

March 27, 2009

## UPDATE: "RESOLUTION AUTHORITY FOR SYSTEMICALLY SIGNIFICANT COMPANIES ACT OF 2009"

The following is an initial summary of the "Resolution Authority for Systemically Significant Companies Act of 2009" (or the "Act"), a proposed measure unveiled yesterday by Treasury Secretary Geithner before the House Financial Services Committee. The resolution authority, to be headed by the Treasury Department, the Federal Deposit Insurance Corporation (FDIC), and the Federal Reserve, would permit the U.S. government to reorganize or wind-down an institution that is deemed to be at risk of insolvency and that poses a threat to the U.S. financial stability. The Act applies to non-bank financial companies that have the potential to pose systemic risks to our economy but that are not currently subject to the resolution authority of the FDIC. By way of background, the measure is modeled after the FDIC's existing resolution authority for commercial banks.

The following provides an initial summary of highlights of the Act, including: (1) the definition of "financial company" (which includes insurance companies, among other nonbank entities); (2) the triggering test as to whether government action should be taken; (3) the factors that must be considered in determining whether an institution is in danger of default/insolvency; (4) the discretion of the government as to whether to place company in conservatorship or receivership; (5) the authority of the FDIC in conservatorship or receivership; and (6) the FDIC's authority to handle claims from creditors.

### **I. Definition of "Financial Company" Covered Under the Act**

The Act defines a "financial company" as one that is incorporated or organized under Federal law or the laws of any State that fits into any of the following seven categories:

- (1) a bank holding company;
- (2) a financial holding company as defined in section 2(p) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1841(p));
- (3) a savings and loan holding company;
- (4) a holding company of a domestic insurance company;
- (5) a holding company of a broker or dealer registered with the Securities and Exchange Commission (Commission) under section 15(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)), as amended;
- (6) a holding company of a futures commission merchant or commodity pool operator; or
- (7) any subsidiary of companies described in categories 1 through 5 above (other than an insured depository institution, any subsidiary thereof, any broker or dealer registered with the Commission under section 15(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)), as amended, which is a member of the Securities Investor Protection Corporation, or an insurance company).

### **II. Triggering Determination as Prerequisite for Action to be Taken**

In order for emergency resolution authority action to be taken, the Act requires a determination by the Secretary, following a written recommendation of the Federal Reserve Board and the board of directors or commission of the Appropriate Federal Regulatory Agency, in consultation with the Treasury, that:

- (1) the financial company is in default or is in danger of default;

*This update provides only general information and should not be relied upon as legal advice. For more information, contact your Patton Boggs LLP attorney or one of the lawyers/authors listed below.*

Kirsten Wegner  
202.457.5276  
kwegner@pattonboggs.com

Matthew Kulkin  
202.457.6056  
mkulkin@pattonboggs.com

(2) the failure of the financial company and its resolution under otherwise applicable Federal or State law would have serious adverse effects on financial stability or economic conditions in the United States; and

(3) any actions or assistance under or assistance under this section would avoid or mitigate such adverse effects.

### **III. Factors to Consider in Determining Whether Financial Company is in Default or Danger of Default**

The Act provides that a financial company shall be considered to be in default or in danger of default if any of the following conditions exist:

(1) a case has been, or likely will promptly be, commenced with respect to the financial company under Title 11, United States Code;

(2) the financial company is critically undercapitalized, as such term has been or may be defined by the company's Appropriate Federal Regulatory Agency;

(3) the financial company has incurred, or is likely to incur, losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the company to avoid such depletion without assistance by the Corporation under this section;

(4) the financial company's assets are, or are likely to be, less than its obligations to creditors and others; or

(5) the financial company is, or is likely to be, unable to pay its obligations (other than those subject to a bona fide dispute) in the normal course of business.

### **IV. FDIC and Treasury Discretion Over Whether to Assist Institution in Conservatorship or Unwind in Receivership**

The Act grants the FDIC and the Treasury broad discretion over what actions to take, in conference with the Federal Reserve and appropriate regulatory agency, with respect to a systemically significant institution that is at danger of default. For example, an institution could be placed in a conservatorship to restore the institution to a position of solvency so that it can carry on its business. Conversely, an institution could be placed in a receivership to provide for the orderly liquidation of the institution. Specifically, the following are among the actions, either alone or in combination, that the government may take:

(1) making loans to, or purchasing any debt obligation of, the covered financial company or any subsidiary;

(2) purchasing assets of the covered financial company or any subsidiary directly or through an entity established by the Corporation for such purpose;

(3) assuming or guaranteeing the obligations of the covered financial company or any subsidiary to one or more third parties;

(4) acquiring any type of equity interest or security of the covered financial company or any subsidiary;

(5) taking a lien on any or all assets of the covered financial company or any subsidiary, including a first priority lien on all unencumbered assets of the company or any subsidiary to secure repayment of any financial assistance provided by the Corporation pursuant to this subsection;

(6) selling or transferring all, or any part thereof, of such acquired assets, liabilities, obligations, equity interests or securities of the covered financial company or any subsidiary upon such terms and conditions that the Corporation deems appropriate; or

(7) Appoint itself as conservator or receiver for the covered financial company.

If the FDIC appoints itself as conservator or receiver for the covered financial company, the covered financial company may bring an action in federal court within 30 days requiring that the conservator or receiver be removed.

#### **V. Authority of FDIC in Conservatorship or Receivership**

The Act gives wide ranging powers to the FDIC in managing the affairs of any financial company that is determined to be in default or in danger of default without the approval of creditors or other stakeholders of an institution. As successor of a covered financial company, the FDIC can take control of “all rights, titles, powers, and privileges” of the covered financial company, its stockholders, officers and directors, including the covered financial company’s assets. Among the FDIC’s powers under the Act are:

- (1) selling or transferring the assets or liabilities of the institution in question;
- (2) renegotiating or repudiating the institution's contracts (including with its employees);
- (3) fundamentally restructuring the institution by, for example, replacing its board of directors and its senior officers; and
- (4) if necessary, request assistance from foreign financial authorities or provide assistance to foreign financial authorities or maintain offices to coordinate foreign investigations.

Depending on the situation, the FDIC, as conservator or receiver, may take different actions. As conservator, the FDIC’s role is limited to operating the covered financial company in such a way as to put it in a sound and solvent condition. As receiver, the FDIC is granted additional authority to place the covered financial company in liquidation and either sell or transfer the assets of the covered financial company or organize a bridge financial company. In addition, once the FDIC is appointed as receiver, the Appropriate Financial Regulatory Agency shall make supervisory records available to be used as appropriate.

#### **VI. Authority to Handle Claims from Creditors**

If a covered financial company is placed into receivership, the Act grants the FDIC the ability to resolve claims against the financial company, including the right to:

- (1) publish notice to creditors of 90 day period to present claims;
- (2) prescribe rules and regulations regarding allowance or disallowance of claims;
- (3) determine whether to allow or disallow a creditor's claim, which decision is subject to limited judicial review;
- (4) dispose of assets in order to maximize the covered financial company’s value and use the proceeds to pay allowed claims to creditors; and
- (5) determine the priority of claims made against covered financial institutions.

Please do not hesitate to contact us if you have further questions or would like further follow-up.

*This update provides only general information and should not be relied upon as legal advice. For more information, contact your Patton Boggs LLP attorney or one of the lawyers/authors listed below.*

Kirsten Wegner  
202.457.5276  
kwegner@pattonboggs.com

Matthew Kulkin  
202.457.6056  
mkulkin@pattonboggs.com

**PATTON BOGGS** LLP  
www.pattonboggs.com