VENABLE LLP

capitol view

A PUBLICATION OF VENABLE'S LEGISLATIVE GROUP

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Rescue Mission

FROM HAMILTON TO PAULSON

On January 14, 1790, the first Secretary of the Treasury, Alexander Hamilton, presented his First Report on Public Credit to the Congress in which he recommended that the Federal Government assume the troubled debts of the individual states which had accrued during the Revolutionary War. The amount of debt to be assumed by the Federal Government was about $25 million.

On September 18, 2008, Hamilton's successor, Secretary Henry Paulson, presented a somewhat similar plan to Congress. In response to severe and growing pressure on the credit markets, he recommended that the Federal Government assume the troubled debt instruments held by various private financial institutions. The amount of debt to be assumed by the Federal Government in 2008 was $700 billion.

The original Paulson plan was about three pages long and vested considerable discretion in the Secretary in administering the program. It even specified that there would be no jurisdiction in any agency or court to review the decisions of the Treasury in implementing the program.

After hearings in the Senate Banking and House Financial Services Committees and days of negotiations between members of Congress and the Administration, the parties reached tentative agreement on a 110 page Emergency Economic Stabilization Act of 2008 (EESA). The major provisions of the House version of the EESA are:

- EESA provides up to $700 billion to the Secretary of the Treasury to establish a Troubled Assets Relief Program (TARP). TARP is authorized to buy mortgages and other assets that are clogging the balance sheets of financial institutions. The Secretary is given the authority to manage the troubled assets, including the ability to determine the terms and conditions for the disposition of troubled assets. In administering TARP, the Treasury must consult with the Board of Governors of the Federal Reserve System, the Federal Reserve of New York, the FDIC, the OCC, the OTS and the Secretary of Housing and Urban Development.

- EESA requires the Treasury to assist in modifying troubled loans under the HOPE for Homeowners program wherever possible to help American families keep their homes. It also directs other federal agencies to modify loans that they own or control.

- The legislation requires companies that sell some of their bad assets to the government to provide warrants so that taxpayers will benefit from any future growth these companies may experience as a result of participation in this program. The legislation also requires the President to submit legislation that would cover any losses to taxpayers resulting from this program from financial institutions.

- In order to participate in this program, companies will lose certain tax benefits and, in some cases, must limit executive pay. In addition, the bill limits "golden parachutes" and requires that unearned bonuses be returned.

- Rather than giving the Treasury all the funds at once, the legislation gives the Treasury $250 billion immediately, which can be raised to $350 billion if the President certifies to Congress that the Treasury needs additional funds. The amount can be raised to a maximum of $700 billion upon a request of the President but Congress has 15 days to disapprove the request for additional funds by the adoption of a Congressional Joint Resolution.

- EESA also authorizes the Comptroller General, acting through the Government Accountability Office (GAO), to exercise oversight of the implementation of TARP. These include oversight authority over transactions, procurement, terms and conditions of contracts and future commitments made by TARP. The GAO is required to submit reports on its findings to Congress at least every 60 days. It also establishes a TARP Special Inspector General to protect against waste, fraud and abuse.

- Actions of the Treasury under the EESA are subject to judicial review under the Administrative Procedure Act and can be set aside if the actions are determined to be arbitrary or capricious.

CONGRESS ACTS

On the afternoon of September 29, the House defeated the EESA by a vote of 205 yeas to 228 nays. By the end of that trading day, the stock market had fallen 778 points, wiping out over a trillion dollars of wealth. Congressional Leaders decided to let the Senate assume the lead in this effort, since it was believed there was a lower level of opposition to the EESA in the Senate than in the House.
Senate negotiators produced an expanded 451 page version of the EESA. The Senate bill retained the basic provisions of the House EESA and added a variety of measures designed to attract votes on the Floor. In the new EESA the rescue plan took up 110 pages while the "sweeteners" were laid out over the remaining 341 pages. Among the inducements were an increase in the level of FDIC deposit insurance from $100,000 to $250,000, an extension of the

tax credits for renewable energy, extensions of various individual and business deductions, including state and local sales tax, and expenses for research and development. Also included were the enactment of provisions that would protect some 20 million taxpayers from the Alternative Minimum Tax (ATM) and a requirement that mental health insurance be treated the same as other health insurance policies. Other inducements appear to be more targeted for attracting specific votes such as the exemption from excise taxes for certain wooden arrows designed for use by children or the proposed rules on rum excise tax in Puerto Rico and the Virgin Islands.

The newly packaged EESA easily crossed the Senate goal line. On the night of October 1, it attracted 74 yes votes and 25 no votes. Thirty-nine Democrats and 34 Republicans supported the measure, while 9 Democrats and 15 Republicans voted against it. On Friday, October 3, the House followed suit and approved the bill by a vote of 263-171. One hundred-seventy-two Democrats and 91 Republicans voted for the bill, while 63 Democrats and 108 Republicans voted against it. The President signed the Emergency Economic Stabilization Act of 2008 into law that same afternoon.

THE ROAD AHEAD

William Donovan, one of the Venable attorneys involved on behalf of the Firm's clients in the consideration and enactment of the EESA, believes that the Treasury Department will act quickly to implement the Act. On Monday, October 6, the Department announced that it would use two mechanisms for engaging private sector firms to assist in implementing the Act. These mechanisms are financial agent authority and procurement under the Federal Acquisition Regulations. The Department stated they would make a determination on which of these authorities best applies on a case-by-case basis.

The Department also unveiled the process it would use for selecting asset managers pursuant to the EESA. Financial asset agents would be solicited through the issuance of a public notice posted on the Treasury website, requesting that interested and qualified financial institutions submit a response. The notice will describe the asset management services sought by the Treasury and set forth the rules for submitting a response, and list the factors that will be considered in selecting the financial institutions.

Enactment of the "Emergency Economic Stabilization Act" closes one chapter in the nation's efforts to address the greatest economic challenge to the nation since the Great Depression, but many more chapters remain to be written. Implementing regulations need to be written by Treasury. Contractors need to be vetted and hired to administer the "Troubled Asset Relief Program". Accounting reforms are not only being contemplated, but are well on their way to implementation by FASB. The SEC and DOJ have initiated investigations in an effort to identify any criminal activity that may have contributed to what was by any definition an economic disaster. Countless Congressional hearings into the cause of the crisis will be held, with many of them already on the calendar.

When the 111th Congress convenes in January, look for early hearings on proposals for significant restructuring and consolidation of the financial regulatory agencies; the introduction of legislation to impose significant additional regulation on hedge funds; and a move away from de-regulation and toward re-regulation of the financial services industry generally. Also look for strict oversight by Congress of the Treasury Department's administration of the "Troubled Asset Relief Program"

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VENABLE IN THE NEWS

John O'Neill, a Partner in Venable's Legislative and Government Affairs Practice Group, was interviewed by Financial Week and the Am Law Daily on the financial rescue plan and its implications for executive compensation.

Birch Bayh, a Partner in Venable's Legislative and Government Affairs Practice Group, was the key note speaker at the 2008 InterSite Conference of the Juvenile Detention Alternatives Initiative. Birch was the author of the Juvenile Justice Act when he was a member of the U.S. Senate. Birch also spent a day at the Indiana University School of Law where he participated in student seminars on the separation of powers and the Voting Rights Act and related issues. He also gave a public lecture on the" Separation of Church and State."

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