

PLUGGING THE LEAKS IN THE BAILOUT BILL

The attached materials are divided into five parts in the following order:

Oversight Entities;
Major Issues to Resolve;
Reports & Studies;
Transparency; and
Judicial Review.

The Oversight Entities are set forth at the beginning as a backdrop against which other issues will be considered. The discussion will consider the other issues first and then return to oversight at the end. At the beginning of each section, there is a short narrative with some possible questions to be considered, but the discussion will not be limited to them. Each section also summarizes the major operative provisions that bear on the issues to be discussed, but the summaries omit details that might be important in some contexts, but hopefully not for these discussions.

The goals of the conference are to probe these issues, within the context of the major goals of the bill which will not be debated in this forum, and to seek to prepare suggested questions and/or amendments for Congress to consider. The bill was drafted in great haste and many questions seem to be the result of the time pressures on the drafters. Other issues appear not to have been considered at all. In some areas, such as oversight and reports, the bill appears to have achieved consensus by accepting all suggested forms of oversight, without focusing on the cumulative impact and on which entities are best suited for which types of oversight.

The questions, examples, and even the broad topics are only starting points. Other ideas (other than those questioning the advisability of the bill's basic premises) are welcome.

10/28/08

OVERSIGHT ENTITIES

This listing of oversight entities, many of which were created in this Act, is mainly a background against which to assess the reporting and other oversight functions assigned in the bill. There appears to be a substantial amount of overlap among the oversight entities (see the reports required, as well as duties imposed) especially as among the 8 Congressional Committees; the Financial Stability Oversight Board; the Comptroller General; and the Special Inspector General. Is overlap a useful check or are there ways to at least limit some of it, by assigning some duties to the entity with the greatest expertise?

Congressional Entities

Appropriate Committees - § 3(1) (App Com)

Senate: Banking, Finance, Budget & Appropriations

House: Financial Services, Ways & Means, Budget, & Appropriations

Congressional Support Agencies - § 3(3)

Congressional Budget Office & Joint Committee on Taxation

Committees on Waiver of Federal Acquisition Regulations - § 107(a) (FAR)

House: Oversight and Government Reform & Financial Services

Senate: Homeland Security and Governmental Affairs & Banking

Congressional Oversight Panel - § 125 (COP)

§ 125(c)(1) - 5 Members appointed by congressional leadership

§ 125(c)(3) - contemplates some fed employees/Congress members

Financial Stability Oversight Board - § 104 (Stability Board)

5 members, including Treasury Secretary – all high executive branch officials

Chair of Fed Reserve, Chair of SEC, Director of Fed Housing & Financial

Authority (Regulates Fannie & Freddie) & Secretary of HUD

Comptroller General - § 116 –

Broad overall review of program, plus review of OMB audits

Special Inspector General - § 121 –

Appointed by President with advice & consent of Senate

Placement in executive branch not determined

Broad review of program – prepare public lists of activities – other duties

Office of Management & Budget - § 134

Reporting on costs of program with review by Congressional Budget Office

MAJOR ISSUES TO RESOLVE

The bill leaves a number of major issues that the Secretary must resolve in implementing the bill. In some provisions (such as Section 101a(1)) the Secretary is authorized to develop a wide range of policies and procedures that must be published, but there is no requirement for public input. Some provisions use terms like “policies and procedures” others use “plan” or “guidelines,” while in a few places the term “regulations” is used. Is there or should there be any significance for public participation purposes based on the term chosen by Congress? Section 101(b) requires consultation with a number of executive branch officials, but the timing and manner of such consultation are not spelled out. There are other provisions that require more limited consultation, such as § 3(9)(B), the provision authorizing the use of alternative financial instruments.

The list below includes what appear to be the most significant policy matters, and the issue is whether some kind of notice-and-comment type procedure (perhaps with shortened deadlines and alternative procedures) would be appropriate and helpful, and would provide additional accountability and transparency. These issues also bear on the oversight aspects of the bill: what is best way to assure that the requirements of the bill are being followed and which, among the oversight entities, is best situated to oversee particular decisions and their implementation. The list is illustrative and not inclusive.

§ 3(9)(B) (Definitions section) What other financial instruments should the Secretary purchase in addition to mortgages and mortgage back securities set forth in § 3(9)(A), and what terms and conditions should those instruments contain, in particular, how the management of troubled assets under § 101(c)(4) should be reconciled with minimizing the cost to the taxpayers in connection with the purchase and sale of such securities? The Secretary has already used \$250B of the \$700 authorized to purchase preferred stock in banks, presumably after consultation with the Chairman of the Fed and with after the fact notice to Congress, both required by § 3(9)(B). It has also been reported that the Secretary may use his authority to aid insurance companies as well as traditional financial institutions, as § 3(5) permits. See also § 106(c) allowing the Secretary to sell or otherwise dispose of assets “upon such terms and conditions and a price determined by the Secretary.”

§ 101(d) requires the publication of “program guidelines” (not “rules”) regarding mechanisms for purchasing troubled assets, methods for pricing and valuing them, and criteria for identifying troubled assets for purchase.

§ 102(a)(2) directs the Secretary to establish a guarantee program, including use of categories of troubled assets to determine guarantees, and subsection (3) tells the Secretary to establish terms and conditions for guarantees, within certain limits. Subsection (c)(2) directs the Secretary to set premiums for such guarantees, and requires the publication (only) of the methodology for each class of premiums and an explanation of the appropriateness of the classes that are established.

§§ 103(5) & (6) are, respectively, the anti-discrimination and the economic affirmative action provisions that the Secretary must follow under the program, but they do not spell out how they interact with other goals in the same section, such as protecting taxpayers, lenders, and homeowners.

§ 107(a) allows the Secretary to waive certain contracting rules in urgent and compelling circumstances, but there is no requirement that there be rules spelling out in even a general way when those conditions might apply. Subsection (b) requires the Secretary to “develop and implement standards and procedures [not “rules”] regarding the “inclusion and utilization of minorities ... and women” in contracting.

§ 108 requires the Secretary to establish conflict of interest “regulations or guidelines” in a variety of areas, including post-employment restrictions, to be issued “as soon as practicable after the date of enactment of this Act.”

§ 109(a) requires the Secretary to “implement a plan that seeks to maximize the assistance for homeowners” in a variety of ways, including using loan guarantees. Under subsection (b), the Secretary, in consultation with others, is directed to “attempt to identify opportunities for the acquisition of classes of troubled assets,” in order to further the purposes of (a) and as part of the plan required by (a). And subsection (c) allows the Secretary, “where appropriate” to consent to “loss mitigation measures” with respect to existing investment contracts. Section 110(b)(1) also requires federal property managers, that hold troubled assets, to adopt a plan designed to achieve similar ends. See also subsection (b)(6) requiring federal property managers to consult with each other and develop consistent plans.

§ 111(b) directs the Secretary to establish “appropriate standards” for executive compensation in institutions from which he purchases troubled assets. There are also “criteria” set forth in subsection (b)(2) that use terms such as “incentives”, “unnecessary and excessive risks” “ threaten the value of the financial institution” “bonus or incentive compensation” and “golden parachute,” not to mention the limitation that these conditions can apply only when the Secretary holds a debt or equity position in the institution. The Department of the Treasury issued “interim final rules” (with a 30-day comment period) implementing this provision on October 20, 2008, 73 Fed. Reg. 62,205 (to be codified at 31 C.F.R. Part 30).

Similar issues arise from subsection (c) when the Secretary uses his authority to make auction purchases, in which case he is also required to control excessive executive compensation. See also, for auction purchases, section 302, which includes tax provisions as amendments to sections 162(m) and 280G of the Internal Revenue Code (26 U.S.C. §§ 162(m) and 280G) that address compensation paid to certain executive officers employed by financial institutions that sell assets under TARP

§ 113 includes requirements that appear to restrict some of the Secretary’s other powers. Thus, subsection (a) requires him to “minimize any potential long-term negative impact on the taxpayer” and under subsection (c), if the Secretary “determines that use of a

market mechanism under subsection (b) is not feasible or appropriate,” he may pursue other methods. Then, in subparagraph (d)(1)(A), the Secretary is required to acquire warrants for non-voting common or preferred stock when purchasing assets from a financial institution, subject to open-ended terms and conditions outlined in paragraph (2).

§ 132 authorizes the SEC to suspend “by rule, regulation or order” the “mark-to-market” Statement of the Financial Accounting Standards Board for “any issuer” or “with respect to any class or category of transaction” if the SEC “determines that it is necessary or appropriate in the public interest and is consistent with the protection of investors.”

REPORTS & STUDIES

The issues here are whether all these reports are needed, whether they are needed with the frequency with which they are mandated, whether the entity that is required to write the report is the optimal one for that report, and whether there is overlap and/or mismatch in these reporting assignments. In addition, are the times frames for reporting reasonable, who will write the reports, will responsible officials have time to review them prior to submission, will anyone besides staff on the oversight entities read them, and how will the information submitted in them be digested and translated into action, or even knowledge of what has happened? Some reports are due within a set number of days from enactment and others from the first exercise of a given power (most of which have now been exercised). For simplicity, we will use only “X days” because, for these purposes, the “from what” is of no practical significance.

- § 104 (g) Stability Board, semi-annually, to “appropriate committees of Congress”
(App Com) on all broad duties

- § 105 (a) Secretary, within 60 days & every 30 days thereafter to App Com
Overview, all expenditures & obligations & detail financials
- (b) Secretary, within 7 days of 1st commitment to purchase \$50 billion
& within 7 days of each \$50B thereafter
Report includes details of purchases, prices, impacts & challenges
- (c) By April 30, 2009, regulatory modernization report w/recommendations
- (d) Share reports with the Congressional Oversight Panel (COP)

- § 107 (a) Secretary reports on waivers of the Federal Acquisition Regulations (FAR)
to FAR Committees in 7 days

- § 110 Federal Property managers (bank regulators who get assets) to Congress
60 days and then every 30 days – loan modifications & foreclosures

- § 114 Secretary, to public in electronic form, within 2 business days
Description, amounts and prices of assets acquired

- § 117 (a) Study by Comptroller General on margin authority & leverage
- (c) Due June 1, 2009 – for Banking & Financial Services Committees
- (d) Share with COP

- § 121 (f) Report by Special IG to App Com – 60 days & then quarterly
Appears to cover all areas of work - shared with COP

- § 125 (b)(1) COP, regular reports to Congress every 30 days – very broad –
(2) Special report on regulatory reform on January 20, 2009

- § 129 Federal Reserve to Banking & Financial Services Committees
7 Days after exercise of authority to grant discounts
Updates at least every 60 days
- § 133 SEC to do study of mark-to-market accounting within 90 days
- § 134 OMB report on net cost of program after 5 years (consult Congressional Budget Office (CBO))
- § 202 (a) OMB, 60 days & semi-annually thereafter, to President & Congress
Cost of assets purchases & guarantees w/backup information
(b) CBO to report on its evaluation of OMB report w/in 45 days
- § 203 OMB to include separate analysis of effect of Act w/President's budget
Applies with respect to submission for FY 2010 (due in Jan 2009)

TRANSPARENCY

Along with public participation, special oversight mechanisms, and possible judicial review, there is an important role for transparency so that the public can decide for itself whether the Secretary (and others) are following the law and using taxpayer funds wisely. There is no overall transparency provision in the bill, and in particular, the bill does not address whether exemption 8 of the FOIA, which severely access to records held by agencies that regulate financial institutions, applies to records relating to this law, particularly those of the Treasury Department. Congressional entities are not subject to FOIA in any event, but they are also not subject to its limitations or to other non-disclosure statutes directed at the executive branch. In some places the bill speaks directly to issues of disclosure, but even some of those are unclear in their impact. In addition to the broad exemption 8 question, what do the specific disclosure-related provisions in the Act say about disclosures under the rest of the bill? There are many reports required under the bill, including some by congressional panels, and there is a general question as to whether the reports themselves, as well as the underlying data used to prepare them, are presumptively public or not. The list of reports below includes only those for which there is some accompanying provision on disclosure.

§ 105 deals with reports generally and subsection (d), entitled “Sharing of Information,” states that any reports under § 105 “shall also be submitted to the Congressional Oversight Panel established under section 125.” Some other sections (§§ 116(d), 122(f)(3), & 129(e)) have similar provisions for sharing information with that Panel. At least two inferences are plausible: subsection (d) is simply a courtesy or reminder that was added so that the earlier reporting provisions would not each have to be changed. Or, it suggests that the reports are non-public, but that they should be shared with the Panel.

§ 114 (a) requires the Secretary to “make available to the public, in electronic form, a description, amounts, and pricing of assets acquired under this Act, within 2 days of purchase, trade or other disposition.” Is there a negative pregnant regarding the availability or form of disclosure of other records held by the Secretary?

§ 114 (b) is captioned “Disclosure” and it directs the Secretary to determine whether certain information regarding certain types of transactions with the Secretary should be made public. Leaving aside the standard that the Secretary is directed to apply in making that determination, does this provision have any effect beyond the limits of what is covered explicitly by it?

§ 116(b)(1) requires annual audits to be prepared and sent to “Congress and the public,” which is one of the few places that the public is mentioned in connection with reports, which presumably does not cover the records underlying the audits.

§ 122 creates the Special Inspector General for the Troubled Asset Relief Program, but does not indicate where in the government that office is located. That may make a difference for determining whether exemption 8 of FOIA applies to its records.

Subsection (f)(2) is a disclosure disclaimer – “Nothing in this subsection shall be construed to authorize the public disclosure of” three types of information, which are, more or less, those categories covered by exemptions 1, 3 & 7 of FOIA. Two aspects of this provision are worth underscoring: its effects are limited to “this subsection,” and there is nothing comparable to it in any other part of the bill.

§ 129 deals with the Federal Reserve Board’s exercise of certain loan authority, which it is required to report to congressional committees on a regular basis. Subsection (c) allows the Board to keep that information confidential “upon the written request of the Chairman of the Board, in which case it shall be made available only to the Chairpersons and Ranking Members of the Committees described in subsection (a).”

§ 201 provides that on request “and to the extent otherwise consistent with law, all information used by the Secretary in connection with activities authorized under this Act shall be made available to congressional support agencies [the CBO & the Joint Committee on Taxation].” To the extent that some or most of this information would be public, which may depend on the meaning of “to the extent otherwise consistent with law,” this provision seems superfluous.

JUDICIAL REVIEW

The main issue is whether there is a meaningful role for judicial review under this Act, given the law of standing, the nature of the decisions being made, and the speed with which the program will be carried out. Subsidiary questions under § 119 include:

Should cases go to district courts or courts of appeals or special courts?

Is the standard for review in § 119 different from that in the APA & if so, how?

Injunctions are limited to constitutional challenges: will that push judges to decide cases on constitutional grounds in order to be permitted to afford full relief?

Would a declaratory judgment be the function equivalent of an injunction for this section?

Who would have standing to challenge any of the decisions made by the Secretary?

Is the requirement that a court must act on a TRO within 3 days an invasion of the power of the courts to conduct their business as they see fit under Article III? Is it waivable?

What is the meaning of the final portion of § 119(a)(3) beginning with “except as” ?

What is the meaning of the sentence in § 119(b)(2) beginning with “Except as” and in particular the portion beginning with “and shall be deemed”?