

Deciphering the Financial Rescue Bill and Related Government Actions

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October 3, 2008

GIBSON, DUNN & CRUTCHER LLP

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Today's Gibson Dunn Panelists



Michael Bopp chairs Gibson Dunn's Financial Services Crisis Group, a multi-disciplinary team formed to address client concerns stemming from the credit and capital markets crisis. Michael served as Associate Director of the Office of Management and Budget in the White House from 2006-2008 and spent eleven years in senior positions on Capitol Hill.

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Amy L. Goodman is co-chair of the firm's Securities Regulation and Corporate Governance practice. Amy previously held several positions with the SEC's Division of Corporation Finance, including Associate Director, and the Chairman's office. She is Chair of the Committee on Director and Officer Liability of the American Bar Association's Business Law Section, and Chair of the Section's Shareholder and Investor Relations Subcommittee of the Corporate Governance Committee.

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Emergency Economic Stabilization Act of 2008

- Passed the Senate on 10/1 by a vote of 74-25.
- Passed the House (on second try) today by a vote of 263-171.
- Includes (1) rescue package; (2) Energy Improvement and Extension Act; and (3) tax extenders package with Alternative Minimum Tax relief.

Overview

- Creates new, up to \$700 billion program to purchase “troubled assets” from “any financial institution.”
- Creates parallel insurance program.
- Creates new Treasury “Office of Financial Stability” to be headed by a presidentially-appointed assistant secretary who will run program.
- Authorities terminate on December 31, 2009.

Key Definitions (Section 3)

- *Financial Institution* – “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 . . . and having significant operations in the United States, but excluding any central bank of, or institution owned by, a foreign government.”
- *Troubled Assets* – “(A) 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; and

(B) any other financial instrument that the Secretary . . . determines the purchase of which is necessary to promote financial market stability”

Treasury Secretary Given Broad Authority (Sections 101 & 107)

- Authorized to “take such actions as the Secretary deems necessary to carry out the authorities in this Act, including:”
 - direct hiring;
 - contracting for services with authority to waive provisions of Federal Acquisition Regulation;
 - set all terms of asset purchase program; and
 - issue regulations and guidance as necessary or appropriate.

Implementation – On a Fast Track (Section 101)

- Within 45 days from enactment, the Secretary must issue guidelines on:
 - *purchase mechanisms;*
 - *pricing and valuation methods;*
 - *asset manager selection procedures; and*
 - *criteria to identify assets for purchase.*

Conflicts of Interest (Section 108)

- Secretary required to issue “regulations or guidelines necessary to address and manage or prohibit conflicts of interest . . .”
- Provision targeted to conflicts that could arise in—
 - selection of asset managers and other contractors or advisors;
 - purchase of assets;
 - management of assets; and
 - post-employment restrictions.

Foreclosure Mitigation (Sections 109 & 110)

- Secretary and “federal property managers” required to implement plan to assist homeowners and encourage use of HOPE for Homeowners Program.
- Not included in bill:
 - contributions to affordable housing fund (proceeds to be remitted to Treasury); and
 - bankruptcy court “cramdown” authority.

Executive Compensation Restrictions (Section 111)

- For direct purchases, Secretary to set executive compensation and corporate governance standards for institution regarding:
 - *compensation for senior executive officers;*
 - *clawback of bonus or incentive based on statements later proven to be “materially inaccurate”;* and
 - *golden parachutes.*
- Auction purchases that exceed \$300 million from an institution trigger golden parachute restriction.

Cost-Control and Recoupment (Sections 113 & 134)

- Market Mechanisms – suggests that Secretary use auctions or reverse auctions to purchase troubled assets.
- Warrants and Debt Instruments – requires Secretary to secure warrants or debt instruments from participating financial institutions.
 - “*reasonable participation*” or “*reasonable interest rate premium*” required
- Recoupment – 5-year lookback; Presidential plan to recoup losses from “financial industry.”

Oversight Mechanisms

(Sections 104, 116, 117, 121 & 125)

- Financial Stability Oversight Board
 - Government heavyweights;
 - Mainly advisory.
- Comptroller General
 - Audit/Oversight function;
 - To conduct study on margin authority.
- Special Inspector General
 - PAS position;
 - Audits and Investigations.
- Congressional Oversight Panel
 - Selected by leadership;
 - Reporting function;
 - To produce special report on regulatory reform.

Judicial Review (Section 119)

- Secretarial actions subject to “arbitrary and capricious” standard.
- Injunctions and other equitable relief not available except in cases of Constitutional violations.
- Expedited consideration.
- No person that “divests its assets” can bring action against Secretary.

Budget Issues

(Sections 123 & 201-204)

- Scoring under Federal Credit Reform Act – subsidy cost, not outlays.
- Unusual degree of transparency in Office of Management and Budget and Congressional Budget Office scoring.
- “Emergency” designation for budget scoring purposes.
 - Avoided point of order under budget rules.

SEC & FDIC Provisions (Sections 126, 132, 133 & 136)

- Gives SEC authority to suspend mark-to-market accounting and requires it to conduct a study.
- Federal Deposit Insurance Act deposit insurance limit raised from \$100,000 to \$250,000 until December 31, 2009.
- FDIC given authority to address certain false representations.
- Protection for acquirers of FDIC-insured banks.

Tax Provisions (Sections 301-303)

- Ordinary treatment of gains and losses on preferred stock of Fannie Mae or Freddie Mac.
- Tax disincentives to certain levels and types of compensation for certain program participants.
- Extension of provision excluding income from the cancellation of “qualified principal residence indebtedness.”

Related Government Activities

- SEC short sale-related orders.
- Treasury “guaranty program” for money market mutual funds.
- Federal Reserve Board’s relaxation of restrictions on investments in banks.

Other Issues

- Challenges posed by prime broker insolvency.
- FDIC authority with respect to bank failures.

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