

**COMPETING ADMINISTRATION, SENATE AND HOUSE VERSIONS
OF PROPOSED \$700 BILLION GOVERNMENT BAILOUT**

On September 22, 2008, we provided you with a memorandum (the “September 21 Memorandum”) describing the historic \$700 billion bailout plan the Bush Administration proposed to Congress. The September 21 Memorandum (which can be accessed by clicking on http://www.willkie.com/files/tbl_s29Publications/FileUpload5686/2698/Summary_Status_and_Issues_Surrounding_Bailout.pdf) outlined a multitude of issues relating to this proposal, and noted that it appeared virtually certain that there would be changes to the terms originally proposed by the Bush Administration as Congressional committee staffs seek to craft a bipartisan bill.

We now have received a revised proposal that was submitted by the Bush Administration, a proposal that has been made by Senate Banking Committee Chairman Dodd (D-CT) (in the form of proposed legislation) and a summary prepared by Chairman Dodd’s staff, and a proposal that has been made by House Financial Services Committee Chairman Frank (D-MA) (which is not in the form of legislation, but is an outline of key provisions). The revised proposal from the Bush Administration and the proposal made by Chairman Frank are attached to this memorandum. You can access the legislative proposal made by Chairman Dodd by clicking on <http://banking.senate.gov/public/files/Doddproposal92208.pdf> and the related summary by clicking on <http://banking.senate.gov/public/files/SummaryDoddproposal92208.pdf>.

Not surprisingly, the proposals differ in many material respects. We do not detail the differences between the three proposals in this memorandum, as the situation continues to be very fluid and there are certain to be additional material changes in the coming days, if not hours. Instead, we believe you are better served by our prompt distribution of the attached material.

We nevertheless note that the negotiations between the House, the Senate and the Bush Administration are focused on the two controversial items that were highlighted in the initial Congressional reactions to the Treasury proposal last weekend. The Democrats in Congress want limits on the compensation paid to executives of entities selling assets to the Government, and also want to give bankruptcy courts the authority to grant adjustments in the terms of individual mortgages. There are reports that in a briefing for the media this afternoon, Chairman Frank said that, in principle, he and Chairman Dodd “are in agreement.” Chairmen Frank and Dodd propose to limit compensation, severance, and incentive payments, and to do so retroactively if financial statements are found to be misleading. It is also reported that the Bush Administration is balking at Chairman Dodd’s proposal to require that 20 percent of any profit from the sale of mortgage-related assets go back into an affordable housing trust fund.

The three sides seem to be moving toward consensus on other major issues. There are reports that Chairman Frank said that the Bush Administration has basically agreed to:

- Provide greater relief to homeowners at risk of losing their homes. Chairman Frank proposed requiring the Secretary of the Treasury (the “Secretary”) to encourage mortgage servicing firms to take advantage of a \$300 billion assistance program contained in the recently enacted housing bill that allows delinquent borrowers to refinance into new fixed loans guaranteed by the Federal Housing Administration (the “FHA”). Under Chairman Frank’s bailout bill, the Secretary would be required to coordinate with the FHA, the Federal Deposit Insurance Corporation and other government entities holding the mortgage assets to work on loan modifications and, where permissible, allow renters to remain in their homes under terms of the current lease.
- Establish an oversight board to oversee the bailout fund.
- Remove the exemption from judicial review. It is unclear what, if anything, will be substituted that may limit the scope of judicial review to certain questions.
- Authorize the Secretary to take an equity position in firms selling assets through “equity with warrants.” Chairman Frank particularly mentioned preferred stock with warrants.

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This memorandum was prepared by Paul Shalhoub, William Hiller, Marc Abrams and Russell Smith. If you have any questions about this memorandum or the attached proposals, please contact the foregoing or any of the members of the WF&G Government Rescue and Credit Crisis Task Force listed below or the attorney with whom you regularly work. The Task Force (which includes UK insolvency professionals from our strategic ally, Dickson Minto W.S., and attorneys from our European offices) was formed to respond to client questions and provide targeted advice in connection with the proposed Government bailout and the credit crisis (including the Lehman Brothers Holdings Inc. bankruptcy).

September 22, 2008

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Draft of 9/21/08

**LEGISLATIVE PROPOSAL FOR TREASURY AUTHORITY
TO PURCHASE TROUBLED ASSETS**

Section 1. Short Title.

This Act may be cited as the Troubled Asset Relief Act of 2008.

Sec. 2. Purchases of Troubled Assets.

(a) Authority to Purchase.--The Secretary is authorized to purchase, and to make and fund commitments to purchase, on such terms and conditions as determined by the Secretary, Troubled Assets from any Financial Institution, as those terms are defined in section 16 of the Act.

(b) Necessary Actions.--The Secretary is authorized to take such actions as the Secretary deems necessary to carry out the authorities in this Act, including, without limitation:

(1) appointing such employees as may be required to carry out the authorities in this Act, and defining their duties, without regard to the provisions of chapter 33 of title 5, United States Code;

(2) entering into contracts, including contracts for services authorized by section 3109 of title 5, United States Code, without regard to any other provision of law regarding public contracts, but subject to the limitations set forth in section 6;

(3) designating financial institutions as financial agents of the Government, and they shall perform all such reasonable duties related to this Act as financial agents of the Government as may be required of them;

(4) establishing vehicles that are authorized, subject to supervision by the Secretary, to purchase Troubled Assets and issue obligations; and

(5) issuing such regulations and other guidance as may be necessary or appropriate to define terms or carry out the authorities or purposes of this Act.

Sec. 3. Considerations.

In exercising the authorities granted in this Act, the Secretary shall take into consideration means for--

(1) providing stability or preventing disruption to the financial markets or banking system; and

(2) protecting the taxpayer.

Sec. 4. Reports.

(a) Reports to Congress.--Within 90 days of the first exercise of the authority granted in section 2(a), and every 90 days thereafter, the Secretary shall report to the Committees on the Budget, Financial Services, and Ways and Means of the House of Representatives and the Committees on the Budget, Finance, and Banking, Housing, and Urban Affairs of the Senate with respect to the authorities exercised under this Act and the considerations required by section 3 and efforts under section 7.

(b) Reports of Purchases.--Within 90 days of enactment of this Act, the Secretary shall issue guidelines for prompt public reports on results of the purchases of Troubled Assets. The reports shall include descriptions, amounts, and prices of Troubled Assets purchased.

Sec. 5. Rights; Management; Sale of Troubled Assets.

(a) Exercise of Rights.--The Secretary may, at any time, exercise any rights received in connection with Troubled Assets purchased under this Act.

(b) Management of Troubled Assets.--The Secretary shall have authority to manage Troubled Assets purchased under this Act, including revenues and portfolio risks therefrom.

(c) Sale of Troubled Assets.--The Secretary may, at any time, upon terms and conditions and at prices determined by the Secretary, sell, or enter into securities loans, repurchase transactions or other financial transactions in regard to, any Troubled Asset purchased under this Act.

(d) Application of Sunset to Troubled Assets.--The authority of the Secretary to hold any Troubled Asset purchased under this Act before the termination date in section 13, or to purchase or fund the purchase of a Troubled Asset under a commitment entered into before the termination date in section 13, is not subject to the provisions of section 13.

(e) Disposition of Revenues and Sale Proceeds.--Revenues of, and proceeds from the sale of, Troubled Assets will be deposited into the general fund of the United States Treasury.

Sec. 6. Contracting Procedures.

In awarding contracts to asset managers, that otherwise would be subject to the Federal Acquisition Regulation, the Secretary shall to the extent practicable solicit proposals from a broad range of qualified firms and publish a Request for Information seeking information from qualified vendors interested in performing the work. In awarding such contracts, the Secretary shall take appropriate steps to manage conflicts of interest, including but not limited to, where appropriate, requiring potential firms to identify potential conflicts of interest and to submit a strategy to mitigate such conflicts, requiring such vendors to acknowledge that they have a fiduciary duty to the United States, and restricting staff from sharing information received from the United States or providing services to both the United States and other clients where a conflict exists. Notwithstanding the foregoing, the Federal Deposit Insurance Corporation shall be considered in the selection of asset managers for whole loans.

Sec. 7. Foreclosure Mitigation Efforts.

(a) Residential Mortgage Loan Servicing Standards.--For any Troubled Assets purchased under this Act that are whole residential mortgages, the Secretary shall require the loan servicers servicing the mortgage loans to follow industry best practices, as appropriate, including entering into sustainable modifications, to avoid preventable foreclosures. Industry best practices shall be identified by the Secretary in consultation with the Hope for Homeowners Oversight Board established by the Housing and Economic Recovery Act of 2008. Where reasonable, the Secretary may direct loan servicers to take additional measures beyond industry best practices deemed appropriate to avoid preventable foreclosures.

(b) Consent to Reasonable Loan Modification Requests.--For residential mortgages underlying Troubled Assets purchased under the Act, the Secretary shall request loan servicers servicing the mortgage loans to follow industry best practices, as identified in subsection (a) of this section, to avoid preventable foreclosures, to the extent that the Secretary, as an investor, has discretion to do so under existing investment contracts. Upon any request arising under existing investment contracts, the Secretary shall consent, where appropriate, to reasonable requests for loss mitigation measures, including term extensions, rate reductions, principal write downs, increases in the proportion of loans within a trust or other structure allowed to be modified, or removal of other limitation on modifications.

Sec 8. Minimization of Long-Term Costs and Maximization of Benefits for Taxpayers.

(a) Long-Term Costs and Benefits.--The Secretary shall use the authority under this Act in a manner that will minimize any potential long-term negative impact on the taxpayer, taking into account the direct outlays, potential long-term returns on assets purchased, and the overall economic benefits of the program, including through improving the economic activity and the availability of credit, limiting losses to the savings and pensions of individuals, and reducing losses to the Government.

(b) Use of Market Mechanisms.--In making purchases under this Act, the Secretary shall maximize the efficiency of its use of taxpayer resources in making purchases by using market mechanisms, including auctions or reverse auctions, where appropriate.

(c) Direct Purchases.--Where the Secretary determines that the purposes of the Act are best met through direct purchases from an individual Financial Institution where no bidding process or market prices are available, the Secretary shall pursue additional measures to (a) ensure that prices paid for assets are reasonable; and (b) share potential benefits or losses of the purchase to the Financial Institution, including, but not limited to, warrants, loss participations, or other similar mechanisms. In determining whether to engage in a direct purchase from an individual Financial Institution, the Secretary shall consider the strength of the Financial Institution in determining whether the purchase represents the most efficient use of funds under this Act.

Sec. 9. Coordination with Foreign Authorities and Central Banks.

Treasury shall coordinate, as appropriate, with foreign financial authorities and central banks to work toward the establishment of similar programs by such authorities and central banks and to maximize the impact of purchases under this Act.

Sec. 10. Maximum Amount of Authorized Purchases.

The Secretary's authority to purchase Troubled Assets under this Act shall be limited to \$700,000,000,000 outstanding at any one time

Sec. 11. Funding.

For the purpose of the authorities granted in this Act, and for the costs of administering those authorities, the Secretary may use the proceeds of the sale of any securities issued under chapter 31 of title 31, United States Code, and the purposes for which securities may be issued under chapter 31 of title 31, United States Code, are extended to include actions authorized by this Act, including the payment of administrative expenses. Any funds expended for actions authorized by this Act, including the payment of administrative expenses, shall be deemed appropriated at the time of such expenditure.

Sec. 12. Review.

Decisions by the Secretary pursuant to the authority of this Act are non-reviewable and committed to agency discretion, and no injunction or other form of equitable relief may be issued by any court of law or any administrative agency.

Sec. 13. Termination of Authority.

The authorities under this Act, with the exception of authorities granted in sections 2(b)(5), 5, 6, 7 and 11, shall terminate two years from the date of enactment of this Act.

Sec. 14. Increase in Statutory Limit on the Public Debt.

Subsection (b) of section 3101 of title 31, United States Code, is amended by striking out the dollar limitation contained in such subsection and inserting in lieu thereof \$11,315,000,000,000.

Sec. 15. Credit Reform.

The costs of purchases of Troubled Assets made under section 2(a) of this Act shall be determined as provided under the Federal Credit Reform Act of 1990, as applicable.

Sec. 16. Definitions.

For purposes of this Act, the following definitions shall apply:

(1) Financial Institution.--The term "Financial Institutions" means (a) any institution including, but not limited to, banks, savings associations, credit unions, broker-dealers, and insurance companies organized 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 Marianas 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; or (b) any institution that is providing financing secured by Troubled Assets of a Financial Institution.

(2) Secretary.--The term "Secretary" means the Secretary of the Treasury.

(3) Troubled Assets.--The term "Troubled Assets" means 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 September 17, 2008, the purchase of which the Secretary determines promotes financial market stability; and, upon the determination of the Secretary in consultation with the Chairman of the Board of Governors of the Federal Reserve, any other financial instrument, the purchase of which the Secretary determines necessary to promote financial market stability.

Sec 17. GAO Study on Impact of Troubled Asset Purchases.

(a) Study Required.--The Comptroller General shall conduct a study to evaluate the impact of the purchases of Troubled Assets as provided for in section 2 of this Act with respect to –

(1) the impact on Financial Institutions as defined in this Act; and

(2) the cost incurred by the Government and the likelihood of proceeds from sales of the assets being returned to the Government.

(b) Report- Not later than one year after the date of enactment of this Act, the Comptroller General shall provide an interim report to the Committees on the Budget, Financial Services, and Ways and Means of the House of Representatives and the Committees on the Budget, Finance, and Banking, Housing, and Urban Affairs of the Senate including the initial results of the study conducted under this section. The Comptroller General shall follow up with such Committees after the second year and the fourth year after such date of enactment.

House Proposal

Sec -- Executive Compensation

The Secretary shall require that all entities seeking to sell assets through the program meet appropriate standards for executive compensation and shareholder disclosure in order to be eligible. These standards shall include, but not be limited to: (1) limits on compensation to exclude incentives for executives to take risks that the Office deems to be inappropriate or excessive; (2) a claw-back provision for incentive compensation paid to a senior executive based on earnings, gains, or other criteria that are later proven to be inaccurate; and (3) such limitations on the entity paying severance compensation to its senior executives as determined to be appropriate in the public interest in light of the assistance being given to the entity.

Sec. -- Foreclosure Mitigation Efforts

To the extent the [Treasury facility] acquires mortgages, mortgage backed securities and other assets secured by residential real estate, it shall maximize assistance to the underlying mortgagors and use its authority as investor to encourage the servicers of the underlying mortgages to take advantage of the Hope for Homeowners Program or other available programs to minimize foreclosures.

The [Treasury facility] shall coordinate with the FDIC, FHA and other federal government entities that hold mortgage related assets to emphasize the acquisition of classes of mortgage-related assets that will improve their ability to improve the loan modification and restructuring process and, where permissible, to permit bona fide tenants who are current on their rent to remain in their homes under the terms of the lease.

Within 30 days of enactment of this act, and every 90 days thereafter, the [Treasury Facility], FDIC, FHA, FHFA shall report to the House Financial Services Committee and Senate Banking Committee on the status of such efforts and what, if any, constraints limit their collective ability to make existing loans perform over time.

Sec.____. OVERSIGHT AND AUDITS

(a) Comptroller General Oversight.

(1) Scope of Oversight. The Comptroller General shall, upon establishment of the TARP, commence ongoing oversight of the activities and performance of the TARP and of any agents and representatives

of the TARP (as related to the agent or representative's activities on behalf of or under the authority of the TARP). The subjects of such oversight shall include, but are not limited to:

- A. TARP's performance in meeting the goals set out in this section, particularly those involving foreclosure mitigation, consumer protection, cost reduction, and stabilization of the financial system;
- 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 TARP's operations in the use of appropriated funds;
- F. Compliance with all applicable laws and regulations by TARP, its agents and representatives; and
- G. TARP's efforts 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.

(2) Conduct and Administration of Oversight.

- A. A. The Comptroller General shall establish a permanent presence in the offices of the TARP in order to facilitate its oversight.
- B. B. The Comptroller General and representatives of the Government Accountability Office shall have access, upon request, to any information, data, schedules, books, accounts, financial records, reports, files, or other papers, things, or property belonging to or in use by the TARP, and to the officers, directors, employees, independent public accountants, financial advisors, and other agents and representatives of the TARP (as related to the agent or representative's activities on behalf of or under the authority of the TARP) all at such reasonable time as the and the representatives of the Government Accountability Office may request. The representatives of the Government Accountability Office shall be afforded full facilities for verifying transactions with the balances or securities held by depositaries, fiscal agents, and custodians. The representatives of the Government Accountability Office may make and retain copies of such books, accounts, and other records as they deem appropriate.
- C. C. The Treasury shall reimburse the Government Accountability Office for the full cost of any such oversight activities as billed therefor by the Comptroller General of the United States. Such reimbursements shall be credited to the appropriation account "Salaries and Expenses, Government Accountability Office" current when the payment is received and remain available until expended.

(3) Reporting. The Comptroller shall submit reports of findings under this section, regularly and no less frequently than once every 60 days, to the House Committee on Financial Services, the Senate Committee on Banking, Housing, and Urban Affairs, and the Treasury Department Inspector General on the activities and performance of the TARP. The Comptroller may also submit special reports under this subsection as warranted by the findings of its oversight activities.

(b) Comptroller General Audits

(1) The TARP shall annually prepare and issue to the Congress and the public audited financial statements prepared in accordance with generally accepted accounting principles and the Government Accountability Office shall annually audit such statements in accordance with generally accepted auditing standards. The Treasury shall reimburse the Government Accountability Office for the full cost of any such audit as billed therefor by the Comptroller General of the United States. Such reimbursements shall be credited to the appropriation account "Salaries and Expenses, Government Accountability Office" current when the payment is received and remain available until expended. The financial statements prepared under this paragraph shall be on the fiscal year basis prescribed under section 1102 of title 31, United States Code.

(2) The Comptroller General of the United States may audit the programs, activities, receipts, expenditures, and financial transactions of the TARP and any agents and representatives of the TARP (as related to the agent or representative's activities on behalf of or under the authority of the TARP).

(3) For the purpose of conducting an audit under this subsection, the Comptroller General is authorized in his discretion to employ by contract, without regard to section 3709 of the Revised Statutes [41 U.S.C.A. § 5], professional services of firms and organizations of certified public accountants for temporary periods or for special purposes.

(4) Comptroller General Access . To conduct audits of the TARP under subsection [(a)], the representatives of the Government Accountability Office shall have access, upon request, to any information, data, schedules, books, accounts, financial records, reports, files, or other papers, things, or property belonging to or in use by the TARP , and to the officers, directors, employees, independent public accountants, financial advisors, and other agents and representatives of the TARP (as related to the agent or representative's activities on behalf of or under the authority of the TARP) all at such reasonable time as the and the representatives of the Government Accountability Office may request. The representatives of the Government Accountability Office shall be afforded full facilities for verifying transactions with the balances or securities held by depositaries, fiscal agents, and custodians. The representatives of the Government Accountability Office may make and retain copies of such books, accounts, and other records as they deem appropriate.

(5) Corrective responses to audit problems. The TARP shall--

(A) Take action to address deficiencies identified by the Comptroller General of the United States or other auditor engaged by the TARP; or

(B) Certify to Congress that no action is necessary or appropriate.

(c) Internal Control

(1) The TARP shall establish and maintain an effective system of internal control, consistent with the standards prescribed under section 3512(c) of title 31, United States Code, that provides reasonable assurance over-

(A) The effectiveness and efficiency of operations, including the use of the TARP's resources;

(B) The reliability of financial reporting, including financial statements and other reports for internal and external use; and

(C) Compliance with applicable laws and regulations.

(2) In conjunction with each annual financial statement issued under subsection [(b)], the TARP shall:

(A) State the responsibility of management for establishing and maintaining adequate internal control over financial reporting; and

(B) State its assessment, as of the end of the most recent year covered by such financial statement of the TARP, of the effectiveness of the internal control over financial reporting