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Summary of Administration's Proposal to Bail Out Financial Industry

On September 20, 2008, the Bush Administration announced its plan for resolving the crisis that has affected the U.S. financial markets. That plan is designed to provide stability and prevent further disruption to the financial markets and banking system. With a price tag of \$700 billion, it will be the largest government intervention in the private markets since the Great Depression.

The bill will:

- Permit the Treasury to purchase, and to make and fund commitments to purchase, mortgage-related assets from any financial institution having its headquarters in the United States. Currently, the bill defines "mortgage related assets" as residential or commercial mortgages and any securities, obligations or other instruments that are based on or related to such mortgages. Although the Administration is in favor of permitting the Treasury to purchase non-mortgage related distressed assets, the initial version of the bill limited Treasury's authority to mortgage-related assets only. Another topic for discussion relates to the institutions that may participate in the program. The term "financial institution" is not defined in the bill and it is yet to be determined whether it will include any institution holding mortgage-related assets (e.g. any mortgage lender) or whether it will be limited to federally or state chartered and/or supervised institutions (e.g. banks, thrifts, insurance and investment banking firms). Also under consideration is whether non-U.S. firms with significant U.S. activities would be included. The Administration favors allowing foreign firms to participate in the program, although the version of the bill released on the 20th only permits those firms headquartered in the U.S. to participate, thereby

leaving foreign firms to rely on their own governments for assistance if needed.

- Grant broad authority to the Secretary of the Treasury to establish an organization within the Treasury to carry out the purposes of the bill. This authority would include the ability to establish "vehicles" to purchase mortgage-related assets and issue obligations; enter into contracts, including contracts for services; appoint such employees as may be necessary; issue regulations; and take such other actions as may be required.
- Enable the Treasury to dominate the mortgage-related market. The bill permits the Treasury to exercise all rights relating to mortgage assets which it purchases and authorizes the management of those assets, including the revenues and portfolio risks associated therewith. The bill authorizes the Treasury to hold the assets indefinitely and to sell or enter into loans, repurchase transactions or other financial transactions in regard to the purchased mortgage-related assets.
- Limit qualifying mortgage-related assets to only those that were originated or issued on or before September 17, 2008. The bill terminates the authority of the Treasury to purchase mortgage-related assets on the date two years after enactment.
- Make the decisions of the Secretary of the Treasury non-reviewable by any court of law or administrative agency. This provision may result in constitutional challenges to the bill.

Action on the bill is expected by the end of this week. Treasury Secretary Paulson and Federal Reserve Chairman Bernanke are

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scheduled to testify before the Senate Banking Committee and House Financial Services Committee on Tuesday and Wednesday, respectively, of this week. Whether the bill will pass and if so, the final form it will take depends on Congress' appetite for adding other provisions to the bill. As expected, there is a lively debate on Capitol Hill among key members and their staffs as to the impact of the legislation on bankruptcy matters and the degree of judicial review of Treasury's actions. Discussions on the bill also have centered on adding provisions that would create independent oversight of the Treasury's actions pursuant to the bill, enhancing protections for homeowners, allowing bankruptcy judges to modify mortgages on primary residences, limiting compensation packages of officers of firms that participate in the program, and adding various economic stimulus provisions. In addition, various industry groups are weighing in with suggestions that the bill temporarily suspend mark-to-market accounting rules on securities sold to the Treasury, and that the Treasury provide support for municipal securities.

ABOUT THE AUTHORS

Douglas P. Faucette is a banking attorney in Locke Lord Bissell & Liddell's corporate department in Washington, DC. Mr. Faucette has more than 30 years of experience representing publicly and privately held companies in a variety of corporate and securities transactions. In the past decade, he has been involved in the passage of all major financial institution legislation including FIRREA and FDICIA.

John Bruno has more than 20 years of experience in the financial industry as a regulator, attorney and investment banker, and he has in-depth knowledge of banking law, regulations, policies and procedures. He has provided legal and financial counsel to numerous Boards and senior managements on transaction structure and general corporate matters and has completed several precedent-setting transactions in the area of financial institutions.