchase, such assets are not counted towards calculation of the $300,000,000 threshold. "Covered executive" is defined as the chief executive officer or the chief financial officer of the applicable employer (or an individual acting in either such capacity) while the TARP is in effect or any of the three most highly compensated officers (other than the chief executive officer or chief financial officer) while the TARP is in effect. A person who is such a covered executive under the foregoing definition remains a covered executive for subsequent years even if no longer employed. This amendment is applicable to taxable years ending on or after the date of enactment of the Act (October 3, 2008).

**Golden Parachute Rule (Section 302(b))**

The Act amends Section 280G of the Internal Revenue Code of 1986 (which denies deductions for "excess parachute payments") by treating as a parachute payment any payment of compensation by an "applicable employer" (as defined) to a "covered executive" (as defined) on account of severance from employment while the TARP is in effect by reason of an involuntary termination of the executive by the employer, or in connection with any bankruptcy, liquidation, or receivership of the employer. Such payments would also be treated as "parachute payments" for the purpose of determining whether the "covered executive" is subject to the 20% excise tax on excess parachute payments under Section 4999 of the Internal Revenue Code of 1986. If a payment that is treated as a "parachute payment" under the amendment to Section 280G is also a "parachute payment" determined without regard to the amendment, the amendment would not apply to the payment (i.e., only one 20% excise tax would be imposed on the payment). This amendment is applicable to severances occurring while the TARP is in effect.

## Extension of Exclusion of Income from Discharge of Qualified Principal Residence Indebtedness (Section 303)

The Act extends by three years subparagraph (E) of section 108(a)(1) of the Internal Revenue Code of 1986 which excludes from gross income discharges of qualified principal residence indebtedness.

## Temporary Increase in FDIC Insurance (Section 136)

The Act raises the FDIC insurance cap to $250,000 from $100,000 during the period beginning on the date of enactment of the Act (October 3, 2008) and ending on December 31, 2009.

## Certain Other Provisions of the Act

- The Act increases the statutory limit on the public debt to $11,315,000,000,000. (Section 122)

- The Act amends Section 18(a) of the Federal Deposit Insurance Act (12 U.S.C. 1828(a)) to prohibit misrepresentations regarding insurance or guarantee of deposits by the FDIC. (Section 126)

- The Act requires that not later than 7 days after the date on which the Board exercises its loan authority under the third paragraph of section 13 of the Federal Reserve Act (12 U.S.C. 343, relating to discounts for individuals, partnerships, and corporations) the Board must provide to the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services of the House of Representatives a report which includes: (1) the justification for exercising the authority; and (2) the specific terms of the actions of the Board, including the size and duration of the lending, available information concerning the value of any collateral held with respect to such loan, the recipient of warrants or any other potential equity in exchange for the loan, and any expected cost to the taxpayers for such exercise. The Board must provide updates to the Committees specified above not less frequently than once every 60 days while the subject loan is outstanding, including: (1) the status of the loan; (2) the value of the collateral held by the Federal reserve bank which initiated the loan; and (3) the projected cost to the taxpayers of the loan. (Section 129)

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com;; or Mike Shannon Wenzel at 212.701.3527 or mwenzel@cahill.com.