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TO: Commercial Mortgage Securities  
Association

FROM: Scott A. Sinder  
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RE: Summary of Senate's Economic Stabilization Plan

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We have reviewed the Senate's version of an economic stabilization plan that it reportedly will vote on tonight. In a nutshell, the Senate has taken the economic rescue bill that was voted on by the House and makes only one change: the Senate bill temporarily increases the maximum amount of FDIC and NCUA insurance for deposit accounts from \$100,000 to \$250,000. The new maximum amount expires December 31, 2009. Otherwise, the economic rescue portion of the Senate bill is identical to the bill that failed to gain House passage on Monday.

The Senate's bill, entitled the Economic Recovery Amendment to the Paul Wellstone Mental Health Parity Act, H.R. 1424, also contains sections that extend certain tax code provisions, provide AMT relief, address energy taxes, and require parity between insurance benefits for mental health and physical health. Procedurally, Congress Daily reports that the Senate is using a House-passed mental health parity bill as the vehicle for the economic stabilization measure and is attaching the Senate-passed tax legislation. The Senate will call up the House mental health parity bill, and then substitute the economic rescue plan as an amendment from Senate Banking Chairman Christopher Dodd.

Below are the highlights of the Senate bill with a particular focus on difference between the Senate bill and the one defeated in the House:

- The Senate bill is entitled the Economic Recovery Amendment to the Paul Wellstone Mental Health Parity Act, H.R. 1424; "Division A" of the bill is the Emergency Economic Stabilization Act of 2008;

- Treasury is authorized to purchase “troubled assets” that were initiated or originated on or before March 14, 2008, as in the House bill; the name of the program is the Troubled Asset Relief Program (“TARP”); the program sunsets on December 31, 2009 with Treasury having the ability to make a written request to Congress to extend the expiration to not later than two years after the legislation’s enactment date, as in the House version;
- The Senate bill authorizes the purchase of troubled assets from financial institutions and the creation of an insurance fund to guarantee troubled assets issued or originated before March 14, 2008, including mortgaged backed securities, the same as the House version. Under the insurance program, Treasury can develop guarantees of troubled assets that will provide timely payment of principal and interest on the asset. Treasury is directed to charge premiums for the guarantees, which can be determined based on the credit risk associated with each category or class of troubled asset, as in the House version;
- Treasury is required to publish guidelines for how it will operate the program, including purchasing mechanisms, valuation methods, procedures for choosing asset managers, and criteria for identifying troubled assets for purchase; guidelines must also be published explaining how Treasury arrives at the premiums it will charge for the insurance program. Both of these requirements were in the House version;
- Treasury must take steps to prevent program participants from selling a troubled asset to the government for a higher price than what the seller paid to buy the asset, with the caveat that this provision does not apply to troubled assets acquired in a merger, acquisition, purchase of assets in conservatorship or receivership, or purchase from an entity that is in bankruptcy proceedings. This requirement was in the House bill;
- As was required in the House bill, a Financial Stability Oversight Board will have oversight authority over Treasury; board members will be the Treasury Secretary and the heads of the Federal Reserve, SEC, FHFA, and HUD. The Congressionally appointed oversight panel, which was also part of House bill, remains in place and will consist of 3 members appointed by Democrats and 2 by Republicans. The panel is charged with studying “the current state of the financial markets and regulatory system” including Treasury’s TARP activities and providing recommendations for improvements;
- Treasury must provide detailed periodic reports to Congress, as the House bill required;
- The Secretary can waive specific provisions of the government contracting regulations to create a more streamlined contracting process in “urgent and compelling circumstances,” and is required to notify Congress of such waivers, as was required in the House bill;
- Treasury must develop conflict of interest rules for government contractors, as in the House bill;

- The Secretary must maximize and encourage modification of residential mortgages, as was required in the House bill;
- The Senate bill makes no changes to the executive compensation limits contained in the House version. Thus, the executive compensation limits differ depending on whether the Secretary acquires the assets directly from the institution (and takes an equity stake in the institution) or whether they are acquired through auction. For the former, the compensation limits must include: 1) limits on incentives that encourage management to take inappropriate or excessive risk (same as before); 2) claw back of incentive compensation based on gains or other criteria that later prove to be false (same as before); and 3) no golden parachutes for senior executives (this outright prohibition is back from the first draft of the bill). For the latter, the limits are more relaxed than before and grandfather existing compensation agreements, as there can be no new contracts providing golden parachutes for executives that end up being fired or where the company goes into bankruptcy, is insolvent, or goes into receivership. The compensation limits apply to institutions that participate in TARP, and become effective upon entry. The compensation limits last as long as Treasury has an equity or debt position in the institution in the case of direct asset purchases; where Treasury purchases assets through an auction, the limits apply only to institutions that sell assets worth more than \$300 million total to the government and last until the TARP program sunsets;
- Treasury must maximize use of “market mechanisms” such as auctions or reverse auctions to purchase troubled assets, and “shall encourage” the private sector to buy troubled assets and invest in institutions with such assets, as in the House bill;
- Where Treasury makes direct purchases of troubled entities, it is required to obtain warrants and debt instruments, with a de minimis exception to this requirement that contains an explicit cap of \$100 million on the size of transaction that can qualify for the de minimis exception. The Secretary is required to establish appropriate alternative requirements to the equity stake for institutions that are legally prohibited from issuing securities and debt instruments. All of these provisions are the same as in the House bill;
- The Senate bill makes no changes to the graduated authorization schedule that was in the House bill, despite media reports to the contrary: a total of \$700 billion is authorized for the program, to be released in tranches as follows: initially only \$250 billion can be outstanding at any one time; upon written notification by the President to Congress, authority can be increased to \$350 billion outstanding; the remaining \$350 billion will be authorized if the President sends Congress a written detailed plan for use of the remainder and Congress does not disapprove it within 15 days;
- There will be GAO oversight and auditing of the program, and a special Inspector General for the program, as in the House bill;
- As was provided in the House bill, the Secretary’s actions under the program will be subject to judicial review and there is a limitation on the availability of court

injunctions to stop Treasury's actions with respect to the TARP, insurance program, and foreclosure mitigation efforts. Such injunctions can only be granted to address constitutional violations and courts are directed to handle any such matters on a highly expedited basis. And TARP participants may only sue Treasury for violations of the Administrative Procedure Act;

- The Senate bill's provision requiring Treasury to reimburse the Economic Stabilization Fund for any money taken from it to provide guarantees for money market mutual funds, and prohibiting Treasury from using the Economic Stabilization Fund to create any money market mutual fund insurance program in the future, is the same as in the House version;
- Also the same is the Senate bill's provision authorizing the SEC to suspend the mark-to-market accounting rules for any issuer or category of transaction if the SEC determines that it is required by the public interest, and directing the SEC to study mark-to-market accounting standards including their effect on balance sheets, any role the rules played in bank failures in 2008, their impact on the quality of information received by investors, and recommendations for alternative. The SEC must report on this issue 90 days from enactment of the bill;
- The Senate version contains the same "recoupment" provision as the House version, which directs OMB and CBO to report to Congress in 5 years whether the TARP program has made or lost money, and if there is a loss, the President is directed to submit a legislative proposal to recoup the shortfall from the "financial industry;"
- In what appears to be the only difference between the Senate and House versions, the Senate bill contains a new provision that temporarily increases the limit of FDIC insurance from \$100,000 to \$250,000. The increase only lasts from the time the bill is enacted until December 31, 2009. And the new maximum is not to be taken into account in setting assessments for FDIC insurance. The FDIC is permitted to borrow from Treasury to cover the costs of the new insurance limit. Corresponding changes are made to the insurance program that covers credit union accounts;
- The Senate plan contains the same tax code changes that were in the House bill:
  - any losses on sales of Fannie Mae and Freddie Mac preferred stock by financial institutions or financial institution holding companies are to be treated as ordinary losses. This applies to any preferred stock that was owned on September 6, 2008 or sold between January 1 and Sept 6, 2008. The purpose of this provision reportedly is to allow banks to obtain the tax benefit of the loss on the preferred stock and therefore reduce the need to obtain additional capital; and
  - a cap on the ability of institutions participating in the troubled asset program to take tax deductions for compensation in excess of \$500,000 paid to CEOs and CFOs, applies only to those institutions that sell \$300 million or more in assets to the TARP program, and a limitation on the

ability to deduct golden parachute payments for those who are fired or leave in connection with a bankruptcy, liquidation or receivership.