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EMERGENCY ECONOMIC STABILIZATION ACT OF 2008 ALLOWING THE TREASURY TO BUY MORTGAGE-RELATED ASSETS TO ADDRESS FINANCIAL INSTABILITY

The “Emergency Economic Stabilization Act of 2008” (“EESA”), passed by the Senate on Wednesday, October 1, 2008, and by the House on Friday, October 3, 2008, and signed by the President that same day, provides authority to the Secretary of the Treasury (the “Secretary”) to restore liquidity and stability to the United States financial system. In addition to the bailout provisions, the legislation contains supplemental provisions not directly related to the financial bailout package, which extend and expand existing tax credits and deferrals for individuals and businesses, and establish incentives to encourage the use of renewable and alternative energy. Below, we have highlighted certain key bailout provisions of EESA, and have summarized the supplemental provisions.

Troubled Asset Relief Program

The EESA authorizes the Secretary to establish a Troubled Asset Relief Program (“TARP”) to purchase “troubled assets” from financial institutions. It authorizes Treasury, through a new Office of Financial Stability within the Department, to purchase “residential or commercial mortgages and any securities, obligations or other instruments that are based on or related to such mortgages,” provided they were originated on or before March 14, 2008. Treasury and the Federal Reserve have the discretionary authority to adjust the definition of what constitutes a “troubled asset.”

In addition to the authorization to purchase, hold and sell the assets and to issue obligations for future purchases, the Secretary is required to establish a program to guarantee troubled assets of financial institutions, but has discretion as to whether or not to use the program. The Secretary is required to establish risk-based premiums for such guarantees sufficient to cover anticipated claims. The Secretary must report to Congress on the establishment of the guarantee program.

Purchase Authority. The Act authorizes the full \$700 billion as requested by the Treasury Secretary for implementation of the TARP, as follows:

- Immediate use of up to \$250 billion;
- Upon a Presidential certification of need, the Secretary may access an additional \$100 billion;
- The final \$350 billion may be accessed if the President transmits a written report to Congress requesting such authority. The Secretary may use this additional authority unless within 15 days Congress passes a joint resolution of disapproval which may be considered on an expedited basis.

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Program Guidelines. Within two business days after the first purchase of a troubled asset, or within 45 days following enactment of the Act, the Secretary must publicly issue program guidelines that will include:

- The mechanisms used to purchase troubled assets;
- the methods for pricing and valuation of assets; and
- the criteria for identifying troubled assets for purchase.

The Secretary has substantial discretion under the Act in the establishment of the guidelines. In a statement on October 8, 2008, the Secretary said the first purchase of troubled assets was “several weeks” away. Subject to the timeline referenced above, as soon as the first purchase event occurs, financial institutions considering participation in the TARP will have access to the guidelines. The Williams Mullen Financial Crisis Task Force will also be prepared to assist clients in the interpretation of the guidelines.

Eligible Financial Institution. Under the Act, financial institutions that are eligible to participate in the TARP include, but are not necessarily limited to, banks, broker dealers and insurance companies regulated under U.S. law, and having “significant operations” in the U.S. Foreign central banks and financial institutions owned by foreign governments are specifically excluded, but the Act may be interpreted to cover their U.S. licensed branches.

Management and Sale of Troubled Assets; Revenues and Sale Proceeds. The Act establishes the right of the Secretary to exercise authority under EESA at any time, and to manage troubled assets, including the ability to determine the terms and conditions associated with the disposition of troubled assets. The Act requires profits from the sale of troubled assets to be used to pay down the national debt.

Considerations. In exercising his TARP authority, the Secretary is required to take a number of considerations into account, including maximizing the interests of taxpayers, minimizing the impact on the national debt, providing stability to the financial markets, preserving homeownership, minding the needs of all financial institutions regardless of size or other characteristics, and weighing the needs of local communities. EESA requires the Secretary to examine the long-term viability of an institution in determining whether to directly purchase assets under TARP.

Oversight.

While certain early draft proposals did not contain any oversight provisions, the new law provides the following oversight provisions:

1. **Office of Financial Stability.** Establishes an Office of Financial Stability within the Department of the Treasury (the “Treasury”) to implement TARP in



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consultation with the Board of Governors of the Federal Reserve System, the FDIC, the Comptroller of the Currency, the Director of the Office of Thrift Supervision and the Secretary of Housing and Urban Development.

2. ***Guidelines.*** Requires the Secretary to establish guidelines and policies to carry out the purposes of EESA.
3. ***Prevent Unjust Enrichment.*** Includes provisions to prevent unjust enrichment by participants of the program.
4. ***Judicial Review.*** Provides for restrictive standards for judicial injunctive and equitable relief with regard to asset purchases, asset management or actions to mitigate foreclosures. Where judicial review actions are permitted, the Act requires that they be expedited.
5. ***Special Inspector General for the Troubled Asset Relief Program (Section 121).*** Establishes the Office of the Special Inspector General for the Troubled Asset Relief Program to conduct, supervise, and coordinate audits and investigations of the actions undertaken by the Secretary under EESA. The Special Inspector General is required to submit a quarterly report to Congress summarizing its activities and the activities of the Secretary under EESA.
6. ***Congressional Oversight Panel (Section 125).*** Establishes a Congressional Oversight Panel to review the state of the financial markets, the regulatory system, and the Secretary's use of the TARP authority. The Oversight Panel is required to report to Congress every thirty days and to submit a special report on regulatory reform prior to January 20, 2009. The Oversight Panel will consist of five outside experts appointed by the House and Senate Minority and Majority leadership.
7. ***Financial Stability Oversight Board (Section 104).*** Establishes the Financial Stability Oversight Board ("FSOB") to review and make recommendations regarding the exercise of authority under EESA. In addition, the FSOB must ensure that the policies implemented by the Secretary protect taxpayers, are in the economic interests of the United States, and are in accordance with EESA. The FSOB is comprised of the Chairman of the Board of Governors of the Federal Reserve System, the Secretary of the Treasury, the Director of the Federal Home Finance Agency, the Chairman of the Securities and Exchange Commission and the Secretary of the Department of Housing and Urban Development.
8. ***Oversight and Audits (Section 116).*** Requires the Comptroller General of the United States to conduct ongoing oversight of the activities and performance of TARP, and to report every sixty days to Congress. The Comptroller General is required to conduct an annual audit of TARP. In addition, TARP is required to establish and maintain an effective system of internal controls.



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9. ***Market Transparency (Section 114).*** Establishes a 48-hour reporting requirement. The Secretary, within two business days of exercising authority under EESA, is required to publicly disclose the details of any transaction.
10. ***Disclosures on Exercise of Loan Authority (Section 129).*** Requires the Federal Reserve to provide a detailed report to Congress, in an expedited manner, upon the use of its emergency lending authority under Section 13(3) of the Federal Reserve Act.
11. ***Analysis in President's Budget (Section 203).*** Requires that the President include in his annual budget submission to the Congress certain analyses and estimates relating to costs incurred as a result of the Act.
12. ***Reports.***
 - ***Monthly Reports:*** Within sixty days of the first exercise of authority under EESA and every month thereafter, the Secretary is required to report to Congress its activities under TARP, including detailed financial statements.
 - ***Tranche Reports:*** For every \$50 billion in assets purchased, the Secretary is required to report to Congress a detailed description of all transactions, a description of the pricing mechanisms used, and justifications for the financial terms of such transactions.
 - ***Regulatory Modernization Report:*** Prior to April 30, 2009, the Secretary is required to submit a report to Congress on the current state of the financial markets, and the effectiveness of the financial regulatory system, and to provide any recommendations for improvement of the existing regulatory regime.
 - ***Information for Congressional Support Agencies:*** Requires that information used by the Secretary in connection with activities under EESA be made available to the Congressional Budget Office (the "CBO") and the Joint Committee on Taxation (the "JCT").
 - ***Reports by the Office of Management and Budget (the "OMB") and the Congressional Budget Office:*** Requires CBO and OMB to report cost estimates and related information to Congress and the President regarding the authorities that the Secretary has exercised under EESA.

Public Debt Limit (Section 122)

Increases the statutory limit on the public debt from \$10 trillion to \$11.3 trillion.



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Consumer & Taxpayer Issues

1. ***Recoupment (Section 134).*** Requires that in five years, the President submit to the Congress a proposal that recoups from the financial industry any projected losses to the taxpayers.
2. ***Minimization of Long-Term Costs and Maximization of Benefits for Taxpayers (Section 113).*** In order to cover losses and administrative costs, as well as to allow taxpayers to share in equity appreciation, requires that the Treasury receive non-voting warrants from participating financial institutions.
3. ***Contracting Procedures (Section 107).*** Allows the Secretary to waive provisions of the Federal Acquisition Regulation where compelling circumstances make compliance contrary to the public interest. Such waivers must be reported to Congress within seven days. If provisions related to minority contracting are waived, the Secretary must develop alternate procedures to ensure the inclusion of minority contractors. This section allows the FDIC to be selected as an asset manager for residential mortgage loans and mortgage-backed securities.
4. ***Temporary Increase in Deposit and Share Insurance Coverage (Section 136).*** Raises the FDIC and the National Credit Union Share Insurance Fund deposit insurance limits from \$100,000 per account to \$250,000 until December 31, 2009. Temporarily raises the borrowing limits at the Treasury for the FDIC and the National Credit Union Share Insurance Fund.

Specific to Homeowners

1. ***Foreclosure Mitigation Efforts (Section 109).*** For mortgages and mortgage-backed securities acquired through TARP, the Secretary must implement a plan to mitigate foreclosures and to encourage servicers of mortgages to modify loans through Hope for Homeowners and other programs. Allows the Secretary to use loan guarantees and credit enhancement to avoid foreclosures. Requires the Secretary to coordinate with other federal entities that hold troubled assets in order to identify opportunities to modify loans, considering net present value to the taxpayer.
2. ***Assistance to Homeowners (Section 110).*** Requires federal entities that hold mortgages and mortgage-backed securities, including the Federal Housing Finance Agency, the FDIC, and the Federal Reserve, to develop plans to minimize foreclosures. Requires federal entities to work with servicers to encourage loan modifications, considering net present value to the taxpayer.
3. ***Hope for Homeowners Amendments (Section 124).*** Strengthens the Hope for Homeowners program to increase eligibility and improve the tools available to prevent foreclosures.



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4. ***Extension of Exclusion of Income From Discharge of Qualified Principal Residence Indebtedness (Section 303).*** Extends current law tax forgiveness on the cancellation of mortgage debt.

Corporate Issues

1. ***Executive Compensation and Corporate Governance (Section 111).*** Requires the Treasury to promulgate executive compensation rules governing financial institutions that sell it troubled assets. Where the Treasury buys assets directly, the institution must observe standards limiting incentives, allowing clawback and prohibiting golden parachutes. When the Treasury buys assets at auction, an institution that has sold more than \$300 million in assets is subject to additional taxes, including a 20% excise tax on golden parachute payments triggered by events other than retirement and an elimination of corporate tax deductions for employee salaries for top-level executive salaries for the portion of those salaries exceeding \$500,000.
2. ***Special Rules for Tax Treatment of Executive Compensation of Employers (Section 302).*** Applies limits on executive compensation and golden parachutes for certain executives of employers who participate in the auction program under TARP.

Accounting Issues

1. ***Authority to Suspend Mark-to-Market Accounting (Section 132).*** Restates the Securities and Exchange Commission's authority to suspend the application of Statement Number 157 of the Financial Accounting Standards Board ("FAS 157") if the SEC determines that it is in the public interest and protects investors.
2. ***Study on Mark-to-Market Accounting (Section 133).*** Requires the SEC, in consultation with the Federal Reserve and the Treasury, to conduct a study on mark-to-market accounting standards as provided in FAS 157, including its effects on balance sheets, impact on the quality of financial information, and other matters, and to report to Congress within 90 days on its findings.

Supplemental Provisions

1. ***Tax Credits.*** Most of the tax relief provisions in EESA extend, expand or renew existing tax credits. Many of the new and revised tax credits apply in limited circumstances or, in many cases, only to specific industries. EESA does the following:
 - Extends existing research and development business tax credit through



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2009. Increases the alternative simplified research and development credit from 12% to 14%.

- Establishes a business tax credit for businesses within a specified enterprise zone in the District of Columbia.
- Extends, through 2009, the tax deferral provided U.S. parent companies for earnings of a foreign subsidiary engaged in a banking or financing business.
- Extends, through 2009, the deferral of tax on interest, dividends, rents, royalties and other payments made between commonly controlled foreign corporations.
- Extends, through 2009, business tax credits for holders of certain qualified new market equity investments.
- Extends, through 2009, rules that permitted cost recovery periods of 15 years for certain leasehold improvements and restaurant property.
- Extends, through 2009, the exclusion from business income of payments made to tax-exempt organizations by a controlled entity.
- Extends, through 2009, business deductions for charitable contributions of food inventory. Also extends deductions for charitable contributions of books, computer equipment and software to schools and public libraries.
- Expands scope of deductions for producers of film and television, including increasing the overall deduction for expenses incurred in productions in economically depressed areas. Extends deduction through 2009.
- Increases the exemption under the alternative minimum tax to \$46,200 for individuals and \$69,950 for married couples filing jointly.
- Expands the alternative minimum tax credit allowed in calculating taxes due on exercise of Incentive Stock Options.

2. ***Renewable and Alternative Energy.*** EESA also contains incentives and credits intended to promote renewable and alternative energy. It includes provisions that do the following:

- Extends, through 2013, existing tax credits for use of energy efficient systems and materials in commercial buildings.
- Extends, through 2009, existing tax credits for contractors building energy efficient new homes.
- Extends, through 2012, existing bond program for qualified “green” building and sustainable design projects.
- Permits accelerated depreciation on recycling equipment.
- Permits employers to provide benefits to employees who commute by bicycle to help offset the costs of bicycle storage and repair.
- Expands and extends, through 2009, the excise tax credit for alternative fuels.
- Extends, through 2009, existing tax credits for producers of biodiesel and extends credit to any producer of diesel fuel from biomass regardless of



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- the type of process used or the source.
- Establishes new tax credits for plug-in electric drive vehicles.
 - Extends, through 2016, existing tax credits for investment in solar energy properties and qualified fuel cell properties and expands the credit to apply to small commercial wind projects.
 - Expands existing tax credit for facilities that produce energy from wind and refined coal to include facilities that produce energy from biomass and marine waves and tides. Extends the credit to apply to facilities in service by 2009.
 - Provides tax credits for use of energy-efficient “idling reduction” units, most commonly used in the transportation industry.
 - Extends, through 2010, existing tax credits for building of alternative refueling stations and expands the credit to apply to electric vehicle recharging stations.
 - Establishes a program of new tax credits for advanced coal electricity projects and coal gasification facilities that demonstrate the ability to recapture a high percentage of their carbon emissions. Provides a separate tax credit for other industrial facilities that demonstrate recapture and transportation of their carbon dioxide emissions.
 - Establishes a procedure for giving refunds to coal producers and exporters that have paid taxes on exported coal in the past. The coal export tax was struck down as unconstitutional by the courts.
 - Establishes a program of new clean renewable energy bonds to fund building of facilities such as hydropower, geothermal, wind and biomass energy production facilities.
 - Removes current caps on tax credits for residential solar energy investment and extends credit through 2016. Provides for additional tax credits for residential small wind turbines and geothermal heat pumps.