

The Emergency Economic Stabilization Act of 2008

Public Law 110 – 343

BACKGROUND

On Friday, October 3, 2008, President Bush signed the Emergency Economic Stabilization Act of 2008 (“EESA”) into Public Law 110 - 343. This followed a tumultuous week in Congress regarding the rescue legislation. On Monday, the House of Representatives, in a stunning rejection, failed to pass the EESA by a vote of 205 -228, and its future was very much in doubt. Negotiators returned to the table in an effort to sweeten the deal and garner enough votes to pass both the Senate and House. The Senate incorporated the EESA provisions as well as numerous energy and tax provisions into H.R. 1424, the Paul Wellstone Mental Health and Addiction Equity Act of 2007. On Wednesday, October 1, the Senate passed H.R. 1424 by a vote of 74 – 25. On Friday, October 3, the House reconsidered the bill and passed it by a vote of 263-171, and it was signed by the President just hours later. In total, 33 Democrats and 25 Republicans switched their votes, which was sufficient for passage in the House.

Representatives Who Changed Their Vote To “Yea”

REPUBLICANS who switched:

Rodney Alexander (LA), Gresham Barrett (SC), Judy Biggert (IL), Charles Boustany (LA), Vern Buchanan (FL), Howard Coble (NC), Mike Conaway (TX), Charles Dent (PA.), Mary Fallin (OK), Rodney Frelinghuysen (NJ), Jim Gerlach (PA), Peter Hoekstra (MI), Joseph Knollenberg (MI), Randy Kuhl (NY), Sue Myrick (NC), Jim Ramstad (MN), Ileana Ros-Lehtinen (FL), Jean Schmidt (OH), John Shadegg (AZ), Bill Shuster (PA), John Sullivan (OK), Lee Terry (NE), William “Mac” Thornberry (TX), Patrick Tiberi (OH), Zach Wamp (TN).

DEMOCRATS who switched:

Neil Abercrombie (HI), Joe Baca (CA), Shelley Berkley (NV), Bruce Braley (IA), Andre Carson (IN), Emanuel Cleaver (MO), Henry Cuellar (TX), Elijah Cummings (MD), Donna Edwards (MD), Gabrielle Giffords (AZ), Al Green (TX), Mazie Hirono (HI), Jesse Jackson Jr. (IL), Sheila Jackson Lee (TX), Carolyn Kilpatrick (MI), Barbara Lee (CA), John Lewis (GA), Harry Mitchell (AZ), Solomon Ortiz (TX), Bill Pascrell (NJ), Ed Pastor (AZ), Bobby Rush (IL), Adam Schiff (CA), David Scott (GA), Hilda Solis (CA), Betty Sutton (OH), Mike Thompson (CA), John Tierney (MA), Diane Watson (CA), Peter Welch (VT), Lynne Woolsey (CA).

SUMMARY

The EESA is summarized below with an emphasis on provisions of particular interest to state securities regulators.

Section 2. Purposes

The purposes of this Act are (1) to immediately provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States; and (2) to ensure that such authority and such facilities are used in a manner that--

- (A) protects home values, college funds, retirement accounts, and life savings;
- (B) preserves homeownership and promotes jobs and economic growth;
- (C) maximizes overall returns to the taxpayers of the United States; and
- (D) provides public accountability for the exercise of such authority.

Section 3. Key Definitions

5) FINANCIAL INSTITUTION- The term `financial institution' means 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.

(7) SECRETARY- The term `Secretary' means the Secretary of the Treasury.

(9) TROUBLED ASSETS- The term `troubled assets' means--

- (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, 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.

Title I. Troubled Assets Relief Program

Section 101. Purchases of Troubled Assets.

Authorizes the Secretary to establish a Troubled Asset Relief Program (“TARP”) to purchase troubled assets from financial institutions. Establishes an Office of Financial Stability within the Treasury Department to implement the TARP in 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.

The Secretary shall implement the TARP through an Office of Financial Stability, established within the Office of Domestic Finance of the Department of the Treasury, which office shall be headed by an Assistant Secretary of the Treasury. Mr. Neel Kashkari has been designated as the Interim Assistant Secretary for the newly created

office. Mr. Kashkari came to Treasury from Goldman Sachs as a Senior Adviser to the Secretary and later appointed to the position of Assistant Secretary for International Economics and Development.

Section 102. Insurance of Troubled Assets.

If the Secretary establishes the TARP program, the Secretary is required to establish a program to guarantee troubled assets of financial institutions. The Secretary is required to establish risk-based premiums for such guarantees sufficient to cover anticipated claims. No later than January 1, 2009, the Secretary must report to Congress on the establishment of the guarantee program.

Section 103. Considerations.

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

Section 104. Financial Stability Oversight Board (“FSOB”).

This section establishes the Financial Stability Oversight Board to review and make recommendations regarding the exercise of authority under this Act. In addition, the Board 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 this Act. The FSOB would be responsible for reporting any suspected fraud, misrepresentation, or malfeasance to the Special Inspector General for the Troubled Assets Relief Program or the Attorney General of the United States.

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.

The FSOB shall report to the appropriate committees of Congress and the Congressional Oversight Panel not less frequently than quarterly.

Section 105. Reports.

Monthly Reports: Within 60 days of the first exercise of authority under this Act (December 2, 2008) and every month thereafter, the Secretary is required to report to Congress an overview of its activities under TARP, the actual obligation and expenditure of the funds provided for administrative expenses, and detailed financial statements.

Tranche Reports: The Secretary is required to report to Congress a detailed description of all transactions, a description of the pricing mechanisms used, justifications for the financial terms of such transactions, challenges that remain in the financial system, and

an estimate of additional actions that may be necessary to address those challenges. The report required shall be submitted not later than 7 days after the date on which commitments to purchase troubled assets under the authorities provided in this Act first reach an aggregate of \$50,000,000,000 and not later than 7 days after each \$50,000,000,000 interval of such commitments is reached thereafter.

Regulatory Modernization Report: Not later than April 30, 2009, the Secretary shall review the current state of the financial markets and the regulatory system and submit 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--

(1) 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

(2) the rationale underlying such recommendations.

Section 106. Rights; Management; Sale of Troubled Assets; Revenues and Sale Proceeds.

Establishes the right of the Secretary to exercise authorities under this Act at any time. Provides the Secretary with the authority to manage troubled assets, including the ability to determine the terms and conditions associated with the disposition of troubled assets. Requires profits from the sale of troubled assets to be used to pay down the national debt.

Section 107. Contracting Procedures.

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 7 days. If provisions related to minority contracting are waived, the Secretary must develop alternate procedures to ensure the inclusion of minority contractors. Allows the FDIC to be selected as an asset manager for residential mortgage loans and mortgage-backed securities.

Section 108. Conflicts of Interest.

The Secretary shall issue regulations or guidelines necessary to address and manage or to prohibit conflicts of interest that may arise in connection with the administration and execution of the authorities provided under this Act, including—

(1) conflicts arising in the selection or hiring of contractors or advisors, including asset managers;

(2) the purchase of troubled assets;

(3) the management of the troubled assets held;

(4) post-employment restrictions on employees; and

(5) any other potential conflict of interest, as the Secretary deems necessary or appropriate in the public interest.

Section 109. Foreclosure Mitigation Efforts.

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.

Section 110. Assistance to Homeowners.

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.

Section 111. Executive Compensation and Corporate Governance.

Treasury will promulgate executive compensation rules governing financial institutions that sell it troubled assets. Where Treasury buys assets directly, the institution must observe the following standards:

- (A) 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;
- (B) 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
- (C) a prohibition on the financial institution making any golden parachute payment to its senior executive officer during the period that the Secretary holds an equity or debt position in the financial institution.

The term `senior executive officer' means an individual who is one of the top 5 highly paid executives of a public company, whose compensation is required to be disclosed pursuant to the Securities Exchange Act of 1934, and non-public company counterparts.

Section 112. Coordination With Foreign Authorities and Central Banks.

Requires the Secretary to coordinate with foreign authorities and central banks to establish programs similar to TARP.

Section 113. Minimization of Long-Term Costs and Maximization of Benefits for Taxpayers.

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.

Section 114. Market Transparency.

The Secretary is required, within 2 business days of exercising authority under this Act, to publicly disclose, electronically, the description, amounts, and pricing of assets acquired under this Act.

Section 115. Graduated Authorization to Purchase.

Authorizes the full \$700 billion as requested by the Treasury Secretary for implementation of TARP. Allows the Secretary to immediately use up to \$250 billion in authority under this Act. 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 a “fast-track” procedure set forth in the EESA.

Section 116. Oversight and Audits.

Requires the Comptroller General of the United States (General Accountability Office) to conduct ongoing oversight of the activities and performance of TARP, and to report every 60 days to Congress.

The subjects of such oversight shall include the following:

- (A) The performance of the TARP in meeting the purposes of this Act, particularly those involving foreclosure mitigation; cost reduction; whether it has provided stability or prevented disruption to the financial markets or the banking system; and whether it has protected taxpayers.
- (B) The financial condition and internal controls of the TARP, its representatives and agents.
- (C) Characteristics of transactions and commitments entered into, including transaction type, frequency, size, prices paid, and all other relevant terms and conditions, and the timing, duration and terms of any future commitments to purchase assets.
- (D) Characteristics and disposition of acquired assets, including type, acquisition price, current market value, sale prices and terms, and use of proceeds from sales.
- (E) Efficiency of the operations of the TARP in the use of appropriated funds.
- (F) Compliance with all applicable laws and regulations by the TARP, its agents and representatives.
- (G) The efforts of the TARP to prevent, identify, and minimize conflicts of interest involving any agent or representative performing activities on behalf of or under the authority of the TARP.
- (H) The efficacy of contracting procedures.

Section 117. Study and Report on Margin Authority.

Directs the Comptroller General to conduct a study and report back to Congress no later than June 1, 2009, on the role in which leverage and sudden deleveraging of financial institutions was a factor behind the current financial crisis.

The study required by this section shall include--

- (1) an analysis of the roles and responsibilities of the Board, the Securities and Exchange Commission, the Secretary, and other Federal banking agencies with respect to monitoring leverage and acting to curtail excessive leveraging;
- (2) an analysis of the authority of the Board to regulate leverage, including by setting margin requirements, and what process the Board used to decide whether or not to use its authority;
- (3) an analysis of any usage of the margin authority by the Board; and
- (4) recommendations for the Board and appropriate committees of Congress with respect to the existing authority of the Board.

Section 118. Funding.

Provides for the authorization and appropriation of funds consistent with Section 115.

Section 119. Judicial Review and Related Matters.

Provides standards for judicial review, including injunctive and other relief, to ensure that the actions of the Secretary are not arbitrary, capricious, or not in accordance with law.

Judicial Review-

- (1) STANDARD- Actions by the Secretary pursuant to the authority of this Act shall be subject to chapter 7 of title 5, United States Code, including that such final actions shall be held unlawful and set aside if found to be arbitrary, capricious, an abuse of discretion, or not in accordance with law.
- (2) LIMITATIONS ON EQUITABLE RELIEF-
 - (A) INJUNCTION- No injunction or other form of equitable relief shall be issued against the Secretary for actions pursuant to certain sections other than to remedy a violation of the Constitution.
 - (B) TEMPORARY RESTRAINING ORDER- Any request for a temporary restraining order against the Secretary for actions pursuant to this Act shall be considered and granted or denied by the court within 3 days of the date of the request.
 - (C) PRELIMINARY INJUNCTION- Any request for a preliminary injunction against the Secretary for actions pursuant to this Act shall be considered and granted or denied by the court on an expedited basis consistent with the provisions of rule 65(b)(3) of the Federal Rules of Civil Procedure.
 - (D) PERMANENT INJUNCTION- Any request for a permanent injunction against the Secretary for actions pursuant to this Act shall be considered and granted or denied by the court on an expedited basis. Whenever possible, the court shall consolidate trial on the merits with any hearing on a request for a preliminary injunction, consistent with the provisions of rule 65(a)(2) of the Federal Rules of Civil Procedure, or any successor thereto.
- (3) LIMITATION ON ACTIONS BY PARTICIPATING COMPANIES- No action or claims may be brought against the Secretary by any person that divests its assets with respect to its participation in a program under this Act, except as provided in paragraph (1), other than as expressly provided in a written contract with the Secretary.
- (4) STAYS- Any injunction or other form of equitable relief issued against the Secretary for actions pursuant to section 101, 102, 106, and 109, shall be automatically stayed. The

stay shall be lifted unless the Secretary seeks a stay from a higher court within 3 calendar days after the date on which the relief is issued.

Section 120. Termination of Authority.

Provides that the authorities to purchase and guarantee assets terminate on December 31, 2009. The Secretary may extend the authority for an additional year upon certification of need to Congress.

Section 121. Special Inspector General for the Troubled Asset Relief Program.

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 this Act. The appointment of the Special Inspector General shall be made on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations. The Special Inspector General is required to submit a quarterly report to Congress summarizing its activities and the activities of the Secretary under this Act.

Section 122. Increase in the Statutory Limit on the Public Debt.

Raises the debt ceiling from \$10 trillion to \$11.3 trillion.

Section 123. Credit Reform.

Details the manner in which the legislation will be treated for budgetary purposes under the Federal Credit Reform Act.

Section 124. Hope for Homeowners Amendments.

Strengthens the Hope for Homeowners program to increase eligibility and improve the tools available to prevent foreclosures.

Section 125. Congressional Oversight Panel.

Establishes a Congressional Oversight Panel (“Oversight Panel”) to review the state of the financial markets, the regulatory system, and the use of authority under TARP.

(1) **REGULAR REPORTS**-Regular reports of the Oversight Panel shall include the following: The use by the Secretary of authority under this Act; 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.

(B) **TIMING**- The reports required under this paragraph shall be submitted not later than 30 days after the first exercise by the Secretary of the TARP authority, and every 30 days thereafter.

(2) **SPECIAL REPORT ON REGULATORY REFORM**- The Oversight Panel shall submit a special report on regulatory reform not later than 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.

Membership-

- (1) IN GENERAL- The Oversight Panel shall consist of 5 members, as follows:
- (A) 1 member appointed by the Speaker of the House of Representatives.
 - (B) 1 member appointed by the minority leader of the House of Representatives.
 - (C) 1 member appointed by the majority leader of the Senate.
 - (D) 1 member appointed by the minority leader of the Senate.
 - (E) 1 member appointed by the Speaker of the House of Representatives and the majority leader of the Senate, after consultation with the minority leader of the Senate and the minority leader of the House of Representatives.

Section 126. FDIC Enforcement Enhancement.

Prohibits the misuse of the FDIC logo and name to falsely represent that deposits are insured. Strengthens enforcement by appropriate federal banking agencies, and allows the FDIC to take enforcement action against any person or institution where the banking agency has not acted.

Section 127. Cooperation With the FBI.

Requires any federal financial regulatory agency to cooperate with the FBI and other law enforcement agencies investigating fraud, misrepresentation, and malfeasance with respect to development, advertising, and sale of financial products.

Section 128. Acceleration of Effective Date.

Provides the Federal Reserve with the ability to pay interest on reserves.

Section 129. Disclosures on Exercise of Loan Authority.

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.

Section 130. Technical Corrections.

Makes technical corrections to the Truth in Lending Act.

Section 131. Exchange Stabilization Fund Reimbursement.

Protects the Exchange Stabilization Fund from incurring any losses due to the temporary money market mutual fund guarantee by requiring the program created in this Act to reimburse the Fund. Prohibits any future use of the Fund for any guarantee program for the money market mutual fund industry.

Section 132. Authority to Suspend Mark-to-Market Accounting.

Restates the Securities and Exchange Commission's authority to suspend the application of Statement Number 157 of the Financial Accounting Standards Board if the SEC determines that it is in the public interest and protects investors.

Section 133. Study on Mark-to-Market Accounting.

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 (January 1, 2009) on its findings. Such a study shall 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 such Statement Number 157.

Section 134. Recoupment.

Requires that in 5 years, the President submit to the Congress a report on the net amount within the Troubled Asset Relief Program under this Act. In any case where there is a shortfall, the President shall submit a legislative proposal that recoups from the financial industry an amount equal to the shortfall in order to ensure that the Troubled Asset Relief Program does not add to the deficit or national debt.

Section 135. Preservation of Authority.

Clarifies that nothing in this Act shall limit the authority of the Secretary or the Federal Reserve under any other provision of law.

Section 136. Temporary Increase in Deposit and Share Insurance Coverage.

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.

Title II—Budget-Related Provisions

Section 201. Information for Congressional Support Agencies.

Requires that information used by the Treasury Secretary in connection with activities under this Act be made available to CBO and JCT.

Section 202. Reports by the Office of Management and Budget and the Congressional Budget Office.

Within 60 days (December 2, 2008) and semiannually thereafter, the EESA requires the CBO and OMB to report cost estimates and related information to Congress and the President regarding the authorities that the Secretary of the Treasury has exercised under the Act.

Section 203. Analysis in President’s Budget.

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.

Section 204. Emergency Treatment.

Specifies scoring of the Act for purposes of budget enforcement.

Title III—Tax Provisions

Section 301. Gain or Loss From Sale or Exchange of Certain Preferred Stock.

Details certain changes in the tax treatment of losses on the preferred stock of certain GSEs for financial institutions.

Section 302. Special Rules for Tax Treatment of Executive Compensation of Employers Participating in the Troubled Assets Relief Program.

Applies limits on executive compensation and golden parachutes for certain executives of employers who participate in the auction program.

Section 303. Extension of Exclusion of Income From Discharge of Qualified Principal Residence Indebtedness.

Extends current law tax forgiveness on the cancellation of mortgage debt.

**DIVISION B—ENERGY IMPROVEMENT
AND EXTENSION ACT OF 2008**

The Energy Improvement and Extension Act includes \$18 billion over ten years in energy-related tax incentives that are completely offset by freezing a scheduled tax deduction for certain profits deriving from oil and natural gas sales and by altering how brokers report customer’s basis in securities transactions for tax purposes, creating a new IRS reporting requirement that makes it easier to tax capital gains on stock sales, extending the Federal Unemployment Tax Act’s temporary surtax, eliminating the distinction between foreign oil and gas extraction income for tax purposes, and increasing the Oil Spill Liability Trust fund tax through 2017.

**DIVISION C—TAX EXTENDERS AND
ALTERNATIVE MINIMUM TAX RELIEF**

Division C was included into the Emergency Economic Stabilization Act to reauthorize dozens of expiring tax credits for business initiatives such as research and community development and alternative energy sources. The major highlights of this section is a one-year “AMT patch” and dozens of expired and expiring tax credits totaling more than \$48 billion over ten years. Also included is disaster relief provisions designed to provide tax relief to areas recently damaged by storms.

