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Congress's First Recipe to Bail Out the Financial Institutions of the United States is Leaving the Taxpayers with a Sour Taste in Their Mouths

Anson Cain

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By Anson Cain*

I. INTRODUCTION

> At its best, a soufflé rises dramatically above its rim to create a light but substantial and crusty top layer cushioned by a luxurious, creamy center that flows slowly across the tongue, richly saucing the taste buds. This contrast between exterior and interior is the essence of a great soufflé.[1]

Before baking a successful and delicious soufflé, a baker must consider what ingredients to use, how to implement those ingredients so they meld together, and the correct method to execute his designed recipe.[2] Otherwise, the baker's finished product may look like a successful soufflé, but its various components may not come together as envisioned and the soufflé will only disappoint.[3]

Congress's bailout of the financial institutions through the Emergency Economic Stabilization Act of 2008 (EESA) was very much like a baker creating a bad soufflé.[4] Congress attempted to use the vast ingredients at its disposal to create something successful, a

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* J.D. candidate, 2010, Pepperdine University School of Law. B.A., Accounting and Business Administration, 2007, Point Loma Nazarene University.

1. Christopher Kimball, *Creamy, Foolproof Dessert Soufflés*, Cook's Illustrated, Sept. & Oct. 2000, at 23.

2. *See id.* at 23-25.

3. *See id.*

4. On Friday, October 3, 2008, President George W. Bush signed into law H.R. 1424, which enacted the EESA. The White House, *infra* note 51.

bailout package that would immediately restore liquidity and stability to the financial system of the United States.[5] Congress, however, was in such a rush to implement the EESA, it seems it did not consider how the ingredients would mold together or even how to completely execute the recipe to achieve the desired goals of the EESA.[6] This lack of planning has caused taxpayers to have a sour taste in their mouths with regard to the use of taxpayer dollars for the EESA.[7]

Through the implementation of just one program under the Troubled Asset Relief Program (TARP), Congress has already allocated over $195 billion to various financial institutions.[8] Congress hoped this would help build capital to increase the flow of financing to business and consumers.[9] These capital injections, however, still have not increased the lending practices to either party.[10] In addition, no one even knows how these financial institutions are using their government allocations because the TARP participating financial institutions have neither a duty to disclose how the funds are being used or to even account for the spending of such

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5. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 2(1), 122 Stat. 3765, 3766 (2008). Congress had allocated a total of $700 billion to the EESA so that the Secretary of the United States Department of the Treasury could use these funds to restore liquidity and stability to the financial system. Emergency Economic Stabilization Act § 115(a).

6. *See infra* notes 41-51 and accompanying text. After the first draft of the EESA was proposed and rejected, the current draft of the EESA was passed in the House of Representatives and the Senate and was enacted into law by President Bush two weeks later. *Id.*

7. *See infra* notes 288-97 and accompanying text.

8. U.S. Dep't of Treasury, Office of Fin. Stability, *Troubled Asset Relief Program: Transaction Report* (Feb. 2, 2009), *available at* http://www.treasury.gov/initiatives/eesa/docs/transaction_report_02-02-09.pdf [hereinafter *TARP Transaction Report*]. As of January 30, 2009, the Capital Purchase Program had spent over $195 billion on 361 different financial institutions. *Id.*

9. *See infra* note 73 and accompanying text.

10. U.S. Government Accountability Office, GAO-09-296, *Troubled Asset Relief Program: Status of Efforts to Address Transparency and Accountability Issues* 68-69 (January 2009), *available at* http://www.gao.gov/new.items/d09296.pdf [hereinafter *GAO January 2009 Report*].

bailout funds.[11] These facts illustrate the lack of transparency, to the public and the government, which is consistent throughout the EESA and its programs.

Even though Congress had the foresight to provide oversight to the EESA, the oversight lacks completeness and leaves many issues of concern. Congress established two administrative agencies for the overall oversight of the EESA, the Financial Stability Oversight Board (FSOB) and the Congressional Oversight Panel (COP).[12] Along with one oversight entity already in existence, the Comptroller General (CG) who is the director of the Government Accountability Office, Congress also established another oversight entity, the Special Inspector General of the Troubled Asset Relief Program (SIG TARP), to perform audit oversight of the EESA.[13] Even with these oversight protections, there are too many holes in the program to provide the necessary oversight of the EESA.[14]

This article will outline and analyze the EESA, with regard to how it is being applied under the laws applicable to the first allocations of the TARP funds. Part II will briefly trace the background and history of the economic crisis in the United States, which prompted the need for the EESA, as well as the process in which the EESA was enacted.[15] Part III will summarize the EESA and go into detail regarding four of the major actions taken to stabilize the financial institutions of the United States.[16] Part IV will analyze the details regarding the EESA's four major oversight entities and describe some of the trying issues present in each one.[17] Part V proposes methods to revamp the EESA's lack of transparency, accountability of TARP funds, and lack of consequences for financial institutions' failure to comply with the EESA and its programs.[18] Finally, in Part VI, this article will conclude by summarizing the

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11. *See infra* notes 287-327 and accompanying text.
12. *See infra* notes 182-83 and accompanying text.
13. *See infra* notes 183-84 and accompanying text.
14. *See infra* notes 186-285 and accompanying text.
15. *See infra* notes 20-51 and accompanying text.
16. *See infra* notes 52-180 and accompanying text.
17. *See infra* notes 181-286 and accompanying text.
18. *See infra* notes 287-348 and accompanying text.

areas of the EESA that are in need of revision, and the anticipated future of the remaining TARP funds.[19]

II. Historical Background

A. Causes of the Economic Crisis in the United States

The United States had major signs of an economic recession beginning in early 2008. In March 2008, Bear Stearns, one of the biggest banks and brokerage firms in the world, was forced to accept an emergency loan from JP Morgan Chase and the Federal Reserve Bank of New York in order to avoid going insolvent.[20] In addition, in April 2008, America was hit with an airline crisis that caused five airlines to go out of business in two weeks and another to file for bankruptcy.[21] Other events foreshadowed America's economic downturn as well, such as the record high prices for oil and gold.[22] On April 9, 2008, the price for a barrel of oil reached $110, which was a major reason for the airline crisis and other panic spread across the United States.[23] In March 2008, gold sold for more than $1,000 per ounce on the global market.[24] The price of gold set off alarms when it was coupled with the fact that at the time the American dollar was getting weaker.[25] All of these factors contributed to the economic crisis of 2008, but the largest contributor had to deal with

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19. *See infra* notes 349-59 and accompanying text.

20. Yalman Onaran, *Bear Stearns Gets Emergency Funds From JPMorgan*, BLOOMBERG.COM, March 14, 2008, *available at* http://www.bloomberg.com/apps/news?pid=20601087&sid=aJnjOuYTjv00&refer=home.

21. Peppercoin Insurance, *Economic Credit Crisis of 2008*, http://www.peppercoin.com/200805/economic-credit-crisis-of-2008 (last visited Feb. 12, 2009).

22. Ben Rooney, *Getting in on the Gold Rush*, CNN MONEY.COM, Mar. 13, 2008, *available at* http://money.cnn.com/2008/03/13/pf/gold_howto/index.htm; Kenneth Musante, *Oil Reaches $112 for the First Time*, CNN Money.com, Apr. 9, 2008, *available at* http://money.cnn.com/2008/04/09/markets/eia/index.htm?postversion=200804091.

23. Musante, *supra* note 22.

24. Rooney, *supra* note 22.

25. *Id.*

the subprime mortgage crisis caused by the downturn in the housing market that led to the demise of many major financial institutions.

Over the past decade, the lending practices utilized by the financial institutions have become relaxed and irresponsible. In the early 1990s, someone looking for a loan had to place, on average, a twenty percent down payment of the purchase price and had to prove possession of sufficient income to be able to repay the loan in a timely fashion.[26] Even with these restrictions, potential buyers who met these requirements were often denied loans.[27] Starting around 1997, financial institutions began making high-risk mortgage loans to high-risk borrowers, including illegal immigrants.[28] A form of these high risk loans included the "No Income, No Job, and No Assets" loans, which helped bring the average down payment for first-time home buyers to two percent, and forty-three percent of the buyers made no down payment whatsoever.[29] Other forms of high risk loans that were made highly available were interest-only adjustable rate mortgages.[30] These allowed the homeowner to pay solely the interest, not the principal, during an initial period.[31] Financial institutions were also highly dependent on automated loan approval systems, which have been accused of not having the appropriate review and documentation.[32] In 2007, forty percent of all subprime loans were generated by automated underwriting.[33] As the housing bubble burst and housing prices began to depreciate, refinancing

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26. Holden Lewis, *Programs that Cure the Down-Payment Blues*, BANKRATE.COM, http://www.bankrate.com/brm/news/mtg/20020110a.asp (last visited Feb. 12, 2009).

27. *Id.*

28. Charles W. Calomiris and Joseph R. Mason, *High Loan-to-Value Mortgage Lending: Problem or Cure?*, AEI PRESS, 22 (1999), *available at* http://www.aei.org/docLib/20021130_71252.pdf.

29. World-Crisis.net, *Real Estate Bubble*, http://www.istockanalyst.com/article/viewarticle+articleid_2531032.html (last visited Feb. 12, 2009).

30. *Id.* The value of United States subprime mortgages was estimated at $1.3 trillion as of March 2007. *Id.* Approximately sixteen percent of subprime loans with adjustable rate mortgages were ninety days delinquent or in foreclosure as of October of 2007. *Id.* This is almost triple the rate of 2005. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

became more difficult. This burst led people to begin to default on their loans as their loans reset to higher interest rates and payment amounts. As of March 2008, an estimated 8.8 million homeowners had zero or negative equity in their homes, causing many homeowners to default on their loans.[34] The vast amount of loans defaulting has caused financial institutions, from around the world, to recognize subprime related losses and write-downs exceeding $501 billion as of August 2008.[35]

All of these negative economic situations, which occurred around the United States, prompted financial concerns for investors and caused their rapid withdrawal from the stock market. On September 8, 2008, the United States government seized two of the nation's largest financial companies, Fannie Mae and Freddie Mac, who provided around three-quarters of new home mortgages to American citizens.[36] If this was not enough, 158-year old Lehman Brothers Holdings, Inc. collapsed into bankruptcy one week later.[37] This accelerated the downward spiral of American International Group.[38] Additionally, there was the forced merger of Merrill Lynch and Bank of America worth roughly $50 billion.[39] This was followed with the largest failure in U.S. banking history when Washington Mutual, Inc. was forced to strike a deal to sell the bulk of its operations to J.P.

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34. *Id.* This was almost eleven percent of all the homeowners in the United States and the fact they had zero equity in their home meant their homes were worth less than their mortgages. *Id.* This provided an incentive to "walk away" from their homes despite the negative credit rating that would ensue. *See id.*

35. Onaran, *supra* note 20.

36. James R. Hagerty et al., *U.S. Seizes Mortgage Giants*, WALL ST. J., Sept. 8, 2008, *available at* http://online.wsj.com/article/SB122079276849707821.html. The Treasury Department will acquire $1 billion of preferred shares in Fannie Mae and Freddie Mac without providing immediate cash, and has pledged to provide up to $200 billion to both as they cope with the heavy losses on mortgage debt. *Id.*

37. Carrick Mollenkamp et al., *Lehman's Demise Triggered Cash Crunch Around Globe*, WALL ST. J., Sept. 29, 2008, *available at* http://online.wsj.com/article/SB122266132599384845.html.

38. Vikas Bajaj, *Wall St. Goliath Teeters Amid Fear of Wider Crisis*, N.Y. TIMES, Sept. 13, 2008, *available at* http://www.nytimes.com/2008/09/14/business/14spiral.html.

39. Associated Press, *Bank of America to Buy Merrill Lynch*, MSNBC, Sept. 15, 2008, *available at* http://www.msnbc.msn.com/id/26708958.

Morgan Chase & Co. on September 26, 2008.[40] The collapse of these financial institutions, and others, alarmed the American public and motivated the government to take action in an attempt to stabilize the economy.

B. The Process of Enacting the Emergency Economic Stabilization Act of 2008

On September 20, 2008, United States Treasury Secretary Henry Paulson introduced a plan that was designed to help fix the problems associated with America's financial institutions' holdings of illiquid mortgage backed securities.[41] This plan was named the TARP.[42] Over the next week, Congressional leaders, including both 2008 presidential candidates, started working with the Bush Administration and the Treasury department on finalizing Paulson's initial proposal.[43] On September 29, 2008, the House of Representatives put the economic bailout proposal to a vote under amendment H.R. 3997.[44] The amendment was rejected by a roll call vote of 228 to 205, with one person abstaining.[45] The rejection of H.R. 3997 caused stocks to further plummet.[46] The Dow Jones dropped nearly 788 points, which was the largest single day point drop ever, and the stock market lost approximately $1.2 trillion in

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40. Robin Sidel et al., *WaMu is Seized, Sold Off to J.P. Morgan, In Largest Failure in U.S. Banking History*, WALL ST. J., Sept. 26, 2008, *available at* http://online.wsj.com/article/SB122238415586576687.html.

41. Deborah Solomon and Damian Paletta, *U.S. Bailout Plan Calms Markets, But Struggle Looms Over Details*, WALL ST. J., Sept. 20, 2008, *available at* http://online.wsj.com/article/SB122186549098258645.html.

42. *Text of Draft Proposal for Bailout Plan*, N.Y. TIMES, Sept. 20, 2008, *available at* http://www.nytimes.com/2008/09/21/business/21draftcnd.html.

43. David M. Herszenhorn and Carl Hulse, *Breakthrough Reached in Negotiations on Bailout*, N.Y. TIMES, Sept. 28, 2008, *available at* http://www.nytimes.com/2008/09/28/business/28bailout.html.

44. H.R. 3997, (Sept. 29, 2008) *available at* http://clerk.house.gov/evs/2008/roll674.xml.

45. *Id.*

46. Alexandra Twin, *Stocks Crushed*, CNNMoney.com, Sept. 29, 2008, *available at* http://money.cnn.com/2008/09/29/markets/markets_newyork/index.htm.

market value.[47] This provided even more motivation for the Senate to pass a bill that would fix America's economic crisis. On October 1, 2008, the Senate voted on a revised version of the EESA, which was attached as an amendment to H.R. 1424.[48] The amendment, along with the entire bill, was passed by the Senate with a vote of 74 to 25.[49] On October 3, 2008, the House of Representatives passed H.R. 1424 by a vote of 263 to 161, which sent the bill to the President of the United States for final approval.[50] A few hours later, President George W. Bush signed the bill into law, empowering the Treasury Department to use up to $700 billion to rescue America from the crisis of their failing financial institutions.[51]

III. THE EMERGENCY ECONOMIC STABILIZATION ACT OF 2008

A. A Basic Summary

The EESA was generally established to grant the Secretary with the authority to restore liquidity and stability to the financial system of the United States.[52] This authority must be used by the Secretary in a manner that "protects home values, college funds, retirement accounts, and life savings; preserves homeownership and promotes jobs and economic growth; maximizes overall returns to the taxpayers of the United States; and provides public accountability for the exercise of such authority."[53]

The main component of the EESA is the establishment of the TARP.[54] Under this program, the Secretary was authorized to

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47. *Id.*

48. H.R. 1424, 110th S. (Oct. 1, 2008), *available at* http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=2&vote=00213.

49. *Id.*

50. H.R. Doc. No. 681 (Oct. 3, 2008), *available at* http://clerk.house.gov/evs/2008/rol681.xml.

51. The White House, *President Bush Signs H.R. 1424 Into Law*, (Oct. 3, 2008), *available at* http://www.whitehouse.gov/news/releases/2008/10/20081003-17.html.

52. Emergency Economic Stabilization Act § 2(1).

53. *Id.* at § 2(2).

54. *Id.* at § 101-36.

purchase, and to make commitments to purchase "troubled assets"[55] from any "financial institution"[56] on any terms and conditions that are determined by the Secretary to be in accordance with the EESA.[57] The EESA also established the Office of Financial Stability (OFS), through which the Secretary will implement any necessary program for the TARP.[58] Furthermore, the Secretary has the power to take any action the Secretary finds necessary to carry out the authorities of the EESA.[59]

Through the EESA, Congress gave the Secretary access to $700 billion to purchase troubled assets.[60] These funds were available to

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55. *Id.* at § 3(9). Congress envisioned the TARP to purchase troubled assets that were defined as "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." *Id.* at § 3(9)(a). However, Congress envisioned that there may also be circumstances of such assets that would not fit the first definition, so Congress gave the Secretary claim to any other financial instrument as a troubled asset in which the purchase would be necessary to promote financial stability. *Id.* at § 3(9)(b). The only limit to this authority is that the Secretary must first consult with the Chairman of the Board of Governors of the Federal Reserve System and submit such a determination to the appropriate committees of Congress in writing. *Id.* at § 3(9)(b).

56. *Id.* at § 3(5). Only financial institutions may participate in TARP. *Id.* at § 101(a). The EESA defines a financial institution as "any institution, including but not limited to" an example list of financial institutions that are "established and regulated" under the laws of the Unites States and have "significant operations in the United States." *Id.* at § 3(5). Even though this definition leaves gray areas as to what technically is a financial institution, it clearly excludes foreign central banks and any institution owned by a foreign government. *Id.*

57. *Id.* at § 101(a)(1). However, the EESA also requires that the Secretary sell the assets at a time and price that maximizes their value to taxpayers, who will gain value from these proceeds by the paying down of the national debt. *Id.* at § 106.

58. Emergency Economic Stabilization Act § 101(a)(3). This new administrative agency is an executive agency and a subunit within the Office of Domestic Finance of the Department of the Treasury. *Id.*

59. *Id.* at § 101(c). This includes the authority to hire employees, enter into contracts, designate financial institutions as financial agents of the Federal Government, and establish vehicles that can purchase, hold, and sell troubled assets and issue obligations. *Id.* at §§ 101(c)(1)-(4). In addition, the Secretary is authorized to issue regulations and guidance to define terms or carry out the authorities or purposes of the EESA. *Id.* at § 101(c)(5).

60. *Id.* at § 115(a).

the Secretary in three different stages, with the first stage automatically granting the Secretary access to $250 billion.[61] The next stage, which could occur at any time, would bestow an additional $100 billion to the Secretary, if the President issues a written certification to Congress.[62] The last $350 billion of the bailout would only be available to the Secretary as long as Congress does not enact a joint resolution disapproving the Secretary's plan to use the remainder of the bailout funds.[63]

With the EESA granting the Secretary an enormous amount of discretion to use $700 billion of taxpayers' money, Congress also established and delegated oversight to various administrative agencies.[64] The EESA established three different administrative agencies.[65] Two had the duty to provide general oversight of the EESA program.[66] In order to oversee the auditing of the EESA, the other newly established oversight entity was paired with an entity already in existence.[67] These entities, along with others, are what protect against the abuse of the Secretary's authority and ensure the stability of the taxpayers' money.[68]

On October 14, 2008, the Treasury launched its first program under the TARP, the Capital Purchase Program (CPP), and disclosed the Secretary's departure from Congress's original plan to purchase toxic assets from the financial institutions.[69] Instead, the Secretary would use a total of $250 billion for the CPP, with the first allotment going to nine American bank holding companies that were

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61. *Id.*

62. *Id.* at § 115(a)(2).

63. *Id.* at §§ 115(a)(3); 115(c). In order for the Secretary to receive this money, the Secretary must submit a written report that outlines the use of the funds, after which Congress has fifteen calendar days to issue their joint resolution. *Id.* at § 115(c). If Congress does not issue its joint resolution within the fifteen day window, then the Secretary is automatically authorized to use the remaining $350 billion. *Id.* at § 115(a)(3).

64. *See infra* notes 181-85 and accompanying text.

65. *See infra* notes 181-84 and accompanying text.

66. *See infra* notes 181-82 and accompanying text.

67. *See infra* note 184 and accompanying text.

68. *See infra* notes 181-86 and accompanying text.

69. *See* Jeanne Sahadi, *Rescue Plan: What's In It*, CNNMoney.com, (Oct. 14, 2008) http://money.cnn.com/2008/10/14/news/economy/rescue_plan_foursteps.

determined to be systematically important to the economy.[70] In addition to this program, the Secretary worked with various government agencies to initiate other actions that would strengthen the United States' financial market. These actions mainly include the Systemically Significant Failing Institution Program (SSFI Program), the Temporary Liquidity Guarantee Program (TLG Program), and the temporary increase in deposit insurance.[71]

B. Programs Initiated Through the Emergency Economic Stabilization Act in Order to Stabilize the United States' Financial Institutions

1. The Capital Purchase Program

On October 14, 2008, the Treasury announced the first program to be launched under the EESA, the CPP.[72] This voluntary program was designed to "encourage U.S. financial institutions to build their capital base, which in turn will increase the capacity of those institutions to lend to U.S. businesses and consumers and to support the U.S. economy and stabilize the financial system."[73] The CPP

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70. Of the $250 billion that can be distributed, there is a limit to $25 billion per financial institution. This initial injection to the United States banking system was distributed as followed: Citigroup-$25 billion; JP Morgan Chase-$25 billion; Bank of America-$25 billion (including $5 billion for its Merrill Lynch acquisition); Wells Fargo-$25 billion (including $5 billion for its Wachovia acquisition); Goldman Sachs-$10 billion; Morgan Stanley-$10 billion; Bank of New York-$2 to $3 billion; Mellon Bank-$2 to $3 billion; and State Street Bank-$2 to $3 billion. *Treasury to Infuse $250 Billion of Capital into Nine Largest Banks*, Blank Rome LLP, Oct. 14, 2008, http://www.blankrome.com/index.cfm?contentID=37&itemID=1679. This was a major occurrence because it left only $450 billion available to carry out the rest of the TARP as it was originally contemplated by Congress. *Id.*

71. 1 Fin. Stability Oversight Bd. Q. Rep. 13-16 (2008) [hereinafter *FSOB First Report*]. In addition, the Secretary has also established others programs called the Targeted Investment Program and the Asset Guarantee Program. *Id.*

72. Emergency Economic Stabilization Act, U.S. Dept. of the Treasury (Mar. 24, 2009), *available at* www,treasury.gov/initiatives/eesa/program-descriptions/cpp.shtml.

73. U.S. Dep't of the Treasury, *Second Tranche Report to Congress* at 2 (Dec. 2, 2008), *available at*

enabled the Treasury to purchase up to $250 billion of senior preferred shares of stock and warrants for future Treasury purchases of common stock in these institutions.[74] On October 28, 2008, the Treasury signed an agreement with nine financial institutions that were considered systematically important to the U.S. because, when combined, they held fifty percent of all United States deposits.[75] These nine financial institutions were allocated $125 billion, which is half of the total amount available under the CPP.[76] As of December 31, 2008, the CPP has spent $187,539,500 in a total of 217 private and public financial institutions in over forty states and Puerto Rico.[77]

Funding through the CPP will be available to all sized qualified institutions, which includes publicly traded and privately held financial institutions.[78] Bank holding companies, financial holding companies, insured depository institutions, and savings and loan holding companies that are engaged solely or predominately in activities that are permissible for financial holding companies, under relevant law, may be eligible to participate in the CPP.[79] In addition, the institution must be established and regulated under the laws of the United States and must have significant operations in the United States; however, it cannot be controlled by either a foreign bank or a

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http://www.treasury.gov/initiatives/eesa/docs/TransactionReport-11212008.pdf [hereinafter *Second Tranche Report*].

74. *Id.*

75. U.S. Dep't of the Treasury, *First Tranche Report to Congress* at 2 (Nov. 4, 2008), *available at* http://www.treasury.gov/initiatives/eesa/docs/Tranche-Reportfinal.pdf [hereinafter *First Tranche Report*].

76. U.S. Dep't of the Treasury, *Section 105(a) Troubled Asset Relief Program Report* at 8 (Jan. 6, 2009), *available at* http://www.treasury.gov/initiatives/eesa/docs/105Report_010609.pdf [hereinafter *Second Section 105(a) TARP Report*].

77. *Id.* at 8-10.

78. Neel Kashkari, Interim Assistant Secretary for Financial Stability, *Remarks on Financial Markets and TARP Update* (Dec. 5, 2008), *available at* http://www.treas.gov/press/releases/hp1314.htm.

79. U.S. Dep't of the Treasury, *Application Guidelines for TARP Capital Purchase Program* at 1 (2009), *available at* http://www.treas.gov/initiatives/eesa/docs/application-guidelines.pdf [hereinafter *Application Guidelines for CPP*].

foreign company.[80] Even though all financial institutions use the same CPP application form, there are different deadlines to submit the CPP application depending on the type of financial institution applying.[81] This application must be submitted to the financial institution's primary regulator.[82] The Treasury has established a standardized evaluation process to help ensure that all regulators use the same standards when reviewing applications to ensure consistency.[83] Once the primary regulator has completed its evaluation, the application is sent with the regulator's recommendation to the OFS for final approval, further inquiry, or rejection.[84]

If an application for the CPP is accepted, then the amount of funding that can be given to the financial institution cannot be less than one percent of its risk-weighted assets and could not be more than the lesser of $25 billion or three percent of its risk weighted

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80. Emergency Economic Stabilization Act § 3.

81. *Application Guidelines for CPP*, *supra* note 79, at 1. All applications to participate in the CPP by a publicly traded financial institution must be submitted no later than November 14, 2008. *Id.* For any privately held financial institution whose stock is not traded on the national securities exchange, they have until December 8, 2008 to submit an application to participate in the CPP. *Id.*

82. U.S. Dep't of the Treasury, *Responses to Questions of the First Report of the Congressional Oversight Panel for Economic Stabilization*, at 11 (Dec. 30, 2008), *available at* http://www.ustreas.gov/press/releases/reports/123108%20cop%20response.pdf [hereinafter *Treasury Responses to COP*]. The financial institution's primary regulator can be either the Federal Reserve, the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (OCC), or the Office of Thrift Supervision (OTS). *Id.*

83. *Id.* These banking regulators are to consider bank examination ratings, selected performance ratios, and also the financial institutions' intended use of the capital injection. 1 Congressional Oversight Panel Rep. 28 (Dec. 10, 2008), *available at* http://cop.senate.gov/documents/cop-121008-report.pdf [hereinafter *First COP Report*]. The Treasury values the expertise of the Federal banking agencies, and will give considerable weight to their recommendations. *Id.* Financial institutions that have higher bank examination ratings are presumptively approved by the regulators. *Id.* However, those with lower bank examination ratings are sent to the CPP Council for further consideration where the Council may also look at additional factors such as the existence of a signed merger agreement and private equity investment. *Id.*

84. *Second Tranche Report*, *supra* note 73, at 2.

assets.[85] In exchange for the capital funding, the financial institution will issue to the Treasury non-voting preferred stock with a liquidation value equal to the funding provided, plus warrants for future common stock purchases.[86] The preferred stock will be nonvoting, cumulative, perpetual, will rank senior to common stock, and is *pari passu* to existing senior preferred stock.[87] The senior preferred stock will pay quarterly dividends at a rate of five percent per year for the first five years, and will be adjusted to nine percent thereafter.[88] This preferred stock cannot be redeemed within the first three years from the date of the investment, unless the institution uses the proceeds from a "Qualified Equity Offering" which results in aggregate gross proceeds of at least twenty-five percent of the issue price of the preferred stock.[89] Three years from the date of this CPP investment, the preferred stock may be redeemed at any time, at the option of the financial institution.[90] Regardless of when the stock is finally redeemed, there are different pricing scales depending on whether the stock is cumulative or non-cumulative.[91] All forms of

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85. U.S. Dep't of the Treasury, *Tarp Capital Purchase Program: Summary of Senior Preferred Terms*, at 1 (2008), *available at* http://www.treas.gov/press/releases/reports/termsheet.pdf [hereinafter *CPP Term Sheet*].

86 *Id.* at 1-5.

87. *Id.* at 1-2. The preferred stock is nonvoting, unless the institution does not issue the dividend to the Treasury for six quarters, regardless of whether or not the dividend is consecutive. *Id.* at 3. If the financial institution does not issue a dividend for six quarters, then through the use of the preferred stock the Treasury can elect two directors to add to any directors elected by shareholders of the other classes of preferred stock. *Id.* This right to elect directors will end when full dividends have been paid for four consecutive dividend periods. *Id.*

88. *Id.* at 2. If the senior preferred stock is issued by a bank that is a subsidiary of the holding companies, then the financial institution will pay cumulative dividends. *Id.* If the Senior Preferred stock is issued by banks which are not subsidiaries of holding companies, then the financial institution will pay non-cumulative dividends. *Id.*

89. *Id.* A qualified equity offering is the sale, after the date of the CPP investment, of qualifying preferred stock or common stock for cash. *Id.*

90. *CPP Term Sheet*, *supra* note 85, at 2. After three years from the CPP investment, the preferred stock can be redeemed in whole or in part. *Id.*

91. *Id.* The redemption of any cumulative preferred stock will be at 100 percent of its issue price, plus any accrued and unpaid dividends. *Id.* Furthermore, the redemption of any non-cumulative preferred stock will be at 100 percent of its

redemption are subject to the approval of the financial institution's primary federal bank regulator.[92] These preferred shares owned by the Treasury are not subject to any contractual restrictions which may limit their transferability.[93]

The standardized terms of the CPP, used by all participating financial institutions, also include restrictions on the financial institutions to protect the taxpayers' investment and provisions to enable taxpayers to benefit from the future profitability of the firm.[94] For financial institutions participating in the CPP, there is a restriction on issuing dividends and redeeming other shares of stock.[95] If there is "any Senior Preferred stock outstanding," then the financial institution cannot declare or pay any dividends "on junior preferred shares, preferred shares ranking pari passu with the Senior Preferred, or common shares."[96] In addition, as long as any Senior Preferred shares are outstanding, then the financial institution may not "redeem any junior preferred share, preferred shares ranking pari passu with the Senior Preferred or common shares," unless the dividends are correctly paid for the cumulative or non-cumulative Senior Preferred shares of stock.[97] Financial institutions are also restricted from increasing any common dividends per share for a maximum of three years after the CPP investment is made, unless they receive the financial institution's consent.[98] The Treasury's

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issue price, plus any accrued and unpaid dividends for the then current dividend period regardless of whether any dividends are declared. *Id.* After all the preferred stocks held by the Treasury are redeemed, the financial institution may repurchase any other equity security of theirs that the Treasury is holding. *Id.*

92. *Id.*

93. *Id.*

94. U.S. Dep't of the Treasury, *Section 105(a) Troubled Asset Relief Program Report* at 3 (Dec. 5, 2008), *available at* http://www.treas.gov/initiatives/eesa/docs/TARPfirst-105report.pdf [hereinafter *First Section 105(a) TARP Report*].

95. *CPP Term Sheet*, *supra* note 85, at 2.

96. *Id.*

97. *Id.* at 2-3. For cumulative Senior Preferred shares of stock, all of the accrued and unpaid dividends for all past dividend periods must be fully paid. *Id.* at 3. For non-cumulative Senior Preferred shares of stock, only the full dividend for the latest completed dividend period must be declared and paid in full. *Id.*

98. *Id.* However, a financial institution may increase its common dividends per share, prior to the three years of the CPP investment if the senior preferred

consent is also required for any share repurchases until three years from the date of the CPP investment, unless the Senior Preferred shares have been totally redeemed or completely transferred to third parties.[99]

Another major restriction on the financial institutions participating in the CPP is that they must comply with new executive compensation requirements.[100] At or before signing the securities purchase agreement with the Treasury, the financial institution must have changed its senior executive officers' (SEO)[101] compensation to comply with Section 111 of the EESA.[102] In order to comply with section 111(b)(2)(A) of the EESA, the financial institution's "compensation committee"[103] must review the SEO incentive compensation arrangements to make sure they do not encourage unnecessary and excessive risks that could threaten the value of the financial institution.[104] In addition, the financial institution's

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shares are completely redeemed or the Treasury has transferred all of the Senior Preferred shares to third parties. *Id.*

99. *Id.* There is an exception to this statement. The Treasury's consent is not required for repurchases of the senior preferred shares, junior preferred shares, or common shares that are in connection with any benefit plan that is in the ordinary course of business and is consistent with past practices. *Id.*

100. Emergency Economic Stabilization Act §§ 111, 302.

101. First, an SEO is a "named executive officer" who is employed by a financial institution participating in the CPP while the Treasury holds an equity or debt position acquired under the CPP. TARP Capital Purchase Program, 31 C.F.R. Part 30 § 30.2 (2008). Second, a named executive officer is the principal executive officer (PEO), the principal financial officer (PFO), and the three highest compensated executive officers other than the PEO or the PFO. *Id.* To determine the three most highly compensated executive officers one must look at the officer's total compensation for the last completed fiscal year, as stated in Item 402 of Regulation S-K. *Id.*

102. U.S. Dep't of Treasury, *Capital Purchase Program: Securities Purchase Agreement*, § 4.10 (2008), *available at* http://www.treas.gov/press/releases/reports/spa.pdf.

103. If a financial institution does not have a compensation committee, they can still comply with section 111(b)(2)(A) of the EESA by using another committee acting in a similar capacity. 31 C.F.R. Part 30 § 30.3.

104. *Id.* The compensation committee should discuss with the financial institution's senior risk officers about the long-term and short-term risks that could threaten the value of the financial institution. *Id.* at § 30.4. The compensation committee should then review the SEO's incentive compensation arrangements to see if they could lead SEOs to take such risks. *Id.* If anything is found that could

compensation committee must meet, review, and "certify"[105] that it has completed the review of the SEO's compensation arrangements on an annual basis, if not more frequently.[106] For a financial institution to comply with section 111(b)(2)(B) of the EESA, they must require any SEO bonuses and incentive compensation paid while the Treasury holds an equity or debt position in the financial institution to be subject to being recovered or claw-backed by the financial institution.[107] This will occur if the payments were based on materially inaccurate statements or any other materially inaccurate performance metric criteria used to award bonuses and incentive compensation.[108] In addition, financial institutions' taxable deductions for an executive's remuneration attributed to services performed, is reduced from $1,000,000 to $500,000 for any financial institutions participating in the CPP.[109]

The last provision of section 111 of the EESA which financial institutions must comply with prohibits a financial institution from paying a "golden parachute" payment to any SEO while the Treasury holds any equity or debt position, acquired under the CPP, in these financial institutions.[110] In order to be deemed a prohibited golden

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lead SEOs to take such risks, then these features in the compensation arrangements should be limited to remove the incentive of taking these unnecessary or excessive risks. *Id.*

105. The following sentence is an example of a statement which will satisfy the certification requirement of section 111(b)(2)(A): "The compensation committee certifies that it has reviewed with senior risk officers the SEO incentive compensation arrangements and has made reasonable efforts to ensure that such arrangement do not encourage SEOs to take unnecessary and excessive risks that threaten the value of the financial institution." *Id.* at § 30.5(a). For public companies, they should files this certification in the "Compensation Discussion and Analysis required pursuant to Item 402(b) of Regulation S-K under the federal securities laws (17 C.F.R. § 229.402)." *Id.* at § 30.5(b). Private financial institutions must still file the same certification, but with their primary regulatory agency. *Id.* at § 30.5(c).

106. *Id.* at § 30.3.

107. *Id.* at § 30.6.

108. *Id.*

109. Emergency Economic Stabilization Act § 302. However, this provision still does not limit the compensation for the executives of financial institutions that participate in the TARP. *Id.* Instead, this provision only limits the financial institution's taxable deduction for the compensation due to its executives. *Id.*

110. *Id.* at § 111(b)(2)(C).

parachute payment under section 111(b)(2)(C) of the EESA, the payment must be made to a SEO on account of an "applicable severance from employment"[111] and the present value of all such payments of compensation equals or exceeds three times the SEO's base compensation amount.[112] All of these restrictions on executive compensation apply to institutions that participate in the CPP and will continue to apply to institutions that are later acquired by another company that is not participating in the CPP.[113] In addition, a company cannot become subject to these executive compensation restrictions merely by acquiring a company that is participating in the CPP.[114]

The Treasury will also receive, in addition to the senior preferred shares of stock, warrants for common shares of stock from the financial institutions participating in the CPP, which will allow taxpayers to benefit from any appreciation in the market value of the invested financial institution.[115] These warrants have a ten year term equal to fifteen percent of the Senior Preferred shares amount on the date of the investment, which may be further reduced as time

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111. This generally occurs when an SEO is either "involuntarily terminated" from the financial institution or when an SEO's employment is terminated in connection with any bankruptcy filing, insolvency, or receivership of the financial institution. 31 C.F.R. Part 30 § 30.9. For the purposes of section 111(b), an SEO is involuntarily terminated when an employer independently exercises unilateral authority to terminate the SEO's services, even though the SEO is willing and able to continue performing services. *Id.* In two voluntary instances, the voluntary termination of an SEO will be considered an involuntary termination under Section 111(b). *Id.* The first instance is when an SEO voluntarily terminates himself or herself due to a materially negative change in the SEO's employment relationship. *Id.* The second instance occurs when the facts and circumstances of the employment indicate the employer would have terminated the SEO had he or she not voluntarily terminated himself or herself and the SEO had knowledge that he or she was going to be terminated. *Id.*

112. 26 U.S.C. § 280G(e).

113. 31 C.F.R. Part 30 § 3.11(a). Once the participating financial institution is acquired by a non-participating company, the restrictions on executive compensation will continue to apply until the earlier of one year after the acquisition or when the Treasury ceases to hold any equity or debt in the institution. *Id.*

114. *Id.*

115. *First Tranche Report*, *supra* note 75, at 3.

passes.[116] The exercise price of warrants is based on a twenty trading-day trailing average price of common stock from the date the financial institution entered the CPP; however, the price can also be reduced for every six months that the financial institution has not received consent from its shareholders for issuing the warrants.[117] These warrants are immediately exercisable, in whole or in part,[118] and the Treasury has agreed not to exercise any voting power stemming from the common stock obtained through these warrants.[119]

2.Temporary Increase in Deposit Insurance

When the EESA was enacted on October 3, 2008, it also temporarily raised the basic limit on the Federal Deposit Insurance Corporation's (FDIC) insurance coverage from $100,000 to $250,000 per depositor for all deposit categories.[120] This temporary increase in FDIC insurance is only effective until December 31, 2009.[121] The deposit insurance was increased to help reassure Americans concerned about the safety of their bank accounts and to help prevent a widespread fear of the collapse of the financial market causing a run on banks.[122]

3.Temporary Liquidity Guarantee Program

On October 14, 2008, the FDIC announced the TLG Program as an attempt to circumvent the nationwide crisis relating to America's

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116. *CPP Term Sheet*, *supra* note 85, at 4-5. The number of warrants will be reduced by fifty percent if the financial institution can receive gross proceeds equal to at least 100 percent of the Senior Preferred stock by December 31, 2009. *Id.*

117. *Id.* at 4. The reduction can only reduce the exercise price of the warrants by a maximum of forty-five percent. *Id.*

118. *Id.*

119. *Id.* at 5.

120. Emergency Economic Stabilization Act § 136.

121. *Id.*

122. Federal Deposit Insurance Corporation, *Emergency Economic Stabilization Act of 2008 Temporarily Increases Basic FDIC Insurance Coverage from $100,000 to $250,000 Per Depositor*, Oct. 7, 2008, http://www.fdic.gov/news/news/press/2008/pr08093.html.

financial institutions.[123] The FDIC believed that this program would preserve confidence in the banking system and would encourage liquidity so that financial institutions could lend to creditworthy businesses and consumers.[124] This program is a "voluntary and time-limited program that will be funded through special fees without reliance on taxpayer funding."[125] The TLG Program consists of two different temporary programs.[126] First, a Debt Guarantee Program was established to guarantee "newly-issued senior unsecured debt of insured depository institutions and most U.S. holding companies."[127] Second, the Transaction Account Guarantee Program was created and designed to guarantee "certain noninterest-bearing depository institutions."[128] The FDIC believes these two programs will help increase the available capital and lower the cost of credit.[129]

On October 29, 2008, the FDIC published an interim rule that was designed to implement the TLG Program and gave the public a fifteen-day opportunity to make comments.[130] The FDIC received many comments and later created an Amended Interim Rule on November 4, 2008, while still requesting additional comments.[131] After receiving over 700 comments regarding the Interim Rule and the Amended Interim Rule, the FDIC executed a Final Interim Rule regarding the TLP Program on November 26, 2008.[132]

The Final Rule established which institutions were eligible to participate in either the Debt Guarantee Program, Transaction Account Guarantee Program, or both.[133] FDIC-insured banks and thrifts, U.S. bank holding companies with an FDIC-insured subsidiary, and certain U.S. savings and loan holding companies are

123. Temporary Liquidity Guarantee Program, 7 Fed. Reg. 72244, 72244 (Nov. 26, 2008) (to be codified at 12 C.F.R. pt. 370).

124. *Id.*

125. *Id.* at 64,181.

126. *Id.* at 72,244.

127. *Id.*

128. *Id.*

129. Temporary Liquidity Guarantee Program, 73 Fed. Reg. at 72,244.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 64,181.

considered eligible institutions for both programs.[134] In addition, the FDIC can designate, after consultation with the appropriate federal banking agency, affiliates of FDIC-insured depository institutions as eligible entities for participation in the Debt Guarantee Program.[135]

As of October 14, 2008, all eligible institutions are presumed to be participating in the TLG Program.[136] These institutions have until December 5, 2008, to affirmatively opt-out of any part or all of the TLG Program by notifying the FDIC of its election.[137] If an institution chooses to participate in the Debt Guarantee Program, the institution is required to fill out a Master Agreement, which must be fully executed and submitted to the FDIC within ten business days of

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134. *Id.* Bank holding companies and savings and loan holding companies must have at least one chartered and operating insured depository institution within their holding company structure in order to be an "eligible entity" that can participate in the TLG Program. *Id.* Additionally, eligible U.S. savings and loan holding companies must either engage only in permissible activities for bank holding companies per section (4)(k) of the Bank Holding Company Act of 1956, or must have at least one FDIC-insured depository institution as of October 13, 2008 that has applied for authority to engage in certain non-banking activities under Section 4(c)(8) of the Bank Holding Company Act of 1956. *Id.*

135. Temporary Liquidity Guarantee Program, 73 Fed. Reg. at 64,181. The FDIC will consider several factors in making this determination such as: "(1) the extent of the financial activity of the entities within the holding company structure; (2) the strength, from a ratings perspective, of the issuer of the obligations that will be guaranteed; and (3) the size and extent of the activities of the organization." Temporary Liquidity Guarantee Program, 73 Fed. Reg. at 72,244. The same basic process will apply for any institution that becomes an eligible entity after October 13, 2008. Federal Deposit Insurance Corporation, *Temporary Liquidity Guarantee Program Frequently Asked Questions*, Jan. 15, 2009, http://www.fdic.gov/regulations/resources/TLGP/faq.html [hereinafter *TLG Program FAQ*].

136. Temporary Liquidity Guarantee Program, 73 Fed. Reg. at 64,181.

137. *Id.* at 66,161. Once the choice to opt out or in is made, the decision is irrevocable. *Id.* However, an entity that has opted-out can have the option to re-elect participation in the TLG Program when there is a merger between it and another eligible entity. *TLG Program FAQ*, *supra* note 135, at 21. In addition, there needs to be conformity with the TLG Program elections between subsidiaries and their parents. *Id.* at 22. Specifically, all eligible entities within a U.S. Bank Holding Company or a U.S. Savings and Loan Holding Company must make the same participating elections or none of the members of the holding company will be eligible to participate in that part of the program. *Id.*

the date the Election Form is completed and submitted.[138] All participating institutions are also required to publicly disclose to its potential lenders and creditors the character of the debt it was offering and whether the debt was guaranteed under the Debt Guarantee Program.[139] Furthermore, all eligible entities must post a notice in the lobby of their main office and in all of their branches of the decision whether to participate in the Transaction Account Guarantee Program or not.[140]

a) Debt Guarantee Program

The Debt Guarantee Program temporarily guarantees all "senior unsecured debt," up to a certain limit that was issued by a participating institution between October 14, 2008 and June 30, 2009.[141] Under this program, the FDIC will guarantee, until June 30, 2012, the unpaid principal and interest of eligible senior unsecured debt when a participating institution fails to make payment or files for bankruptcy.[142] Debt that was issued between October 13, 2008 through December 5, 2008 will be considered a "senior unsecured debt" for the Debt Guarantee Program as long as the debt is evidenced by a written agreement or trade confirmation, has a specific and fixed principal, is not subordinate to any other liability, is non-contingent, and contains no embedded options, forwards, swaps, or other derivatives.[143] Debt that was issued after December 5, 2008 has an additional requirement in that it must have a stated maturity of more than 30 days.[144] In addition, the FDIC gave non-

138. *Id.* at 22. No guaranteed debt may be issued after November 21, 2008, unless the participating institution agrees to be bound by the terms of the Master Agreement. Federal Deposit Insurance Corporation, *Temporary Liquidity Program: Master Agreement Instructions*, at 1 (Nov. 24, 2008), *available at* http://www.fdic.gov/regulations/resources/TLGP/master.pdf. It is not required for an institution to fill out the Master Agreement if they are only participating in the Transaction Account Guarantee Program. *Id.*

139. Temporary Liquidity Guarantee Program, 73 Fed. Reg. at 72,245.

140. *Id.*

141. *Id.*

142. *Id.*

143. *TLG Program FAQ*, *supra* note 135, at 10.

144. Temporary Liquidity Guarantee Program, 73 Fed. Reg. at 72,261.

exclusive examples of debt instruments that would be included and excluded from the Debt Guarantee Program and made a number of other requirements for debt to be deemed eligible senior unsecured debt.[145] For debt issued after December 5, 2008, it also must contain certain terms that are specified in the Master Agreement.[146]

There is a limit to how much the FDIC will guarantee through the Debt Guarantee Program. A participating institution's debt will be guaranteed up to 125 percent of its senior debt outstanding on September 30, 2008 as long as it is scheduled to mature before June 30, 2009.[147] If a participating institution has no outstanding debts or only federal funds purchased on September 30, 2008, then its debt guarantee limit is two percent of its consolidated total liabilities as of September 30, 2008.[148] Participating institutions cannot label debt as FDIC-insured when the institution is in excess of its debt guarantee limit.[149] If an institution issues debt beyond its guaranteed limit, then its assessment fees will be doubled and this action may make the institution subject to enforcement actions and civil money penalties, including the termination of the institution's participation in the Debt Guarantee Program.[150]

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145. *TLG Program FAQ*, *supra* note 135, at 11-13. Examples of included debt instruments are as follows: purchased federal funds, promissory notes, commercial paper, unsubordinated unsecured notes which includes zero coupon bonds, U.S. dollar denominated bank deposits in an international banking facility of an insured depository institution, and U.S. dollar denominated certificates of deposit owed to certain institutions. *Id.* at 11. Examples of excluded debt instruments are as follows: debts that are paired or bundled with other securities, convertible debt, capital notes, the unsecured portion of otherwise secured debt, negotiable certificates of deposit, deposits denominated in a foreign currency, retail debt securities, loans from affiliates, and a few others. *Id.* Senior unsecured debt may pay a fixed or floating interest rate based on the Treasury bill rate, the prime rate, or the LIBOR. Temporary Liquidity Guarantee Program, 73 Fed. Reg. at 72,261.

146. *Temporary Liquidity Guarantee Program: Master Agreement*, *supra* note 138.

147. Temporary Liquidity Guarantee Program, 73 Fed. Reg. at 64,182. This maximum amount will be calculated for each individual participating entity within a holding company structure. *Id.*

148. *Id.* at 72,261. The two percent rule only applies to institutions that are FDIC insured. *Id.* If the institution is not FDIC insured, then it must ask the FDIC to establish a debt guarantee limit for it. *Id.*

149. *TLG Program FAQ*, *supra* note 135, at 17.

150. *Id.*

An institution participating in the Debt Guarantee Program is also required to make certain reports to the FDIC and disclosures to their potential lenders and investors on each issuance of debt.[151] Even if the institution's senior unsecured debt is zero, every participating institution must provide the FDIC, by December 5, 2008, the amount of its senior unsecured debt outstanding as of the close of business on September 30, 2008 that was scheduled to mature on or before June 30, 2009.[152] For every issuance of guaranteed debt after December 5, 2008, the FDIC must be notified of its issuance along with certification from the institution's Chief Financial Officer or equivalent that the debt issued does not exceed the participating institution's debt guaranteed limit.[153] In addition, the FDIC must also be notified in writing within one business day of any payment in default with respect to any of the participating institution's indebtedness, regardless of whether or not it is being guaranteed by the FDIC.[154] Participating institutions also need to specifically disclose to potential lenders or creditors whether or not any senior unsecured debt, issued between December 19, 2008 and June 30, 2009, is guaranteed by the TLG Program.[155]

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151. *Id.*

152. Temporary Liquidity Guarantee Program, 12 C.F.R. § 370.3(c)(1)-(2) (2008).

153. 12 C.F.R. § 370.3(c)(3)-(4).

154. *TLG Program FAQ*, *supra* note 135, at 5.

155. 12 C.F.R. § 370.5(h)(2)-(3). The specific statement, which should be found in all written materials, for FDIC guaranteed debt is:

> This debt is guaranteed under the Federal Deposit Insurance Corporation's Temporary Liquidity Guarantee Program and is backed by the full faith and credit of the United States. The details of the FDIC guarantee are provided in the FDIC's regulations, 12 C.F.R Part 370, and at the FDIC's Web site, http://www.fdic.gov/tlgp. The expiration date of the FDIC's guarantee is the earlier of the maturity date of the debt or June 30, 2012.

12 C.F.R. § 370.5(h)(2). The specific disclosure statement required for non-FDIC guaranteed debt is: "This debt is not guaranteed under the Federal Deposit Insurance Corporation's Temporary Liquidity Guarantee Program." 12 C.F.R. § 370.5 (h)(3).

b) Transaction Account Guarantee Program

The Transaction Account Guarantee Program provides a temporary unlimited guarantee of non-interest bearing transaction accounts at FDIC-insured participating institutions.[156] All "eligible institutions"[157] are deemed to be participating in this program, and it is their obligation to affirmatively opt-out of the program by December 5, 2008.[158] This program provides coverage for non-interest bearing transaction accounts from October 14, 2008 to December 31, 2009.[159] Under the Transaction Account Guarantee Program, the FDIC will pay the claims of depositors holding non-interest bearing transaction accounts "as soon as possible" upon the failure of the institution.[160] The FDIC will first attempt to pay the guaranteed amount into an account at another insured depository institution.[161] If an option to make the payment into an account at another financial institution does not exist, then the FDIC has expressed that it will "mail a check to the depositor for the full

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156. 12 C.F.R. § 370.4(a).

157. The same institutions that are eligible for the Debt Guarantee Program are also considered eligible institutions for the Transaction Account Guarantee Program.

158. 12 C.F.R. § 370.5(c).

159. 12 C.F.R. § 370.4(a). "A 'noninterest-bearing transaction account' is defined as a transaction account with respect to which interest is neither accrued nor paid and on which the insured depository institution does not reserve the right to require advance notice of an intended withdrawal." *TLG Program FAQ*, *supra* note 135, at 6. This definition includes demand deposit checking accounts, but does not include interest bearing money market deposit accounts. *Id.* Generally, even though the Transaction Account Guarantee Program only covers non-interest bearing transaction accounts, the program will also cover two types of interest-bearing accounts. *Id.* The program also guarantees negotiable order of withdrawal accounts (NOW accounts) as long as the interest is 0.50 percent or lower and it will also guarantee Interest on Lawyers Trust Accounts (IOLTAs) or accounts functionally equivalent to IOLTAs. *Id.* Sweep accounts are also generally excluded from the Transaction Account Guarantee Program. *Id.* However, funds that are swept from a non-interest bearing transaction to a non-interest bearing savings account will be treated as non-interest bearing transaction accounts for purposes of the Transaction Account Guarantee Program. *Id.*

160. Temporary Liquidity Guarantee Program, 73 Fed. Reg. at 72,247-48.

161. *Id.* at 72,247. This is most likely going to be at the acquiring financial institution. *Id.*

amount of the guaranteed account within days of the insured depository institution's failure."[162] The FDIC also has the right to require a depositor to file a proof of claim before making payment under the Transaction Guarantee Account Program.[163]

To participate in the Transaction Account Guarantee Program, strict disclosure requirements must be met. Any participating institution must disclose in the lobby of its main office, in each domestic branch, and on the institution's website if it offers Internet deposit services, that the institution is participating in the Transaction Account Guarantee Program and that its noninterest bearing transaction accounts are guaranteed in full by the FDIC.[164] If a company is participating in the TLG Program, but has opted out of the Transaction Account Guarantee Program, then this information must also be disclosed in the same fashion as above.[165] The only other specific disclosures that must be made are when an institution sweeps, transfers, or reclassifies funds into an account that is not guaranteed under this program.[166] This disclosure must be made to all affected customers and must state that this action will void the FDIC's guarantee under this program.[167]

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162. *Id.* at 72,247-48.

163. 12 U.S.C. § 1821(f)(2) (2001).

164 12 C.F.R. § 370.5(h)(4). An example of the type of disclosure that is required by a participating institution is as follows:

> [Institution Name] is participating in the FDIC's Transaction Account Guarantee Program. Under that program, through December 31, 2009, all noninterest-bearing transaction accounts are fully guaranteed by the FDIC for the entire amount in the account. Coverage under the Transaction Account Guarantee Program is in addition to and separate from the coverage available under the FDIC's general deposit insurance rules.

12 C.F.R. § 370.5(h)(4)(i).

165. 12 C.F.R. § 370.5(h)(4). An example of the type of disclosure that is required by a non-participating institution is as follows: "[Institution Name] has chosen not to participate in the FDIC's Transaction Account Guarantee Program. Customers of [Institution Name] with noninterest-bearing transaction accounts will continue to be insured through December 31, 2009 for up to $250,000 under the FDIC's general deposit insurance rules." 12 C.F.R. § 370.5(h)(4)(i).

166. 12 C.F.R. § 370.5(h)(4)(ii).

167. *Id.* This will generally occur when the accounts are swept, transferred, or reclassified into interest-bearing accounts. *Id.*

4. Systemically Significant Failing Institutions Program

The Treasury established the SSFI Program as another way to disperse the funds allocated to the EESA.[168] The purpose of the SSFI Program is to "provide stability and prevent disruption to financial markets in order to limit the impact on the economy and protect American jobs, savings, and retirement security from the failure of a systemically significant institution."[169] The Treasury fears that the failure of a systemically significant institution could disrupt financial markets, raise the borrowing costs for households and businesses, and reduce the value of homes.[170]

Because this program deals with the failure of significant financial institutions, the SSFI Program will be utilized on a very limited basis and considered case-by-case.[171] The Treasury is charged with the responsibility to determine whether an institution is systematically significant and has a substantial risk of failure by considering at least four main factors.[172] With the SSFI Program, the Treasury has the power to determine the form, terms, and conditions

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168. U.S. Dep't of Treasury, *Guidelines for Systemically Significant Failing Institutions Program*, Jan. 15, 2009, http://www.treas.gov/initiatives/eesa/program-descriptions/ssfip.shtml [hereinafter *Guidelines for SSFI*].

169. *Id.*

170. *Id.*

171. *Id.*

172.

> (1)The extent to which the failure of an institution could threaten the viability of its creditors and counterparties because of their direct exposures to the institution; (2) [T]he number and size of financial institutions that are seen by investors or counterparties as similarly situated to the failing institution, or that would otherwise be likely to experience indirect contagion effects from the failure of the institution; (3) [W]hether the institution is sufficiently important to the nation's financial and economic system that a disorderly failure would, with a high probability, cause major disruptions to credit markets or payments and settlement systems, seriously destabilize key asset prices, significantly increase uncertainty or losses of confidence thereby materially weakening overall economic performance; or (4) [T]he extent and probability of the institution's ability to access alternative sources of capital and liquidity, whether from the private sector or other sources of government funds.
> *Id.*

of any investment made.[173] To help protect the taxpayers' funds used under the SSFI program, the Treasury will require any participating institution to provide alternative consideration to minimize the long-term costs and to maximize the benefits to the taxpayers.[174] In addition to this alternative consideration, participating institutions must also comply with restrictions on executive compensation and corporate governance, which go beyond those described in the EESA.[175]

As of February 1, 2009, there has been only one application of the SSFI Program, with American International Group, Inc. (AIG).[176] Under the SSFI Program, the Treasury purchased $40 billion of AIG's senior preferred stock and warrants for future common stock.[177] This purchase of stock allows the Federal Reserve to reduce the total amount of funds made available to AIG under the previous credit facility established in September of 2008, and allows the restructure of the terms and conditions associated with that facility.[178] In addition to receiving the $40 billion from the Treasury,

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173. *Second Section 105(a) TARP Report*, *supra* note 75, at 4. Any financial instrument that the Secretary deems to be a "troubled asset," the Treasury may invest in it after consulting with the Chairman of the Board of Governors of the Federal Reserve System and giving notice to Congress. *Id.*

174. *Id.* at 3.

175. *Id.* at 4.

176. *Id.* This was publicly announced on November 10, 2008 and was completed on November 25, 2008. *Id.* "AIG [was] a large financial services company that operated in four general business lines through a number of domestic and foreign subsidiaries: (i) general insurance, (ii) life insurance and retirement services, (iii) financial services, and (iv) asset management." *FSOB First Report*, *supra* note 71, at 9-10. As of September 30, 2008, AIG had over $1 trillion of consolidated total assets. *Id.* at 10.

177. *Second Section 105(a) TARP Report*, *supra* note 76, at 4. The Treasury's preferred stock pays a ten percent cumulative dividend per annum. *FSOB First Report*, *supra* note 71, at 10. AIG is prohibited from paying dividends on its common stock or any other security unless all accrued dividends on the Treasury's preferred stock have first been paid. *Id.* The Treasury also received warrants for up to two percent of AIG's common stock at an exercise price of $2.50 per share, subject to anti-dilution provisions. *Id.* at 10-11.

178. *Second Section 105(a) TARP Report*, *supra* note 76, at 4. In order to prevent AIG from failing, the Federal Reserve "provided AIG with a senior revolving credit facility in an aggregate amount not to exceed $85 billion at any time." *FSOB First Report*, *supra* note 71, at 10. The term of this credit facility was for two years. *Id.* The Treasury's investment, under the SSFI program,

AIG would also benefit from two additional lending facilities that will be established by the Federal Reserve to help "alleviate capital and liquidity pressures on AIG associated with its portfolio of residential mortgage-backed securities and with multi-sector collateralized debt obligations on which AIG has written credit default swaps."[179] Along with these benefits, AIG must also cope with the restrictions on executive compensation that are established under the EESA, which include the board of directors having to form a risk management committee for AIG.[180]

IV. THE OVERSIGHT OF THE EMERGENCY ECONOMIC STABILIZATION ACT OF 2008 AND ITS MANY ISSUES

When Congress constructed the EESA, they had the foresight to understand that this important, complex program was going to need proper oversight in order to prevent abuses of power, maintain the goals of the EESA, and to protect the American taxpayer's interest. The EESA established two different organizations to maintain general oversight of the TARP.[181] These overseeing organizations are the Financial Stability Oversight Board (FSOB) and the Congressional Oversight Panel (COP).[182] Congress also empowered two individuals with the general responsibility of auditing the

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allowed the Federal Reserve to reduce the maximum amount of credit available to AIG from $85 billion to $60 billion and allowed for the facility to be extended another three years. *Id.*

179. *Second Section 105(a) TARP Report*, *supra* note 76, at 4.

180. *Id.* These are the same limitations that are imposed on financial institutions who participate in the CPP. Emergency Economic Stabilization Act § 111. The only change to the restriction is that instead of the limitations being imposed on the SEOs of the financial institution, as described with CPP, the restrictions on compensation are applied to approximately sixty executives at AIG. Emergency Economic Stabilization Act § 111. In addition, AIG had "to maintain and enforce the newly adopted restrictions put in place by the new management on corporate expenses and lobbying, and must receive the Treasury's written consent before materially altering these policies." *FSOB First Report*, *supra* note 71, at 11.

181. Curtis W. Copeland, *Emergency Economic Stabilization Act: Preliminary Analysis of Oversight Provisions*, Congressional Research Service, Nov. 20, 2008, at 2, *available at* http://www.fas.org/sgp/crs/misc/RL34713.pdf [hereinafter *Analysis of Oversight*].

182. *Id.*

TARP.[183] In order to satisfy the audit needs of the TARP, Congress established a new Special Inspector General (SIG) for the TARP and gave additional responsibilities to the Comptroller General of the United States (CG).[184] These entities and individuals not only have to oversee the TARP, but they are also required to submit reports about their findings. There are a total eighteen different reports that are required by the EESA.[185] Congress hoped that these actions would help provide for transparency and for the successful oversight of the TARP. In Congress's rushed attempt to stabilize the U.S. financial institutions, however, they enacted the EESA even though the oversight provisions lacked foresight and completeness.

A. The Financial Stability Oversight Board

1.The Characteristics of the Financial Stability Oversight Board

The FSOB was established through Section 104 of the EESA in order to help provide broad oversight of the TARP and to review the authority exercised by the Secretary.[186] It is composed of five individual members: (1) the Chairman of the Board of Governors of the Federal Reserve System; (2) the Secretary of the Treasury; (3) the Director of the Federal Housing Finance Agency; (4) the Chairman of the Securities and Exchange Commission, and (5) the Secretary of Housing and Urban Development.[187] These FSOB members may

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183. *Id.*

184. *Id.* The Comptroller General of the United States is the head of the Government Accountability Office. *Id.* These newly enacted duties are in addition to the CG's duty to "investigate all matters related to the receipt, disbursement, and use of the money," and to "evaluate the results of a program or activity the Government carries out under existing law." 317 U.S.C. §§ 712(1), 717(b) (2007).

185. Curtis W. Copeland, *Reporting Requirements in the Emergency Economic Stabilization Act of 2008*, Congressional Research Service, Nov. 13, 2008, at 14-17, *available at* http://www.fas.org/sgp/crs/secrecy/RL34740.pdf [hereinafter *Reporting Requirements*].

186. Emergency Economic Stabilization Act § 104(a). The EESA established the FSOB solely with the wording that "[t]here is established the Financial Stability Oversight Board [. . .]." *Id.*

187. *Id.* at § 104(b)(1)-(5). During an FSOB meeting, if a member of the board is also serving in an acting capacity of their executive office, they "shall still serve as a Board member with the same authority and effect as the designated

designate a representative of the same agency to act on behalf of the FSOB member for any purpose governed in the bylaws, without giving a reason for the replacement.[188]

With only the Secretary of the Treasury being ineligible, the FSOB is led by a chairperson who is elected by the members of the FSOB.[189] The Chairperson will not only preside over the FSOB's meetings, but is also required to provide notice of board meetings to its board members.[190] According to the FSOB amended and restated bylaws, the first meeting "shall occur no later than the date that is 2 weeks after the first exercise of the Secretary's purchase authority under the Act, and monthly thereafter."[191] Any board member can also call for a special meeting after giving written notice to the chairperson.[192] Board members do not necessarily have to be physically present to participate or even to vote at an FSOB meeting.[193] It is stated in the Amended and Restated Bylaws that "[a]ny Board member may participate in a meeting by telephone or other communications equipment that allows persons participating in the meeting simultaneously to speak and hear each other."[194] There

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Board member." Fin. Stability Oversight Bd., *Amended and Restated Bylaws*, § B(2), *available at* http://www.treas.gov/initiatives/eesa/docs/Amended_Bylaws.pdf [hereinafter *FSOB Amended and Restated Bylaws*].

188. *FSOB Amendment and Restated Bylaws*, *supra* note 187, at B3. However, the representative must be designated in writing and cannot be below the level of Assistant Secretary or its equivalent. *Id.* In addition, the representative's powers to act on behalf of the FSOB member may be restricted if it is specifically restricted in writing by the FSOB member whom the representative represents. *Id.*

189. Emergency Economic Stabilization Act § 104(c). The Secretary of the Treasury is ineligible to be the Chairperson because the FSOB is charged with the basic duty to review and make recommendations regarding the Treasury's actions. Emergency Economic Stabilization Act § 104(a),(e). Thus, it would not be proper for the Secretary of the Treasury to lead the review of his own executive work.

190. *FSOB Amendment and Restated Bylaws*, *supra* note 187, at C1.

191. *Id.*

192. *Id.* at C2. The bylaws also state that e-mail will be considered an acceptable form of written notice. *Id.*

193. *Id.* at C3.

194. *Id.* As long as the FSOB member is participating in a manner that allows for simultaneous speaking and hearing, then the FSOB member will be deemed present at the meeting. *Id.* Board members who are not physically present can still vote on the issues, but only after the Chairperson has received a form of written communication stating the Board member's vote. *Id.* The Amended and Restated

must be a majority of the FSOB present in order to constitute a quorum and any decision or determination of the FSOB must be made by a "majority vote of the voting members."[195]

The FSOB is entrusted with four main responsibilities.[196] First, it must review the Treasury's authority exercised by the Secretary under any program developed in accordance with Section 101 or Section 102 of the EESA.[197] Second, the FSOB must make recommendations to the Secretary regarding the use of the authority prescribed under the EESA.[198] Third, the FSOB is required to report any suspected fraud, misrepresentation, or malfeasance to the SIG or the Attorney General of the United States.[199] Fourth, the FSOB "has the authority to ensure that the policies implemented by the Secretary are in accordance with the purposes of this Act; in the economic interests of the United States; and consistent with protecting taxpayers, in accordance with section 113(a) [of the EESA]."[200] The

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Bylaws also state that even though FSOB Board members can participate in the meetings through a variety of means, the FSOB must still meet in person at least once a year. *Id.*

195. *FSOB Amendment and Restated Bylaws*, *supra* note 187, at C4. Since the EESA designates five members to the FSOB, there needs to be at least 3 members present to constitute a valid quorum. Emergency Economic Stabilization Act § 104(b). Whenever there is not a valid quorum, the Chairperson shall reschedule the meeting. *FSOB Amendment and Restated Bylaws*, *supra* note 187, at C4. Any voting that takes place regarding the FSOB's decisions and determinations will be recorded in the minutes. *Id.* In the event that an FSOB member may have, or may appear to have, a conflict of interest, then that FSOB member may disqualify himself or herself from participating in a Board discussion or action. *Id.* Instead, the representative of the disqualified FSOB member may act on the matter in the place of the FSOB member. *Id.*

196. Emergency Economic Stabilization Act §§ 104(a),(e).

197. *Id.* at § 104(a)(1). This includes reviewing the policies implemented by the Secretary and the OFS regarding "the appointment of financial agents, the designation of asset classes to be purchased, and plans for the structure of vehicles used to purchase troubled assets . . ." *Id.* at § 104(a)(1)(A). In addition, the FSOB must review "the effect of such actions in assisting American families in preserving home ownership, stabilizing financial markets, and protecting taxpayers." *Id.* at § 104(a)(1)(B).

198. *Id.* at § 104(a)(2).

199. *Id.* at § 104(a)(3).

200. *Id.* at § 104(e). Section 113 of the EESA is entitled the "minimization of long-term costs and maximization of benefits for taxpayers." *Id.* at § 113. The basic purpose of the section is to require the Treasury to receive non-voting

FSOB has the additional power to appoint a credit review committee to evaluate the purchase authority provided under the EESA and the assets acquired through the exercise of such authority.[201] At least quarterly, the FSOB must also report on the first three above-listed responsibilities to the appropriate committees of Congress and the COG established under the EESA.[202] The FSOB and its authority will terminate fifteen days after both "the date the last troubled asset acquired by the Secretary under Section 101 of the [EESA] has been sold or transferred out of the ownership or control of the Federal Government and the date of expiration of the last insurance contract issued under section 102 of the [EESA]."[203]

2. Issues Within the Financial Stability Oversight Board

When the FSOB was created by the EESA, it was created with no other wording than "[t]here is established the Financial Stability Oversight Board."[204] This creates an issue because this language does not indicate whether the FSOB is part of the executive or legislative branch of government. Even though there is no express delegation in the EESA, it can be presumed that the FSOB is an entity of the executive branch. This is because the EESA specifically delegates to the five members of the FSOB, and all five of these FSOB members are from the executive branch.[205] Regardless of this presumption, the EESA still gives no guidance as to the placement of the FSOB within the executive branch or another branch.[206] The FSOB could be placed within the Department of Treasury, within

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warrants from participating financial institutions in order to cover losses, cover administrative costs, and to allow taxpayers to share in equity appreciation. *Id.*

201. Emergency Economic Stabilization Act § 104(f).

202. *Id.* at § 104(g). The responsibilities that must be reported on are specifically located in EESA Section 104(a)(1). *Id.*

203. *Id.* at § 104(h). The 15 day period will begin on the date of the later of the two events. *Id.*

204. *Id.* at § 104(a).

205. *Id.* at § 104(b). "The Financial Stability Oversight Board shall be comprised of the Chairman of the Board of Governors of the Federal Reserve System; the Secretary [of the Treasury]; the Director of the Federal Housing Finance Agency; the Chairman of the Securities Exchange Commission; and the Secretary of Housing and Urban Development." *Id.*

206. *Id.* at § 104(a).

another executive agency, or it could be its own free-standing, independent entity.[207] Based on the Statement and Procedures Regarding Public Access to Records of the FSOB that was adopted by the FSOB on December 19, 2008, it seems that the FSOB is its own free-standing, independent entity.[208] This statement discloses that the FSOB "is independent of the Board of Governors and the other departments and agencies represented on the Oversight Board."[209] It also states that it cannot be implied that "any other provision of the rules adopted by the Board of Governors, or any other agency, apply to the [FSOB]."[210] Thus, the FSOB has specifically stated that it is independent and not a sub-unit of the Federal Reserve, the Treasury Department, the Federal Housing Finance Agency, the Securities and Exchange Commission, or the Department of Housing and Urban Development.[211] This statement, however, may not be necessarily accurate because of two different reasons. First, the FSOB has posted its bylaws, minutes, records procedures, and reports on the Treasury Department's website rather than create its own website to disclose information and thus be truly independent.[212] Secondly, all of the meetings held by the FSOB have either occurred over the telephone or held at the offices of the Treasury.[213] These two facts help show that even though the FSOB may desire to be a free-standing, independent entity that is not subject to any of the rules and policies of its board member's agencies, the FSOB is not truly acting in a free-standing or independent manner. The FSOB's actions show that it may be more

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207. *Analysis of Oversight*, *supra* 181, at 3.

208. Financial Stability Oversight Board, *Statement and Procedures Regarding Public Access to Records*, (Dec. 19, 2008), *available at* http://www.treas.gov/initiatives/eesa/docs/records-procedures.pdf [hereinafter *FSOB Statement and Procedures*].

209. *Id.* at 2.

210. *Id.*

211. *Id.*

212. U.S. Dep't of Treasury, *Emergency Economic Stabilization Act of 2008*, *available at* http://www.treasury.gov/initiatives/eesa/.

213. Financial Stability Oversight Board, *Minutes*, (2009) *available at* http://www.treas.gov/initiatives/eesa/minutes.shtml [hereinafter *FSOB Minutes*]. As of February 1, 2009, there have been 7 total meetings held by the FSOB. *Id.* Of those seven, five of those meetings have taken place at the offices of the Treasury Department and two of those meetings have taken place by phone. *Id.*

accurate for it to be re-characterized as a sub-unit of the Treasury Department.

There is also a question about the functionality of the FSOB because there is no way to know when it is required to begin making reports to the appropriate committees of Congress and the COP. This is important because without the start date, there is no way to know when the FSOB is in violation of the EESA for not making the required reports. Section 104(g) of the EESA and the Amended and Restated Bylaws of the FSOB states the FSOB shall report on its duties "not less frequently than quarterly."[214] This wording is at least adequate enough to establish the frequency of reports due, however, it gives no guidance as to when the FSOB's responsibility to submit reports begins. There are three possible interpretations for when the term "quarterly," as used in this section of the EESA, is intended to begin. First, "quarterly" could mean that the reports are to be issued every three months starting on the date the EESA was signed into law.[215] Second, it could mean three months from the date that the Secretary began exercising his authority under the EESA, as is the benchmark for other things in the EESA.[216] Third, the term could simply mean that reports need to be issued every three months based on the fiscal calendar year.[217] It seems that the FSOB has interpreted the term "quarterly" to mean a combination of the first and third possibilities.[218] The FSOB's first report "covers the period from October 3, 2009 (the date of enactment of the EESA), through the quarter ending December 31, 2008 (the "quarterly period")."[219] This statement shows that the FSOB intends to issue quarterly reports based on the calendar year, but chose to begin reporting before the Secretary exercised any authority under the EESA. This was a wise interpretation by the FSOB because if the report began on the date the Secretary began exercising authority under the EESA, then the

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214. Emergency Economic Stabilization Act § 104(g); *FSOB Amended and Restated Bylaws*, *supra* note 187, at 3.

215. BLACK'S LAW DICTIONARY 1278 (8th ed. 2008); *see* The White House, *supra* note 51 and accompanying text.

216. BLACK'S LAW DICTIONARY 1278 (8th ed. 2008); *First Tranche Report*, *supra* note 75, at 2.

217. BLACK'S LAW DICTIONARY 1278 (8th ed. 2008).

218. *FSOB First Report*, *supra* note 71, at 1.

219. *Id.*

report would be missing eleven days of information.[220] Additionally, the FSOB's interpretation of "quarterly" will also allow for easy predictability for the issuance of future reports because it specifies that the reports will be issued every three months based on the normal calendar year.

B. The Congressional Oversight Panel

1. The Characteristics of the Congressional Oversight Panel

Congress established another entity to provide broad oversight over the TARP and over the Secretary's actions under the EESA. This entity is called the COP and it is specifically established as being in the legislative branch under Section 125(a) of the EESA.[221] The COP is composed of five members that have to be appointed by different members of the House of Representatives or by the Senate.[222] As long as the members of the COP are not members of Congress or full-time federal officers or employees, then members of the COP shall be paid at the daily rate of basic pay for level I of the Executive Schedule for each day that member is performing duties vested in the COP.[223]

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220. The EESA was signed into effect by President George W. Bush on October 3, 2008. The White House, *supra* note 51. The Secretary first exercised authority under the EESA on October 14, 2008, when he announced a program within the TARP to provide capital to eligible financial institutions. Temporary Liquidity Guarantee Program, 73 Fed. Reg. at 62,205. Thus, there are eleven days between the two dates.

221. Emergency Economic Stabilization Act § 125(a). The EESA establishes the COP with the language: "[t]here is hereby established the Congressional Oversight Panel as an establishment in the legislative branch." *Id.*

222. *Id.* at § 125(c). The Speaker of the House of Representatives, the minority leader of the House of Representatives, the majority leader of the Senate, and the minority leader of the Senate must each appoint one member to the COP. *Id.* at § 125(c)(1)(A)-(D). The last member of the COP is appointed by the Speaker of the House of Representatives and the majority leader of the Senate, after consulting with the minority leader of the Senate and the House of Representatives. *Id.* at § 125(c)(1)(E). If there is a vacancy on the panel at any time, then the vacancy will be "filled in the manner in which the original appointment was made." *Id.* at § 125 (c)(6).

223. *Id.* at § 125(c)(2)-(3). When calculating how many days were spent performing vested duties, the section specifies that any applicable travel time spent

The COP is required to issue two different reports to Congress conveying the COP's review of the current state of the financial markets and the regulatory system.[224] The first report is entitled a Regular Report, which must be submitted "no later than 30 days after the first exercise by the Secretary of the authority under section 101(a) or 102 [of the EESA], and every 30 days thereafter."[225] In the COP's first Regular Report, the report contained ten multi-part questions that were first analyzed by the COP, and then a response to these questions was ordered to be given by the Treasury.[226] The second Regular Report included the Treasury's responses to the COP's ten questions and the COP's evaluation of the Treasury's responses.[227] The second type of report that was required by the COP was a special report on regulatory reform which the COP had to

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should be included. *Id.* at § 125(c)(2). If a member of the COP is a Member of Congress or a full-time federal officer or employee, he or she may also not receive any additional allowances or benefits for their performance on the COP. *Id.* at § 125(c)(3). For members eligible to be paid for their services on the COP, the Executive Schedule for Level I established a yearly salary of $196,700 effective January 2008. U.S. Office of Pers. Mgmt., Exec. Schedule, (2009), *available at* http://www.opm.gov/oca/09tables/pdf/ex.pdf [hereinafter *Exec. Schedule*].

224. Emergency Economic Stabilization Act § 125(b).

225. *Id.* at § 125(b)(1)(B). The Regular Report must include the COP's review of the Secretary's use of authority under the EESA, the impact of purchases made under the ESSA on the financial markets and financial institutions, whether the information made available on transactions under the program enables market transparency, the effectiveness of foreclosure mitigation efforts, and the effectiveness or lack thereof of the EESA to minimize costs and maximize benefits to the taxpayers. *Id.* at § 125(b)(1)(A).

226. *First COP Report*, *supra* note 83, at 11-32. These questions were formed as if they were questions which all American have the right to ask. *Id.* at 6. The ten basic questions are as follows: (1) What is the Treasury's strategy?; (2) Is the strategy working to stabilize markets?; (3) Is the strategy helping to reduce foreclosures?; (4) What have financial institutions done with the Taxpayers' money received so far?; (5) Is the public receiving a fair deal?; (6) What is the Treasury doing to help the American family?; (7) Is the Treasury imposing reforms on financial institutions that are taking taxpayer money?; (8) How is the Treasury deciding which institutions receive money?; (9) What is the scope of Treasury's statutory authority?; and (10) Is the Treasury looking ahead? *Id.* at 8-10. The COP requested the Treasury to respond to these ten, multi-part questions by December 30, 2008. 2 Congressional Oversight Panel Rep. App. I (Jan. 9, 2009), *available at* http://cop.senate.gov/documents/cop-010909-report.pdf [hereinafter *Second COP Report*].

227. *Second COP Report*, *supra* note 226.

prepare only once and not later than January 20, 2009.[228] The EESA does not require the COP to make either of these reports available to the public.[229]

In order for the COP to effectively perform its duties and issue thorough reports, the EESA granted the COP various powers.[230] The COP can fulfill its duties with the specific authority to hold hearings, take testimony, receive evidence, and administer oaths and affirmations to witnesses.[231] The COP also has the right to obtain information from any other department or agency of the United States and to receive seven different reports that are filed by various agencies in compliance with the EESA.[232] Upon authorization from the COP, any member or agent of the COP is authorized to take action on behalf of the COP.[233]

Congress also foresaw that the COP would need to hire staff to help fulfill its duties. The EESA allows the COP to appoint and fix the pay of anyone the COP "considers appropriate."[234] In addition, the COP is specifically allowed to procure experts, consultants, and even use employees from any other federal department or agency.[235] The COP is funded through appropriations made by the House of Representatives and the Senate, and through the reimbursement of its

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228. Emergency Economic Stabilization Act § 125(b)(2). This special report's purpose was for Congress to see how the COP was:

> . . . 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.

Id.

229. *Id.* at § 125(b).

230. *Id.* at § 125(e).

231. *Id.* at § 125(e)(1).

232. *Id.* at § 125(e)(3)-(4). The COP can obtain direct information from any United States department or agency, whenever the Chairperson requests it. *Id.* at § 125(e)(3).

233. *Id.* at § 125(e)(2).

234. Emergency Economic Stabilization Act § 125(d)(1).

235. *Id.* at § 125(d)(2)-(3).

expenses from the Treasury.[236] The COP will eventually terminate six months after the authorities provided to the Secretary expire.[237] Unless the Secretary's authority is extended, the COP will be terminated June 31, 2009.[238]

2. Issues Within the Congressional Oversight Panel

With one of the COP's duties consisting of dealing with transparency and asking the Treasury questions which all taxpayers have a right to ask, it is odd that the COP is not more transparent about its own operations. The EESA clearly establishes the members of the COP, how they are appointed, and how to replace a vacancy.[239] Although a chairperson was clearly intended to be appointed for the COP, the legislature does not indicate how that chairperson is to be elected.[240] This has led to some confusion about how the current chairperson of the COP, Elizabeth Warren, was elected.[241] As soon as the COP had four members appointed in order

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236. *Id.* at § 125(g). These appropriations are intended to cover what may be necessary for any fiscal year. *Id.* The applicable account of the House of Representatives and the contingent fund of the Senate will equally contribute half of the appropriations for the COP. *Id.* The COP can also receive reimbursements equal to expenses incurred from the Secretary when the Chairperson of the COP presents the Secretary with a statement of such expenses. *Id.* at § 125(g)(2). When this occurs, the Secretary will transfer funds provided under the EESA and send them to the applicable fund of the House of Representatives and the contingent fund of the Senate for disbursement. *Id.*

237. *Id.* at § 125(f).

238. *Id.* at § 120(a). Unless extended, the Secretary's authority will expire December 31, 2009. *Id.* at § 120(a).

239. *Id.* at § 125(c)(1), (6).

240. Emergency Economic Stabilization Act § 125. It is clear that there was congressional intent to install a Chairperson because the Chairperson was given specific authorities within the COP. *Id.* at §§ 125(c)(7), 125(e)(3), 125(g)(2). Unless a majority of the COP members call for a meeting, then the only way for the COP to have a meeting is "at the call of the Chairperson." *Id.* at § 125(c)(7). Furthermore, the COP can only obtain information directly from any department or agency of the United States with the "request of the Chairperson of the [COP]." *Id.* at § 125(e)(3). Lastly, the COP can only be reimbursed for its expenses from the Secretary "upon the presentment of a statement of such expenses by the Chairperson of the [FSOB]." *Id.* at § 125(g)(2).

241. *First COP Report*, *supra* note 83, at 2.

to satisfy their quorum requirement, their first meeting was held seven days later and the COP chairperson was immediately elected.[242] At this point, the current members of the COP had no idea who the fifth member of COP was going to be because that member had not been appointed yet.[243] The possibility still existed that the fifth member appointed to the COP could be more qualified to be the chairperson and that the vote for chairperson would have turned out differently if the fifth member had been present. Since there was a need for the COP to act quickly to comply with its reporting requirements, it makes sense that the COP had to appoint someone as the chairperson in order to help coordinate the COP. This person, however, should have had a temporary role until the entire panel was established and then there could have been another vote for chairperson which would include all the members of the COP.

Additionally, there is no requirement for how often the COP has to meet, but it is logical to assume the COP would need to meet at least once a month in order to prepare its Regular Reports that are due "not later than 30 days after the first exercise by the Secretary of the authority under section 101(a) or 102 [of the EESA], and every 30 days thereafter."[244] The Secretary first exercised the authority under section 101(a) of the EESA on October 28, 2008.[245] However, the fact that the EESA merely describes the COP's reporting requirement as every "30 days," brings up the question as to whether this should be interpreted as every thirty "calendar" days or every thirty "business" days.[246] Based on the timing of the COP's

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242. *Id.* at 33. The fourth member was appointed to the COP on November 19, 2008 and the COP met for the first time on November 26, 2008. *Id.*

243. *Second COP Report*, *supra* note 226. The fifth member of the COP was appointed on December 16, 2008. *Id.*

244. Emergency Economic Stabilization Act § 125(b)(1)(B).

245. *First Tranche Report*, *supra* note 75, at 2. The first exercise of authority was when the Treasury settled purchases under the CPP with eight financial institutions for a total of $115 billon. *Id.*

246. Emergency Economic Stabilization Act § 125(b)(1)(B). A calendar day is defined as "a consecutive 24-hour day running from midnight to midnight." BLACK'S LAW DICTIONARY 424 (8th ed. 2004). The benefit to using a calendar day system is that it is easy for people to calculate the timing of things, since every day is counted. In contrast, a business day is defined as "a day that most institutions are open for business, usually a day on which banks and major stock exchanges are

reports, they seem to be following a mixed approach. The COP published its first report on December 10, 2008, which was thirty business days following the date the Secretary first exercised his authority under the EESA.[247] Since the COP elected to report based off business days for the first report, it would be assumed that they would maintain the same behavior for the rest of their reporting. Instead, the COP opted to switch to reporting based on a calendar day system for its second report and have the third and fourth reports designated as using the same method.[248] The COP probably manipulated its method for counting the days for the first report compared to the rest for a number of reasons. First, the COP probably used the business day method for the first report because it gave it more time to perform its duties, while still complying with the reporting requirements established in the EESA.[249] Second, after the

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open, excluding Saturdays and Sundays." *Id.* An advantage to using business days is that it will technically give someone a bigger time frame than a person using calendar days. However, a major disadvantage is that it is more difficult to calculate the timing because weekends and holidays are excluded.

247. *First COP Report*, *supra* note 83, at 1. If the COP had been following a calendar day system, then pursuant to Section 125(b)(1)(B) of the EESA the first report would have been due on November 27, 2008. This would mean that the COP failed to meet their first reporting requirement by 13 days.

248. *See* Congressional Oversight Panel, http://cop.senate.gov/index.cfm (last visited Jan. 18, 2009). The COP complied with the thirty day reporting requirement when they issued their second report, but they did so using a different system to count the days. The second report was issued on January 9, 2009, which is thirty calendar days from the issuance of the COP's first report. *COP Second Report*, *supra* note 226. If the COP had maintained the business day approach, the second report would not have been due to be issued until January 27, 2009 because of federal holidays. As of January 2009, the COP still has not issued its third and fourth reports. However, the COP website discloses the dates which the third and fourth reports will be issued and these dates follow a calendar day system. *See* Congressional Oversight Panel, http://cop.senate.gov/index.cfm (last visited Jan. 18, 2009).

249. The COP finally had enough members to facilitate a quorum and coordinate its first meeting on November 26, 2008. *First COP Report*, *supra* note 83, at 33. If the COP had maintained a calendar day approach for the first report, then the first report would have been due on the following day. *See supra* note 248 and accompanying text. This would have led to a weak report that would not have adequately satisfied the COP's duties because they simply would not have had the time to do sufficient analysis. By using the business day approach, it allowed the COP to create a better first report while still complying with their reporting deadline.

first report was issued, the COP probably felt it needed to switch to a calendar day approach so that the reports were less dense and were issued more frequently.[250] Even though this was a minor manipulation of the requirements set forth in the EESA, it still illustrates how easy it is for these agencies to interpret the code in a manner that is most convenient at that time and a reason why these agencies need to be more transparent about their decisions.

C. Special Inspector General for the TARP

1. The Characteristics of the Special Inspector General for the TARP

The EESA also established the Office of the Special Inspector General for the TARP to provide oversight by auditing any program established under Section 101 or Section 102 of the EESA.[251] The SIG TARP shall be appointed by the President and confirmed by the Senate.[252] Once the SIG TARP is appointed, the position is not permanent because the President retains the power to remove the SIG TARP from office at any time.[253] Once the SIG TARP is appointed, he or she is entitled to a salary that is established in the EESA for compensation for his or her services.[254]

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250. By using a calendar approach, the report consists of a little more than four weeks of events to report on. Whereas if the reports were issued using the business day approach, almost six weeks of events would exist for the COP to report on. With all the drastic changes in the EESA and the state of the financial markets in general, the COP most likely felt that their reports needed to be issued more often to better keep up with the changes in the TARP program.

251. Emergency Economic Stabilization Act §§ 121(a), (c).

252. *Id.* at § 121(b)(1). The SIG TARP shall be appointed "on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations." *Id.* at § 121(b)(2). The President is also told to nominate an individual "as soon as practicable" after a program is established under EESA section 101 or section 102. *Id.* at § 121(b)(3).

253. *Id.* at § 121(b)(4). Before the President can remove the SIG TARP from office, the President must notify Congress in writing for the reason of the removal. Inspector General Act of 1978 § 1, 5 U.S.C. App. 3 (2007). This notification must occur at least 30 days before the removal of the SIG TARP. *Id.*

254. Emergency Economic Stabilization Act § 121(b)(6). This provision provides that the SIG TARP is entitled to the basic annual pay of an inspector general under section 3(e) of the Inspector General Act of 1978. *Id.* According to the Inspector General Act of 1978, an inspector general's annual salary is that of

The duties that the SIG TARP must perform, in order to receive compensation, include "conduct[ing], supervis[ing], and coordinat[ing] audits and investigations of the purchase, [the] management, and sale of assets by the Secretary of Treasury under section 101, and the management by the Secretary of any program established under section 102."[255] The SIG TARP must also collect and summarize various pieces of information dealing with the TARP and of any insurance contracts issued under section 102 of the EESA.[256] In addition to the specific duties established in the EESA, the SIG TARP must also conduct the general duties and responsibilities of inspector generals described in the Inspector General Act of 1978.[257]

The SIG TARP also has the power to carry out his specified duties by exercising the authorities provided in the Inspector General Act of 1978.[258] In order to assist in the performance of his duties, the

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level III of the Executive Schedule plus three percent. Inspector General Act of 1978 § (3)(e). The compensation for someone paid based on level III of the Executive Schedule in 2009 is $162,900. *Executive Schedule*, *supra* note 223. In accordance with the Inspector General Act, the SIG TARP's yearly salary will be $167,787, once the income of level III on the Executive Schedule is multiplied by three percent.

255. Emergency Economic Stabilization Act § 121(c)(1).

256. *Id.* at § 121(c)(1)(A)-(G). The SIG TARP needs to provide a description and listing of the categories of troubled assets purchased by the Secretary, an explanation of the reasons the Secretary deemed it necessary to purchase each troubled asset, a listing of each financial institution participating in the TARP, a listing and detailed biographical information on anyone or any entity hired to manage troubled assets, an estimate of the total amount of troubled assets purchased under section 101 of the EESA, the amount of troubled assets on the books of the Treasury, a listing of any profit and loss incurred on each sale or disposition of each troubled asset, and a listing of the insurance contracts issued under section 102 of the EESA. *Id.* at § 121(c)(1)(A)-(G). As a result, the SIG TARP's reports include a multitude of topics and will, as a result, require the SIG TARP to procure employees.

257. *Id.* at § 121(c)(3). Even though this is outside of the scope of this paper, the SIG TARP's duties have been amended to include the conducting, supervising, and coordinating audits and investigations of the auto industry financing and restructuring. H.R. 384, 111th Cong. (2009).

258. Emergency Economic Stabilization Act § 121(d)(1). Thus, the SIG TARP has the same authority as each inspector general holds as specified in the Inspector General Act of 1978. It gives the SIG TARP "access to all records, reports, audits, reviews, documents, papers, recommendations, or other materials

SIG TARP can hire employees as may be necessary. This authority to hire includes the SIG TARP being able to enter into contracts and other arrangements with public agencies and with private persons.[259] The SIG TARP can even request information or assistance from any department, agency, or other entity of the Federal Government.[260] In the event the SIG TARP believes that information or assistance is unreasonably refused or not provided, then the SIG TARP must report the circumstances "to the appropriate committees of Congress without delay."[261]

Within sixty days of taking office and every calendar quarter thereafter, the SIG TARP must issue a report to the appropriate committees of Congress and to the COP.[262] Each report shall include a detailed statement of all purchases, obligations, expenditures, and revenues associated with any program established by the Secretary under sections 101 and 102 of the EESA, along with any other information obtained by the SIG TARP pursuant to his duties.[263] The EESA also mandates that certain information found in the SIG

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available" to any establishment associated with a program of the EESA. Inspector General Act of 1978 § 6(a)(1). When needed, the SIG TARP even has the authority to subpoena the production of any information and administer oaths, affirmations, or affidavits whenever necessary. *Id.* at § 6(a)(4)-(5). The duties assigned to the SIG TARP must also be carried out in accordance with section 4(b)(1) of the Inspector General Act of 1978. *Id.* at § 4(b)(1). The SIG TARP must carry out his or her duties while ensuring that they comply with the standards established by the CG, establish guidelines for determining when it is appropriate to use non-Federal auditors, and taking the appropriate steps to assure that any worked performed by a non-Federal auditors meets with the CG's standards. *Id.*

259. Emergency Economic Stabilization Act § 121(e)(3). These contracts can be specifically for audits, studies, analyses, and other services that are necessary to carry out the duties of the SIG TARP. *Id.*

260. *Id.* at § 121(e)(4)(A). As long as it does not violate any law, the head of any entity must give the information or assistance requested by the SIG TARP. *Id.*

261. *Id.* at § 121(e)(4)(B).

262. *Id.* at § 121(f)(1)-(3).

263. *Id.* at § 121(f)(1). These reports should only include information regarding the applicable period covered by such report. *Id.* The Secretary is required to take action in order to address any deficiencies identified by a SIG TARP report or investigation. The Special Inspector General for the Troubled Asset Relief Program Act of 2008, S. 3731, 110th Cong. (2008) [hereinafter *S. 3731*].

TARP's reports are not authorized to be disclosed to the public.[264] As long as the report is not specifically prohibited from being disclosed to the public, then any report issued by the SIG TARP will be publicly available on the SIG's website within twenty-four hours after the final submission of the report.[265]

The SIG TARP is to be funded with $50,000,000, taken from funds made available to the Secretary under the EESA, in order to carry out its duties and make its reports.[266] This funding is to remain available to the SIG TARP until the funds are completely exhausted.[267] Eventually, the SIG TARP's office will terminate either "on the date the last troubled asset acquired by the Secretary under section 101 [of the EESA] has been sold or transferred out of the ownership or control of the Federal Government or on the date of expiration of the last insurance contract issued under section 102 [of the EESA]."[268]

2. Issues With the Special Inspector General for the TARP

Even though the EESA was thorough in establishing the Office of the SIG TARP, the EESA does not indicate where in the government the office is to be housed.[269] The EESA draws many of the SIG

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264. Emergency Economic Stabilization Act § 121(f)(2). This includes information prohibited from disclosure by any other law, including information that is protected from disclosure in the interest of national defense or national security or in the conduct of foreign affairs, and information that is part of an ongoing criminal investigation. *Id.* This section specifically prohibits the disclosure of information from the public. However, there is no provision in the EESA that requires the SIG TARP to publish any of its reports to the public.

265. *S. 3731*, *supra* note 263, at § 5.

266. Emergency Economic Stabilization Act § 121(g)(1). These funds will be made available no later than seven days after the SIG TARP is confirmed by the senate. *S. 3731*, *supra* note 263.

267. Emergency Economic Stabilization Act § 121(g)(2).

268. *Id.* at § 121(h). The Office of the SIG TARP will terminate on whichever date occurs later. *Id.*

269. *Id.* at § 121(a). "There is hereby established the Office of the Special Inspector General for the Troubled Asset Relief Program." Emergency Economic Stabilization Act § 121(a). This is contrary to legislative history where a special inspector general has been established in Iraq. Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, Pub. L. No. 108-106, §3001 (2004). Even though the Act does not

TARP's duties, powers, pay, and other requirements from the Inspector General Act of 1978. When inspector generals are established in the Inspector General Act, they are usually created in order to conduct and supervise audits and investigations relating to the programs and operations of "establishments."[270] Within the EESA, the TARP is controlled by the Secretary and implemented through the Office of Financial Stability, which is located as a subunit of the Treasury.[271] Thus, the program that the SIG TARP is specifically required to supervise and audit is the TARP; this program is a product of the Treasury Department, which is also considered an "establishment" under the Inspector General Act of 1978.[272] Even though the Treasury is the only "establishment" to have more than one inspector general, the TARP program is so expansive that it would be too much work for Treasury Department's current inspector general to fulfill the required duties of the EESA.[273] This is why the EESA deemed the inspector general for the TARP to be considered "special" because its duties and authority will end

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always specify the organizational placement of the special inspector general, the Act contains other indications of where the entity was to be housed. *Id.* at § 3001(b).

270. Inspector General Act of 1978. The term establishment:

> . . means the Department of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Housing and Urban Development, the Interior, Justice, Labor, State, Transportation, Homeland Security, or the Treasury; the Agency for International Development, the Community Development Financial Institutions Fund, the Environmental Protection Agency, the Federal Emergency Management Agency, the General Services Administration, the National Aeronautics and Space Administration, the Nuclear Regulatory Commission, the Office of Personnel Management, the Railroad Retirement Board, the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, the Small Business Administration, the Corporation for National and Community Service, the Veterans Administration, the Social Security Administration, the Federal Housing Finance Agency, the Tennessee Valley Authority, the Export-Import Bank, as the case may be.

Id. at § 12(2).

271. Emergency Economic Stabilization Act § 101(a)(3)(A).

272. Inspector General Act of 1978, *supra* note 270 and accompanying text.

273. *Id.* at § 2(3)(b).

basically with the TARP. Thus, the SIG TARP should be considered to be within the auspices of the Department of the Treasury.[274]

The SIG TARP is also uniquely different from every other inspector general. Unlike the inspector generals in other agencies who must "report to and be under the general supervision of their agency head," the SIG TARP is not required to report to the head of any agency.[275] Instead, the SIG TARP will report only to Congress and not to its own agency head, the Secretary.[276] This allows the SIG TARP to have complete discretion is pursuing audits, investigations, and in issuing subpoenas.[277] The SIG TARP was most likely granted this unusual power in order to prevent it from being unable to perform its investigations because of difficult or uncooperative agency heads. Because the SIG TARP does not report to the head of its establishment, however, the question is posited as to who is going to supervise the SIG TARP, its activities, and its use of the $50,000,000 in funding it has been provided? It would seem that either Congress or the COP would be the only entities in the position to provide any effective oversight of the SIG TARP because they are the only entities that the SIG TARP must report to. Given Congress's large work load, the COP would be the smart selection to be in charge of ensuring that the SIG TARP does not over-extend its authority and that it uses its funds appropriately.

D. Comptroller General

The EESA also entrusted the CG, who is the director of the Government Accountability Office (GAO), with various oversight

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274. Under section 121(d)(1) of the EESA, the SIG TARP has the same authorities provided to an inspector general in section 6 of the Inspector General Act of 1978. Emergency Economic Stabilization Act §121(d)(1). This authority requires the "head of an establishment," which we have already determined the Office of the SIG TARP is within the Treasury, shall provide adequate office space, equipment, office supplies, communication facilities, and services that are necessary for the inspector general. Inspector General Act of 1978 § 6. Thus, with the Department of Treasury being the "establishment" of the SIG TARP, then the Department of Treasury must also supply the SIG TARP with adequate office space, supplies, etc. pursuant to section 6 of the Inspector General Act of 1978. *Id.*

275. *Id.* at § 3(a).

276. Emergency Economic Stabilization Act § 121(f)(1).

277. *See supra*, notes 255-70 and accompanying text.

and audit responsibilities for the TARP in order to provide a legislative[278] balance to the TARP's oversight.[279] Even though the GAO is a legislative branch agency, the EESA requires the Secretary to provide the GAO with appropriate space and facilities within the Treasury, which is an executive branch agency, in order to perform its duties and responsibilities governed by the EESA.[280] These duties can be generally described as: "[to] commence ongoing oversight of the activities and performance of the TARP and of any agents and representatives of the TARP, including vehicles established by the Secretary under the [EESA]."[281] The CG is required to submit

278. In 1986, the Supreme Court of the United States determined that the GAO is a legislative branch agency and cannot have any significant executive branch functions. Bowsher v. Synar, 478 U.S. 714, 734 (1986).

279. Emergency Economic Stabilization Act § 116. Congress gave this legislative branch audit and oversight abilities in order to balance the executive oversight abilities given to the SIG TARP. Of the four major oversight mechanisms created by the EESA, the CG is the only mechanism that the EESA did not have to establish and create.

280. *Id.* at § 116(a)(2)(A).

281. *Id.* at § 116(a)(1). There are eight different subjects of oversight that the CG is responsible for. *Id.* at § 116(a)(1)(A)-(H). First, the CG must monitor the performance of the TARP in order to ensure that it is meeting the purposes of the EESA. *Id.* at § 116(a)(1)(A). Second, the CG must examine the financial statements and internal controls of the TARP, its representatives and agents. *Id.* at § 116(a)(1)(B). Under the EESA, the TARP must establish and maintain an effective system of internal controls in order to provide a reasonable assurance of the effectiveness and efficiency of its operations, the reliability of its financial reports, and its compliance with applicable laws and regulations. *Id.* at § 116(c)(1). Along with the annual financial statements that the TARP must prepare for the CG's audits, the TARP must also "state the responsibility of management for establishing and maintaining adequate internal control over financial reporting" and its assessment of the effectiveness of the TARP's internal control over financial reporting. *Id.* at § 116(c)(1). The CG provides the only oversight mechanism that is actually given the responsibility to monitor the internal controls of the TARP. Third, the CG must analyze the details of the characteristics of transactions and commitments entered into to purchase assets. *Id.* at § 116(a)(1)(C). Fourth, the CG has the responsibility to review the characteristics and dispositions of acquired assets and the use of the proceeds from their sales. *Id.* at § 116(a)(1)(D). Fifth, the CG must provide oversight for the efficient use of appropriated funds for the operation of the TARP. *Id.* at § 116(a)(1)(E). Sixth, the CG must make sure that the TARP, its agents, and its representatives comply with all applicable laws and regulations. *Id.* at § 116(a)(1)(F). Seventh, the CG is the only oversight entity that must review the TARP's efforts to minimize conflicts of interest. *Id.* at §

reports, at least every sixty days, to the COP and the SIG TARP relating to the CG's oversight of the activities and the performance of the TARP.[282] In addition, the CG must annually prepare audited financial statements of the TARP that are prepared in accordance with generally accepted accounting principles (GAAP).[283] Whenever the CG's audit discovers a problem, the TARP must respond by taking action to address the deficiency or certify to the appropriate committees of Congress that no action is necessary or appropriate.[284] In performing its oversight or audit responsibilities of the TARP, the CG has access to any information, items, or property belonging to or in use by the TARP.[285] This allows the CG to obtain any and all information pertaining to the TARP so that it may reliably perform its responsibilities. Nevertheless, the CG's oversight, reporting, and audit responsibilities will eventually terminate on the later of the date the last troubled asset acquired under Section 101 of the EESA has been sold or transferred out of the control or ownership of the federal

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116(a)(1)(G). Eighth, the CG must examine the TARP's efficacy of contracting procedures in evaluating proposals for the inclusion and contracting to the maximum extent possible of minorities, women, and minority or women owned businesses. *Id.* at § 116(a)(1)(H). This is another unique responsibility of the CG, which no other oversight entity is entrusted with. Any cost associated with performing these oversight duties will be reimbursed by the Department of Treasury. *Id.* at § 116(a)(2)(C).

282. *Id.* at § 116(a)(3). The CG may also submit special reports to the same oversight entities as warranted by the findings of its oversight activities. *Id.*

283. *Id.* at § 116(b). The CG has the authority to "audit the programs, activities, receipts, expenditures, and financial transactions of the TARP and any agents and representatives of the TARP, including vehicles established by the Secretary under [the EESA]." *Id.* at § 116(b)(2). Any expenses incurred by the CG for performing any such audit will be reimbursed by the Department of Treasury. *Id.* at § 116(b)(1).

284. *Id.* at § 116(b)(3).

285. Emergency Economic Stabilization Act § 116(a)(2)(B). The CG specifically has access "to any information, data, schedules, books, accounts, financial records, reports, files, electronic communications, or other papers, files, or property belonging to or in use by the TARP." *Id.* The CG can request any of this information from any vehicle established by the Secretary under the EESA, anyone who performs activities on behalf of or under the authority of the TARP, or even from any vehicle as the CG requests. *Id.* In addition, the CG also has the authority to make and retain copies of anything as the CG deems appropriate. *Id.*

government, or on the date the last insurance contract under Section 102 of the EESA expires.[286]

V. EVEN WITH THE PROVIDED OVERSIGHT, THERE ARE STILL MANY ISSUES REGARDING THE EMERGENCY ECONOMIC STABILIZATION ACT OF 2008 AND ITS PROGRAMS

Through the EESA, Congress has committed $700 billion of taxpayers' money for the TARP's spending.[287] Congress attempted to create adequate safeguards to ensure the taxpayers' money was being spent prudently and solely for the purposes stated in the EESA. These safeguards were intended to be established by the various oversight entities which have the duty to monitor, review, and report on the operations of the Secretary and of the TARP. However, these safeguards seem to be incomplete.

When individuals ask for money from banks, they are required to disclose how the money will be spent before receiving the money – banks should have the same disclosure requirement before receiving taxpayer money. With $700 billion being spent, the public deserves for the TARP to be transparent enough so they feel comfortable with the manner in which their taxpayer dollars are being allocated. The intended purpose of the CPP is stated as being "to encourage U.S. financial institutions to build capital to increase the flow of financing to U.S. businesses and consumers and to support the U.S. economy."[288] As of January 30, 2009, over $195 billion dollars has been spent between 361 different financial institutions through the CPP program alone.[289] Congress has hoped that this huge influx of money would lift financial pressures off these financial institutions, and as a consequence, help restore confidence in America's financial

286. *Id.* at § 116(e). However, unless the date is extended, the Secretary is only required to provide the CG with space and facilities until December 31, 2009. *Id.* at §§ 116(e), 120(a).

287. *Id.* at § 115(a).

288. U.S. Dep't of Treasury, *Guidelines for Capital Purchase Program*, Jan. 2, 2009, http://www.treas.gov/initiatives/eesa/program-descriptions/cpp.shtml [hereinafter *Guidelines for CPP*].

289. Office of Financial Stability, *Troubled Asset Relief Program: Transactions Report*, Feb. 2, 2009, http://www.treasury.gov/initiatives/eesa/docs/transaction_report_02-02-09.pdf [hereinafter *TARP Transactions Report*].

sector. This desired confidence, however, was unattainable once taxpayers learned on December 21, 2008, that the first 116 banks participating in the CPP had awarded their top executives nearly $1.6 billion in salaries, bonuses, and other benefits in 2007.[290] This has understandably caused concern in taxpayers' eyes because these executives were receiving huge compensations while their financial institutions crumbled, requiring federal funds to fix their mistakes.[291] These examples of excessive spending make taxpayers wonder how the CPP funds will be used; will the funds be used to help stabilize the financial market and increase lending or will they be used to excessively compensate its executives as was done in 2007?[292]

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290. Associated Press, *$1.6B of Bank Bailout Went to Execs*, CBS News, Dec. 21, 2008 http://www.cbsnews.com/stories/2008/12/21/business/main4680508.shtml. The Associated Press issued a report giving the details of the executives' compensation. *Id.* Some of the benefits included "cash bonuses, stock options, personal use of company jets and chauffeurs, home security, country club memberships and professional money management." *Id.* Goldman Sachs incurred costs of up to $233,000 per executive for cars and drivers. *Id.* In 2007, the Chairman of JPMorgan Chase spent $211,182 on private jet travel when his family lived in Chicago and he was commuting to New York. *Id.*

291. *Id.* The compensation to executives at such financial institutions as Goldman Sachs Group Inc. (Goldman Sachs), Capital One Financial Corp (Capital One), and Merrill Lynch & Co. (Merrill Lynch) leave taxpayers and investors uneasy about the stability of the financial market. In 2007, Goldman Sachs paid its top five executives a total of $242 million in compensation. *Id.* Then, in 2008, Goldman Sachs was among the first eight financial institutions to receive federal money totaling $10 billion. *CPP TARP Transaction Report*, *supra* note 289. Capital One was also financially forced to participate in the CPP program on November 21, 2008, for $3.56 billion. *Id.* With Capital One having a disappointing year in 2008, its chairman took a $1 million decrease in compensation. *$1.6B of Bank Bailout Went to Execs.*, *supra* note 290. This seemed very noble of the chairman, however, he still received $17 million in stock options. *Id.* The CEO of Merrill Lynch also earned more than a total of $83 million in 2007. *Id.* Merrill Lynch was also a part of the first financial institutions to receive aid from the government. *Id.* Even though Merrill Lynch received $10 billion from the CPP, it was still sold and subsequently merged with Bank of America. *Id.*

292. *Second COP Report*, *supra* note 226, at 3. "So long as investors and customers are uncertain about how taxpayer funds are being used, they question both the health and the sound management of all financial institutions." *Id.*

The Associated Press conducted a survey of twenty-one banks, which received at least $1 billion in government bailout money.[293] This survey asked four questions about the money received by the financial institution from the government and all of the twenty-one banks either declined to comment or did not provide specific answers.[294] This is an example of a major problem with the TARP and why investors still do not have confidence in the United States' financial market. Financial institutions that participate in the CPP have no stated requirement to use the government CPP funds in any particular way.[295] Even if there was such a requirement, there is still nothing in the EESA or in the Securities Purchase Agreement attached to the CPP that requires a financial institution to disclose, to the public or even to the government, how the funds are actually being spent.[296] This lack of transparency of how the financial institutions are using their bailout funds concerns everyone because for all we know the financial institutions are using the government funds for salaries, bonuses, issuing dividends, or even to buy out other banks, instead of using the money to stabilize the larger financial market and increase lending.

The EESA provides for four major oversight entities to help ensure that the Secretary and the TARP would be transparent to the public, but it obviously fell short in regard to how financial institutions used the TARP funds because no government agency or public person has any idea how the money is being spent. The COP has the power to request official data in order to carry out its duties, but this power is limited to only departments and agencies of the United States.[297] The COP, however, does have the power to "hold

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293. Associated Press, *Banks Won't Give Specifics On Bailout Spending*, CBS 5, (December 22, 2008) http://cbs5.com/national/bailout.banks.us.2.892674.html.

294. *Id.* The four questions regarding the government money were: (1) How much has been spent?; (2) What was it spent on?; (3) How much is being held in savings?; and (4) What is the plan for the rest? *Id.*

295. Instead, financial institutions are merely supposed to build their capital to increase the flow of financing. *Guidelines for CPP*, *supra* note 288.

296. Matt Apuzzo, *Where'd the bailout money go? Banks Aren't Saying*, USA TODAY, (Dec. 26, 2008) http://www.usatoday.com/money/industries/banking/2008-12-22-bailout-money-where_N.htm?csp=34.

297. Emergency Economic Stabilization Act § 125(e)(3). Even if the COP requested statements from the SEC or IRS regarding the financial institutions, this

hearings, take testimony, and receive evidence as the [COP] considers appropriate and may administer oaths or affirmations to witnesses appearing before it."[298] If the COP uses this power to hold hearings to gain testimony and evidence from a financial institution, it will only force the witness to disclose if they know how the government money was being spent.[299] This process would not only take a lot of time and use more of the taxpayers' money, but it still would not force the financial institutions to keep records of how they used the bailout funds.

In order to ensure the taxpayer's money is being diligently spent to restore stability to the financial market and ensure lending to taxpayers and businesses, amendments or chanegs need to be made to the EESA. The combination of five different amendments or changes to the EESA and its programs, such as the CPP, could help ensure the goals that Congress and the Secretary had originally envisioned in creating the EESA are met. The first of these amendments should state that when any financial institutions receives funding from the TARP and has preferred stock under the control of the Federal Government, then these financial institutions should be forced to restrict the compensation to their executives.[300] Under the EESA, financial institutions participating in TARP had certain restrictions on their executive compensation, but it did not specify a limit to that compensation nor was there any regulation on luxury expenditures.[301] The Treasury, however, noticed this deficiency and

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still would not provide the COP with enough information to decipher how the government funds were being used.

298. *Id.* at § 125(e)(1).

299. The chairperson of the COP explained that, "[i]f the appropriate restrictions were put on the money to begin with, if the appropriate transparency was in place, then we wouldn't be in a position where you're trying to call every recipient and get the basic information that should already be in public documents." Apuzzo, *supra* note 296.

300. As the AP review of the executives of financial institutions receiving bailout money shows, these executives were awarded huge annual salaries, bonuses, and additional compensations and the following year their financial institution required government funds to stay alive. *$1.6B of Bank Bailout Went to Execs.*, *supra* note 290. Any money paid through the TARP should not be used to compensate executives who did a poor job of running their financial institutions. Furthermore, it should not be the taxpayers' responsibility to pay these executives' exorbitant compensation.

301. *See supra* notes 100-14 and accompanying text.

on February 4, 2009, the Treasury issued guidelines that are "designed to ensure that the compensation of top executives in the financial community is closely aligned not only with the interests of shareholders and financial institutions, but with the taxpayers providing assistance to those companies."[302]

The Guidelines impose new compliance requirements of executive compensation on all companies that have received or are going to receive any form of government assistance.[303] In addition, the Guidelines place increased restrictive conditions on the executive compensation depending on whether the financial institution receiving federal assistance is participating in a "generally available capital access program" or is receiving "exceptional financial recovery assistance."[304] For financial institutions participating in a generally available capital asset program, their senior executives are limited to $500,000 in total annual compensation,[305] the twenty-five

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302. U.S. Dep't of Treasury, *Treasury Announces New Restrictions on Executive Comp*, TG-15 (Feb. 4, 2009), *available at* http://www.ustreas.gov/press/releases/tg15.htm [hereinafter *New Restriction on Executive Comp.*].

303. *Id.* This guideline requires the chief executive officer of the financial institution to annually certify that the company has strictly complied with "statutory, Treasury, and contractual executive compensation restrictions." *Id.* This certification will hold chief executive officers personally liable if there is a deficiency in complying with the executive compensation requirements. Additionally, such companies must have their compensation committee "provide an explanation of how their senior executive compensation arrangements do not encourage excessive and unnecessary risk-taking." *Id.*

304. *Id.* The qualities of "generally available capital access program" are that all the recipients have the same terms, there are limits as to how much each institution may receive from the program, and there are specified returns for taxpayers. *Id.* An example of a generally available capital access program is the CPP. *Id.* Financial institutions that are in need of more assistance than is allowed under a widely available standardized program are distinguished as requiring "exceptional assistance." *Id.* These financial institutions have "bank-specific negotiated agreements with Treasury." *Id.* Examples of financial institutions that require "exceptional assistance" are AIG, under the SSFI, and Citigroup Inc. or Bank of America Corporation, under the Targeted Investment Program. *Id.*

305. *Id.* The $500,000 limit to total annual compensation includes the value of restricted stock. *Id.* However, this limit to senior executives' compensation can be waived upon the full disclosure of their compensation and, if requested, a non-binding "say on pay" shareholder resolution. *Id.* In addition to the limit on compensation, these financial institutions must still review and disclose why the

highest paid senior executives are subjected to claw-back provisions of their bonuses and incentive compensation,[306] the top five senior executives are limited to a golden parachute payment no greater than one year's compensation,[307] and there are new policy requirements for luxury expenditures.[308] The Guidelines also establish executive compensation restrictions on companies receiving exceptional financial recovery assistance which are similar to, but more restrictive than, the guidelines set in place for companies participating in generally available capital access programs.[309] Financial institutions receiving exceptional financial recovery assistance must limit their senior executives' total annual

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compensation agreements of the senior executives and of the other employees do not encourage excessive risk taking. *Id.*

306. *Id.* The top 25 senior executives are subject to having their bonuses and incentive compensation clawed-back "if they are found to have knowingly engaged in providing inaccurate information relating to financial statement or performance metrics used to calculate their own incentive pay." *Id.* This same guideline also applies to companies receiving exceptional financial recovery assistance. *Id.* Under the CPP, only the top five senior executives were subject to such a claw-back provision. *Id.*

307. *New Restriction on Executive Comp.*, *supra* note 302. After one of the top five senior executives is severed from employment, they will not be allowed a golden parachute payment greater than one year's compensation. *Id.* This would seem to severely restrict golden parachute payments, but by using the term "one year's compensation" it allows golden parachutes to include salary, bonuses, and stock when calculating a senior executive's compensation. By limiting golden parachutes to one year's compensation, people like John Thain, Chief Executive Officer of Merrill Lynch, can still take advantage of the system exhibited through his $83 million in total compensation in 2007, which consisted of $57,692 in salary, $15 million in signing bonus, and an additional $68 million in stock options. Apuzzo, *$1.6B of Bank Bailout Went to Execs.*, *supra* note 290.

308. *New Restrictions on Executive Comp.*, *supra* note 302. The board of directors must create, adopt, and publicly disclose a company-wide policy dealing with expenditures relating "to aviation services, office and facility renovations, entertainment and holiday parties, and conferences and events." *Id.* This company-wide policy is to deal with luxury expenditures and not the reasonable expenditures tied to normal business operations. *Id.* Whenever there is an expenditure that could be viewed as excessive or luxury items, then the chief executive officer must certify that the expense is within the company policy or is a reasonable expenditure tied to normal business operations. *Id.*

309. *Id.*

compensation to $500,000 not including restricted stock,[310] have a non-binding shareholder resolution to approve the senior executive compensation structure,[311] subject the twenty-five highest paid senior executives to provisions that can claw-back their bonuses and incentive compensation,[312] expand restrictions on golden parachutes for senior executives,[313] and adopt new policy requirements for luxury expenditures.[314] These guidelines were well "designed to ensure that public funds are directed only toward the public interest in strengthening our economy by stabilizing our financial system and not toward inappropriate private gain."[315] However, there are still issues with the Guidelines that will have to be eventually addressed.

First of all, guidance documents, such as the Guidelines, are not legally binding on the public, the agency, or the courts.[316] Secondly, even if the Guidelines were legally binding, they would only apply to institutions that accept new or additional government funding that

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310. *Id.* The senior executive's compensation limit of $500,000 in total compensation does not include compensation in the form of restricted stock. *Id.* This allows senior executives to be paid more than the $500,000 with restricted stock that can only be cashed in after the government has been completely repaid, including dividends, or "after a specified period according to conditions that consider among other factors the degree a company has satisfied its repayment obligations, protected taxpayer interests or met lending and stability standards." *Id.* By allowing a senior executive to gain this restricted stock, it helps ensure that the financial institution's "incentives [are] aligned with both the long-term interests of shareholders as well as minimizing the costs to taxpayers." *Id.*

311. *Id.* This "say on pay" provision gives the stockholders the power to understand and authorize the executive compensation structure and how the compensation is tied to sound risk management. *Id.*

312. *Id.* This guideline is the same as the claw-back requirement for financial institutions participating in generally available capital access programs. *Id.*

313. *Id.* The top five senior executives are denied the receipt of any golden parachute payments whatsoever. *Id.* In addition, at least the next twenty five executives are prohibited from receiving any golden parachute payment greater than one year's compensation. *Id.* Again, this still leaves the option open for these executives to include their salary, bonuses, and stock when calculating their one year's compensation. *Id.*

314. *New Restrictions on Executive Comp.*, *supra* note 302. This guideline is the same as the luxury expenditure policy requirement for financial institutions participating in generally available capital access programs. *Id.*

315. *Id.*

316. KEITH WERHAN, PRINCIPLES OF ADMINISTRATIVE LAW, 253 (Thomas West 2008).

constitutes either exceptional financial recovery assistance or is made through a generally available capital access program.[317] "These new standards will not apply retroactively to existing investments or to programs already announced."[318] This means the Guidelines will not apply to the 361 financial institutions already participating in the CPP or the other three financial institutions that would be considered receiving exceptional financial recovery assistance because all of these contracts took place before the Guidelines were established on February 4, 2009.[319] The only way the Guidelines could apply to one of these pre-February 4, 2009, financial institutions would be if they had to come back to the government and ask for more money. Otherwise, the Guidelines only apply to post-February 4, 2009, TARP participating financial institutions. This could create a problem because the government would be holding similarly situated financial institutions to two different standards and it would not

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317. *New Restrictions on Executive Comp.*, *supra* note 302.

318. *Id.* In the case of *Bowen v. Georgetown University Hospital*, the Court held that the Department of Health and Human Services could not retroactively recalculate Medicare reimbursements due to hospitals for 1981 and 1982 based on a regulation promulgated in 1984. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 206-08; 216 (1988). The Supreme Court of the United States reasoned that administrative agencies generally do not have the power "to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Id.* at 208. Even if there is substantial justification for there to be retroactive rulemaking, the courts will be reluctant to find such authority absent an express statutory grant. *Id.* at 208-09. So even though there is ample justification in retroactively implementing a law that limits a financial institution's, participating in the TARP, executive compensation, Congress does not expressly grant the Secretary the power to do this. Under the EESA, the Secretary does have the authority to retroactively recover bonuses or incentive compensation paid to senior executives based on criteria proven materially inaccurate. Emergency Economic Stabilization Act § 111(b)(2)(B). However, this retroactive provisions deals only with bonuses and incentive compensation in a specific fact pattern and does not expressly state the Secretary has the power to retroactively limit a TARP participating financial institution's executive compensation. *Id.* Thus, the Secretary cannot implement the Guidelines to apply retroactively.

319. *TARP Transaction Report; Treasury Announces New Restrictions on Executive Compensation.* This is a shame because a majority of the financial institutions have already been granted or denied participation in the TARP. Granted there are still more applications being considered after February 4, 2009, but the numbers will be dramatically less compared to the first couple months directly following the introduction of the TARP

necessarily be fair.[320] The only way to enforce the Guidelines on all financial institutions, equally and retroactively, would be if Congress created an Act that imposed regulatory reform on financial institutions.[321]

Regulatory reform is an extremely feasible possibility in the near future.[322] The Guidelines already propose some regulatory reforms dealing with executive compensation and the Secretary is hosting a conference with various parties to specifically discuss an executive pay reform of financial institutions.[323] Regardless of when a financial institution entered into contract dealing with the TARP, Congress could enact a provision that limits the executive compensation of all financial institutions, removing issues of retroactively changing the financial institutions' TARP agreements with the government. This type of reform, however, would not only limit the executive compensation of troubled financial institutions, but it would also limit the executive compensation of financial institutions that managed to be successful and did not require TARP

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320. Furthermore, the Guidelines are only voluntary "standards" that carry no real authority until the situation exists when an applicable financial institution does not follow the Guidelines, the Treasury takes the financial institution to court, and the judicial courts decide their application and legality. The only other way that the Guidelines can be given the legal authority for the Treasury to enforce would be if Congress passed a bill containing the provisions.

321. Courts can enact retroactive statutes. *See, e.g.*, Pension Benefit Guarantee Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984); Welch v. Henry, 305 U.S. 134 (1938).

322. The restrictions under the Guidelines have been added to the stimulus bill that is currently under consideration in the Senate. H.R. 337, 111th Session (1st Session 2009).

323. *New Restrictions on Executive Comp.*, *supra* note 302. The Guidelines proposed that all public financial institutions must establish a compensation committee to review and disclose strategies for aligning compensation with sound risk management and long-term value creation for their companies and their shareholders. *Id.* Another proposal the Guidelines described was to encourage top executives to focus more on the long-term economic interests of the firm by requiring the top executives to hold stock for several years after it is awarded and before it can be cashed out. *Id.* The Guidelines also proposed that since the shareholders are the owners of the financial institutions, they "should have a non-binding resolution on both the levels of executive compensation as well as how the structure of compensation incentives helps promote risk management and long-term value creation for the firm and the economy as a whole." *Id.*

funds.[324] Thus, it will be interesting to see what actions Congress chooses to take regarding the reform of the financial institutions' executive compensation and when, or if, these regulatory reforms will take place.

Even with regulatory reform on executive compensation, it will still not be enough to restore taxpayers' and investors' confidence in the financial market of the United States because there is still no accountability nor disclosure of how government funds are being used. The lack of any accountability of TARP funds obtained through the CPP may make it too late to monitor financial institutions' use of the first $195,328,219. However, the Secretary can amend the CPP to fix these issues before the rest of the TARP funds are disbursed.

The second recommended amendment to the EESA should state that any entity receiving government funding from participating in a TARP should have to account for how the taxpayers' funds are being used to further the applicable goals, such as stabilizing the financial market and increasing lending, and ensure the funds are not being used for the institution's self-interest. Beginning when a financial institution receives government funding, it should have to prepare a separate financial statement that shows at least four basic items. First, it should disclose how much money the financial institution received from the TARP program. Second, it should account for how much bailout money was spent, when it was spent, and for what. Third, the financial statement should reveal how much of the TARP money is being stored in the financial institution's savings account or capital account. Fourth, it should reveal how much of the government money is being used to further the governmental program's goals and from where the financial institution received its funds. By requiring financial institutions to maintain financial statements that can address at least these four questions, it will force

324. This may not be considered a fair enactment because it would limit the compensation from executives who perform well and rightfully deserve their salary. These successful executives should not be limited to the same compensation as executives of unsuccessful financial institutions. This reform, in the long run, could ultimately cause the executives of financial institutions to not perform their duties to the best of their abilities because they will have no monetary incentive to further the success of the institution. Thus, this lack of motivation by the executives could cause for the downfall of financial market again and require the government to again intervene to stabilize the situation.

the financial institutions to maintain an accurate accounting of their government acquired funds.

Another recommended change to the EESA needs to address the lack of public transparency. Even with an accurate accounting of a financial institution's use of TARP funds, there still needs to be better transparency so that taxpayers can be confident their money is being used for the proper purposes. Transparency can be dramatically increased if the financial institutions were required to issue a financial statement, dealing with the use of its government allocated funds, every thirty days or on a similar time period.[325] These reports would need to be fully disclosed to the public because the public should have the right to know how their taxpayer dollars are being spent.[326] Financial institutions should also be required to send these reports to the COP and to the SIG TARP in order to ensure proper oversight.[327] By requiring financial institutions to account for and disclose the use of TARP funds, the Secretary could help bring confidence and transparency back to the United States' financial markets.

The fourth needed change to the EESA needs to establish some form of consequences for institutions that do not adhere to the provisions of the EESA and its programs. Besides the TARP allowing the claw-back of bonuses and incentive compensation[328] and yearly certification requirements that is imposed by the CPP,

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325. Having the financial institutions issue reports every thirty days will force them to not fall behind in the accounting of their use of bailout funds. The other advantage to having a short reporting period is that it will be easier for oversight to prevent the misallocation of funds because the reports will allow for better oversight tracking of the funds.

326. With the easy accessibility of information on the Internet, financial institutions should be able to post these financial statements for the public on company website.

327. The COP would use these financial reports to measure the impact of the purchases made under the TARP on the financial markets and on the financial institutions. Emergency Economic Stabilization Act § 125(b)(2). The SIG TARP could exercise its authority over the financial statements to conduct, supervise and coordinate audits of the management of the assets under any program established through section 101 or section 102 of the EESA. *Id.* at § 121(c)(1). Under this provision, the SIG TARP would be managing the government's stock in the financial institution by auditing the institution's use of the TARP funds. *Id.*

328. *Id.* at § 121(b)(2)(B).

which could make the signatory liable for fraud,[329] there are no general consequences to the financial institutions that do not uphold the laws of the TARP and its programs. This is not fair to the taxpayers because there are no provisions to compel the financial institutions' compliance with the TARP. If the roles were reversed and it were the financial institutions lending the money to the government, then there would have been definite consequences that the government would have to pay if they did not comply with the contract.[330] The same type of enforcement procedure should be used by the government in order to create incentives to follow the provisions in the TARP.

Thus far, the majority of financial institutions that participate in the TARP have traded shares of preferred stock and warrants for common stock in exchange for receiving bailout funds.[331] While the government holds the preferred stock, the stock pays a five percent cumulative dividend for the first five years and is increased to nine percent thereafter.[332] This is where the consequences for a financial institution for not adhering to the TARP should take effect. I would propose that at the time a report is due by a financial institution, if there are any deficiencies with the compliance of the TARP or any of its future amendments, then there would be a permanent three percent increase of the cumulative dividend due to the government's preferred stock. This provision would be subject to a waiver if the financial institution believes and proves its actions did not violate the

329. *TARP Capital Purchase Program*, *supra* note 105 and accompanying text.

330. If a bank was issuing money to an individual, a business, or even the government, then the party requesting the funds would have to comply with all of the bank's requirements. The banks would make the party disclose, among other things, their financial status and assets that can be used for collateral. Then, the bank would require the party to certify to the truth of the disclosure along with certain ramifications if the disclosures are found to be false. Afterwards, the bank would create a contract for the bank to release the funds to the party. This contract would not only grant funds to the party, but it would also impose strict consequences in the event the party does not fully comply with the terms of the contract. It is this sort of provision that banks use to help ensure compliance with its terms, and this is the same type of provision that should be used by the government to help guarantee financial institutions uphold the provisions laid out in the TARP and its future amendments.

331. *TARP Transactions Report*, *supra* note 289.

332. *CPP Term Sheet*, *supra* note 85.

TARP provisions. Imposing this form of monetary consequence on financial institutions would be an option for the government, but the question still remains whether this form of consequence could be imposed on financial institutions already participating in the TARP.[333]

There are two methods that could be used to implement the enforcement of such consequences on financial institutions that are currently participating in the TARP and on those that may participate in the future. The first method would allow Congress to dictate the terms of the consequences for violating the TARP in an act that amends the TARP. Under this method, Congress could apply the consequences to any financial institution violating the TARP and could even retroactively apply the consequences for gross violations of the TARP. A possible disadvantage to allowing Congress to enact the provision is that there is no telling how long it could take to be approved by the Senate, the House of Representatives, and the President.

An alternative method would require the Secretary to exercise his or her authority under the EESA to create this new "rule."[334] In

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333. This form of consequence would punish financial institutions, and not necessarily its executives, for not respecting the taxpayers' money by neglecting the terms of their contracts and of the TARP. In addition, taxpayers will benefit from this because more money will be made on the capital investment. This is more preferable than the government rescinding the agreements with the financial institutions and recovering the capital that was invested. First of all, it cannot be guaranteed that the government could even reacquire its capital investment because the financial institution may have already used all the funds. If the government could successfully recover their investment, it would be contrary to a purpose of the EESA of stabilizing the financial market because the financial institution will undoubtedly fail without the government assistance. If the government could not recover its investment, then the government would have to act as a creditor, take control of the bank, and manage the sale of its assets. I doubt the government wants to be in charge of such a proceeding and this form of action should be reserved for a last case scenario. Thus, just as a bank would increase the interest rate on a party who violates the provisions of their contract, the government should reciprocate the same behavior with the increase in cumulative dividends paid on preferred stock.

334. Emergency Economic Stabilization Act § 101(a). The Secretary has the authority to determine the terms and conditions by which the TARP purchases troubled assets from any financial institution. *Id.* Under this provision, the Secretary would be merely exercising the same authority to amend the terms and conditions that the Secretary originally established. According to a standard

deciding between the Secretary's options to create this rule using rulemaking procedures or adjudication, the Secretary would most likely follow rulemaking procedures because it would be more advantageous in this situation.[335] As is the general practice of rulemaking,[336] the Secretary would most likely follow informal rulemaking procedures as described in the Administrative Procedure Act.[337] Given the fact that this rulemaking procedure would apply

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dictionary, a rule is a "prescribed guide for conduct or action." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY at 1023 (10th ed. 1993). However, for the purposes of administrative agencies, the Administrative Procedure Act defines a "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. § 551(4) (2007). Consequences enforced against financial institutions that violate the TARP would fall under the APA's definition because this rule would apply to all financial institutions participating in the TARP and would only consider future violations of the TARP.

335. The Supreme Court has held that the choice to follow rulemaking or adjudication procedures is generally the agency's to make. NLRB v. Bell Aerospace Co., 416 U.S. 267, 294-295 (1974). The only time an agency has no choice in the matter, is when a statute requires otherwise. *See, e.g.*, Michigan v. EPA , 744 F.2d 1145 (5th Cir. 1984) (holding that EPA could not determine issues under the Clean Air Act on an adjudicative case-by-case basis, where Clean Air Act required it to follow notice-and-comment rulemaking). Under the EESA, there is no statute requiring a specific rule procedure. Thus, the Secretary can choose the procedure that best fits this issue. The Secretary would probably choose to follow rulemaking procedures because these consequences are supposed to apply for the future actions of all financial institutions and not for holding a single entity accountable for their specific past actions, as adjudication would provide. *See* Bi-Metallic Invest. Co. v. State Bd. Of Equalization, 239 U.S. 441, 445-46 (1915). Rulemaking is also more efficient for the agency because it can result in the adoption of a general principle that can thereafter be applied without reexamination, thereby eliminating the need for many case-by-case adjudications. WERHAN, *supra* note 316 at 177. By correctly following rulemaking procedures, this would allow the only enforcement issue to be whether or not the defendant actually violated the established rule. *Id.*

336. *Id.* at 165.

337. 5 U.S.C. § 553 (2007). There are four basic steps for informal rulemaking. *Id.* at § 553(b)-(d). First, the agency must publish a "notice of proposed rulemaking," which is typically done in the *Federal Register*. *Id.* at § 553(b). "The notice shall include a statement of the time, place, and nature of public rule making proceedings; reference to the legal authority under which the rule is proposed; and either the terms or substance of the proposed rule or a description of the subjects and issues involved." *Id.* at § 553(b)(1)-(3). Second, the agency must allow a comment period to allow "interested persons an opportunity to

the rule equally against all financial institutions for their future actions, the Secretary should also include a waiver provision to allow a party the opportunity to show that this rule should not be applied to its individual case.[338] Either one of these methods, a Congressional enactment or an informal rulemaking by the Secretary, could establish consequences for not following the TARP provisions, so long as they only apply to the future actions of financial institutions and do not attempt to be retroactive.

The fifth recommended change to the EESA would be to determine a way to increase the overall transparency of the TARP and to reconcile any conflicting reporting. Even though Congress has had the foresight to create oversight in the EESA, this oversight was probably established because congressional "consensus seemed to have been reached by including everyone's favorite idea in the bill, with no one thinking hard about how all of them fit together and whether more oversight is necessarily better than less."[339] Under the EESA, there are eleven different entities that prepare and issue a total of eighteen different types of reports.[340] No single entity, including Congress or the "appropriate committees of Congress," receives all

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participate in the rule making through submission of written data, views or arguments with or without opportunity for oral presentation." *Id.* at § 553(c). Depending on the complexity, most rulemakings should include a comment period of at least sixty days. Exec. Order No. 12,866, 58 Fed. Reg. 51735 (1993). However, the comment period may also be less than 60 days as it was with the TLG Program which included a fifteen day comment period. Temporary Liquidity Guarantee Program, 73 Fed. Reg. at 72,244. Third, the agency has a duty to consider the public comments. 5 U.S.C. § 553(c) (2007). Fourth, the agency must publish their final rules in the *Federal Register* which must also include a concise general statement of the rule's basis and purpose. *Id.* After the final rule is published, it will take effect as law in "not less than 30 days." *Id.* at § 553(d). In addition to section 553 procedures of the APA, there may also be government-wide procedural requirements that must be complied with before the rule becomes official.

338. *See* United States v. Storer Broad. Co., 351 U.S. 192, 201-02 (1956); *see also* FPC v. Texaco, 377 U.S. 33, 39 (1964) ("In the present case, as in *Storer*, there is a procedure provided in the regulations whereby an applicant can ask for a waiver of the rule complained of").

339. Alan Morrison, *Plugging Leaks in the Bailout*, LEGAL TIMES, November 10, 2008, http://www.law.com/jsp/dc/PubArticleDC.jsp?id=1202425807997.

340. *Reporting Requirements*, *supra* note 185, at 14-17.

of the reports.[341] Instead, the eighteen different reports are submitted to six various entities.[342] Furthermore, the EESA has created reporting responsibilities that overlap between the different oversight entities.[343] It may have been Congress's original intent for such overlap to occur, believing that it would be a benefit to have different

341. The EESA defines the appropriate committees of Congress to be

> . . the Committee on Banking, Housing, and Urban Affairs, the Committee on Finance, the Committee on the Budget, and the Committee on Appropriations of the Senate; and the Committee on Financial Services, the Committee on Ways and Means, the Committee on Financial Services, the Committee on Ways and Means, the Committee on the Budget, and the Committee on Appropriations of the House of Representatives.

Emergency Economic Stabilization Act § 3(1).

342. *Reporting Requirements*, *supra* note 185, at 10. The 7 various entities that receives the reports required by the EESA are: (1) the appropriate congressional committees; (2) a subset of those appropriate committees; (3) Congress as a whole; (4) the COP; (5) the SIG TARP; (6) the President of the United States; and (7) the public. *Id.*

343. The first example of this is that the FSOB and the COP are both required to review how the Secretary of the Treasury uses the authority provided in the EESA. Emergency Economic Stabilization Act §§ 104(g); 125(b)(1)(A)(i). A second example deals with the CG and the SIG TARP both having the general responsibility of overseeing the activities and performances of the TARP and auditing the purchase, management, and sale of assets under any EESA Section 101 program. *Id.* at §§ 116(a)(1), 121(c)(1). The CG and the SIG TARP also have overlapping specific responsibilities. The CG has the specific duty to describe the "characteristics and dispositions of acquired assets." *Id.* at § 116(a)(1)(D). The SIG TARP has a similar specific duty to provide a description of the different categories of troubled assets procured by the Secretary, along with a listing of the troubled assets in each such category. *Id.* at § 121(c)(1)(A)-(B). Another overlap occurs between the Secretary and the COP. The Secretary must issue a report "not later than April 30, 2009, 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." *Id.* at § 105(c). Nearly three months earlier, the COP had to submit a very similar report that analyzes the current state of the regulatory system, its effectiveness at overseeing the participants in the in the financial system, its effectiveness in protecting consumers, and providing any recommendations for improvement. This reporting requirement to provide a recommendation for improvement is the exact same reporting requirement that the Secretary must comply with by "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." *Id.* at §§ 125(b)(2); 105(c)(1)(A).

perspectives on the same issue. However, this overlap could cause inconsistent reporting between the oversight entities because they may be relying on different information or using different valuation methods, which would lead to various and sometimes conflicting conclusions on the same issue. This could cause confusion as to which report should be ultimately relied on by the administrative agencies, Congress, and the president.

In addition, the current lack of transparency cannot satisfy one of the defined purposes of the EESA, which is "to ensure that such authority [exercised by the Secretary] and such facilities are used in a manner that provides public accountability for the exercise of such authority."[344] This purpose surely cannot be met when only one of the eighteen different TARP reports is required to be made available to the public.[345] Even though some of these reports have been issued to the public without them being required to, there is still a lack of public transparency, resulting in one of the main purposes of the EESA not being satisfied.[346] However, all of these issues could be addressed with Congress enacting a new administrative agency.

Congress could establish an "independent administrative agency"[347] given the sole purpose to issue a single quarterly report

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344. *Id.* at § 2(2)(D).

345. *Reporting Requirements*, *supra* note 185, at 12. This requires the TARP, which is neither an individual nor an organization, to prepare and issue audited financial statements to the appropriate committees of Congress and the public. Emergency Economic Stabilization Act § 116(b)(1).

346. *See supra* note 344 and accompanying text.

347. If this administrative agency was established, it would most likely be a legislative independent agency. This would allow Congress to appoint five or seven individuals to be in charge and who would be somewhat insulated from presidential control. These members would probably be evenly appointed by both parties of Congress, as done with the members of the COP. *See supra* note 222 and accompanying text. Similar to the FSOB, there should be a chairperson elected by the members of the administrative agency. *See supra* note 189 and accompanying text. The members of this administrative agency would be performing a lot of work to compile, reconcile, and analyze the other eighteen EESA reports and these members should be paid the daily rate of basic pay for level I of the Executive Schedule for each day the member is performing agency duties. Since both parties of Congress evenly get to decide the members of this administrative agency, then both parties of Congress should also have to equally fund it like they did with the COP. *See supra* note 236 and accompanying text. The administrative agency's authority should remain in effect until the other eighteen EESA reports are

that analyzes, reconciles, and compiles the eighteen reports required by the EESA. By giving this administrative agency the authority to receive and question all eighteen of the EESA reports, then there would finally be an entity with the access to all of the TARP information. This would put the administrative agency in the best position to publish a single quarterly report that could provide a complete picture of the TARP with specificity and address any conflicting, overlapping reports. Having this report serve as the compilation of the eighteen other EESA reports, this quarterly report should have the authority to be the main report relied upon when dealing with issues that involve the TARP. In addition, by making this authoritative report available to the public, it could fix the EESA's lack of public transparency and satisfy one of the main purposes of the EESA.[348]

VI. CONCLUSION

With the EESA being enacted within two weeks of its first draft, Congress obviously left holes in it.[349] Generally, it is common for there to be some issues regarding the enactment because Congress cannot be expected to be able to foresee all of the future possibilities.[350] That is what happened with the EESA. When the EESA was drafted, Congress believed the TARP would purchase the toxic assets from the financial institutions and Congress drafted the authorities, reports, funding, transparency, and oversight accordingly.[351] Then, eleven days after the EESA was enacted, the

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terminated and this administrative agency has covered all of such reports in its own report.

348. *Supra* note 344 and accompanying text.

349. *See supra* notes 41-51 and accompanying text. After the first draft of the EESA was proposed, the current draft of the EESA was passed in the House of Representatives and the Senate and was enacted into law by President Bush two weeks later. *Id.*

350. Aziz Huq, *Constitutional License*, TOMPAINE.COM, Jan. 24, 2006, http://www.tompaine.com/articles/2006/01/24/constitutional_license.php.

351. Scott Wacholtz, *Treasury Bailout Won't Buy Toxic Assets*, MARKETS.COM, Dec. 3, 2008, http://www.markets.com/story/Markets-6202008-US-TreasuryBailoutWontBuyToxicAsset.php. In early October, the Secretary announced that the TARP would not be utilized to purchase mortgage-backed

Secretary changed the course of the TARP from purchasing toxic assets to making capital injections.[352] The EESA provisions, as they were originally drafted, were not intended to cover this change of policy; thus, the EESA cannot adequately be used as it was intended.[353] This is why the EESA has come under such public scrutiny for the lack of transparency, oversight, accountability, consequences, and applicable provisions.[354]

In the near future, Congress will most likely amend the EESA to address its present and foreseeable issues. It will be interesting to see whether Congress amends the EESA using regulatory reform for all financial institutions or will Congress simply amend the EESA provisions themselves.[355] In the mean time, the Secretary should follow informal rulemaking procedures to attempt to address the EESA's issues, until Congress finally amends the EESA.[356] Regardless of who implements the new provisions, they must address the issues regarding the EESA's oversight, TARP programs, transparency, accountability, and consequences for the financial institutions that do not comply with applicable provisions.

Congress needs to utilize its remaining ingredients in a way that mixes well together in order to create a successful bailout recipe.[357] Even with a successful recipe, this is still not enough. Congress also needs to explicitly establish a procedure to execute the recipe.[358] These are the steps Congress needs to take in order ensure a successful bailout of the financial institutions and to accomplish the purposes for the EESA being enacted.[359]

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securities. *Id.* This came as a shock because the purchase of these securities had been the primary justification for Congress's passage of the TARP. *Id.*

352. *Id.* Regardless, the Secretary changed the focus of TARP to use the funds for direct capital injections into troubled financial institutions to help facilitate increased lending and credit. *Id.* The Secretary believed this to be a more efficient use of the bailout funds than purchasing the mortgage backed securities. *Id.*

353. *See supra* note 351 and accompanying text.

354. *See generally supra* note 287-348 and accompanying text.

355. *See supra* note 322-24 and accompanying text.

356. *See supra* note 334-38 and accompanying text.

357. Kimball, *Creamy Foolproof Dessert Soufflés*, at 23-24.

358. *Id.* at 24-25.

359. Emergency Economic Stabilization Act § 2. The purposes of the EESA are to immediately restore liquidity and stability to the financial system in a manner that protects taxpayers' equity, preserve homeownership, maximize overall returns

to the taxpayers, and provide public accountability. Emergency Economic Stabilization Act § 2.