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The Bailout Package: Vital and Acceptable

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Financial markets in the United States and around the world face a dire emergency requiring urgent and decisive action. Some key parts of the credit market are on the verge of gridlock, resulting not just in the collapse of major financial institutions but also in credit disruption that is severely weakening the long-term prospects of non-financial companies. And while this is currently most visible in Wall Street and in the financial sector, it is only a matter of time before the fallout hits Main Street, with potentially devastating economic effects for typical American households.

Swift action is needed to deal with the “toxic” mortgage-backed securities that are causing credit markets to seize up. The package of emergency steps now before Congress is intended to address that problem and restore America’s credit markets while protecting the taxpayer as much as possible from the cost of dealing with the crisis.

Faced with a crisis of this scale, lawmakers need to consider steps that would be out of the question in more normal times. That is why Congress must structure a recovery plan that involves an extraordinary taxpayer commitment to stabilizing the situation and restoring confidence in the financial system.

While there are those in Congress who would push the role of government far beyond what is necessary in this crisis, the core technical parts of the negotiated package are acceptable. Important protections for taxpayers have been added to the original plan. And while some questionable and potentially counterproductive features have also

been added, other egregious proposals—such as enormous handouts to activist housing groups—were stripped away during the negotiations. Taken together, the main financial measures are likely to accomplish the goal, and the unwise measures are sufficiently limited to warrant passage.

Certain provisions are far more troubling, however, and raise serious constitutional concerns. Specifically:

- The legislation grants extraordinary powers to the Treasury secretary without providing sufficiently specific direction. The legislation still simply gives the secretary a functional “blank check” of authority rather than sufficient legislative direction as to what constitutes permissible action.
- The oversight board contains members not directly subject to or removable by the President, which raises substantial concerns of abrogating the President’s authority under Article II and makes the entire structure thereby less democratically accountable.

Both concerns could be (and should be) remedied, first by providing greater guidance and guidelines to the secretary regarding his new authority—

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sufficient that a reasonable person would be able to determine what acts would be lawful and which acts undertaken by the secretary would be unlawful—and second, ideally, by either removing the oversight board entirely or limiting its role to an advisory one.

Thus serious constitutional concerns remain and should be addressed in putting together a statute to deal with this current and hopefully temporary credit emergency. The constitutional questionability of some provisions is worrying, as is the centraliza-

tion of power. Nonetheless, the situation is so grave that we must take unusual measures now and accept some negotiated arrangements that remain very troubling, provided they are limited in extent and time and are not accepted as a permanent part of our government.

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