

\$700 Billion Also Buys Increased Federal Oversight of Financial Products Transactions

The primary purpose of the “Emergency Economic Stabilization Act of 2008” (the “Act”) is to stabilize the credit markets by authorizing the Treasury to spend up to \$700 billion to buy troubled assets from financial firms (the so-called Troubled Asset Relief Program or “TARP”). As with other instances of crisis-driven legislation, such as the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (“FIRREA”), the USA PATRIOT Act of 2001, and the Sarbanes-Oxley Act of 2002, the Act contains important provisions relating to government regulation, investigation, and enforcement proceedings. The following sections of the Act are particularly noteworthy:

- **Section 127** represents a broad mandate that all federal financial regulatory agencies—including the SEC, the Federal Reserve Board, the Federal Deposit Insurance Company, and the Commodities Futures Trading Commission—cooperate with all FBI and “other law enforcement agency” investigations into the creation, marketing, sale and trade of financial products. Section 127 is of note because of the apparent broad mandate of cooperation between and among investigative agencies at every level of government. While prior statutes have allowed or required cooperation between certain entities during investigations, those entities are typically limited and defined with specificity in the statute. In Section 127, however, the term “law enforcement agency” is left undefined, which may result in mandated cooperation not just with the Department of Justice, but with state law enforcement agencies such as criminal investigators, securities regulators, and banking regulators.
- **Section 127** will likely encourage a proliferation of parallel investigations—simultaneous or successive criminal, civil or administrative investigations or proceedings. During a parallel proceeding, the civil or administrative agency may not only share information with the criminal enforcement agency, but the agencies may also frequently meet to coordinate actions on specific investigations. This kind of cooperation creates difficult choices for regulated and unregulated entities, as well as individuals who may wish to cooperate with a civil or administrative enforcement agency such as the SEC or the Department of Labor. However, Section 127’s sweeping mandate broadly encourages cooperation among prosecutors, and will likely encourage such parallel investigations.
- **Section 121** establishes the Office of the Special Inspector General for the TARP. It requires the Inspector General to conduct, supervise, and coordinate audits and investigations of the purchase, management, and sale of assets by the Secretary of the Treasury under Section 101 of the Act, and the management of any program established under Section 102 of the Act. While the Act creates the new Inspector General, the law does not vest that new Inspector General with any direct powers of enforcement or regulation. In the absence of additional legislative authority, the imposition of liability, sanctions, and penalties could result only from enforcement actions commenced by other agencies based upon a report provided by this new Inspector General.
- **Section 108** requires the Secretary of the Treasury to “issue regulations or guidelines necessary to address and manage or to prohibit conflicts of interest that may arise in connection with the administration and execution

of the authorities provided” under the Act. While Section 108 of the Act allows the Secretary to issue regulations, the Act does not give the Secretary a mechanism to enforce these regulations. Under the Administrative Procedures Act (“APA”), however, the head of an Executive Department, which includes the Treasury Department, has the authority to prescribe regulations for the government of his department and the conduct of its employees. Though unclear at this stage, presumably the Secretary of the Treasury may use the same APA mechanism to enforce the Act’s new conflict of interest rules.

- **Section 126(a)** prohibits uninsured persons and entities from claiming or implying that they are FDIC insured. If the entity is otherwise regulated by an “appropriate federal banking agency,” that agency is now empowered to enforce the false advertising provision. Additionally, the FDIC may identify violators to the appropriate agency and recommend enforcement. If the appropriate agency does not take action within 30 days of the receipt of the FDIC’s recommendation, the FDIC itself has jurisdiction to exercise its authority.
- **Section 126(b)** grants the FDIC’s power to sanction violations of Section 126(a). The FDIC now may issue temporary orders mandating the cessation of false advertising practices described in Section 126(a). These orders would take effect immediately and would remain in effect until the FDIC or the other appropriate federal banking agency dismisses the charges as specified, or until the order expires. The FDIC may also seek civil money penalties. Because this the first expansion of the FDIC’s regulatory authority to cover misleading advertising regarding FDIC insurance, there are no prior FDIC enforcement orders to indicate what standards the FDIC will use when applying this new authority.
- **Section 104** creates the Financial Stability Oversight Board (“FSOB”), whose members will include the Chairman of the Board of Governors of the Federal Reserve System, the Secretaries of Treasury and Housing and Urban Development, the Chairman of the SEC, and the Director of the Federal Home Finance Agency. Among the FSOB’s responsibilities are “reporting any suspected fraud, misrepresentations, or malfeasance to the Special Inspector General for the Troubled Assets Relief Program or to the Attorney General of the United States.”
- **Section 125** establishes a Congressional Oversight Panel, the duty of which is to submit reports to Congress on the use of the authority granted under the Act, the impact of purchases made under the Act, whether the Act is affecting market transparency and the effectiveness of foreclosure-mitigation efforts. At present, the Panel does not have the immediate power to create or enforce greater regulation on these issues. However, Treasury Secretary Henry Paulson recently delivered a report making short-term recommendations for improved coordination and oversight in the mortgage markets, and intermediate-term recommendations to eliminate duplications of regulations. The creation of the Panel provides a mechanism which might initiate greater legislative reform in conformance with Secretary Paulson’s recommendations, and its reports could be used as a basis for Congress to justify greater regulation and prosecution, and ultimately to impose greater penalties.

Contact Ropes & Gray

Ropes & Gray LLP will continue to monitor developments under the Act and any related regulations, and notify our clients of significant developments. In the interim, if you have any questions, please contact [Eva Carman](#), [Richard Marshall](#), or [Michael McGovern](#).

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