



Congressional Oversight Panel

January 13,
2011

JANUARY OVERSIGHT REPORT*

An Update on TARP Support for the Domestic
Automotive Industry

*Submitted under Section 125(b)(1) of Title 1 of the Emergency Economic
Stabilization Act of 2008, Pub. L. No. 110-343

Table of Contents

Executive Summary	4
Section One:	
A. Introduction.....	7
B. Overview of Government Intervention.....	8
1. Summary of Government Intervention in Auto Manufacturing and Financing Industries	8
C. Current State of the Domestic Automotive Industry	20
1. Capacity Reductions	20
2. Lower Labor Costs.....	21
3. Resiliency in Market Share	22
4. Pricing.....	23
5. Outlook	23
D. General Motors	26
1. Context.....	26
2. More Recent Developments.....	30
3. Outlook	37
4. Treasury’s Exit Strategy	42
E. Chrysler.....	48
1. Context.....	48
2. Outlook	60
3. Analysis of the Government’s Exit Strategy Based on Likely Repayment Scenarios.....	67

F. GMAC/Ally Financial	71
1. Context.....	71
2. Outlook	82
3. Analysis of Intended Exit Strategy	91
G. Auto Supplier Support Program.....	104
1. Background	104
2. TARP Intervention.....	104
3. Current Status of Auto Supplier Industry	105
H. Analysis of Treasury’s Interaction with all Three Companies in Light of Government’s Objectives	106
1. Summary of Principles upon which Government Says it Will Conduct its Involvement in Private Companies.....	106
2. Has Treasury Abided by its own Principles?.....	107
3. Has Treasury Used its Limited Authority Effectively?	110
4. Was Treasury Right in Establishing These Guidelines for Itself?.....	114
I. Conclusions and Recommendations	115
Section Two: Additional Views	
A. J. Mark McWatters and Professor Kenneth R. Troske	121
Section Three: TARP Updates Since Last Report	126
Section Four: Oversight Activities.....	166
Section Five: About the Congressional Oversight Panel.....	167

Executive Summary*

Since the Panel's last comprehensive review of TARP support for the domestic automotive industry in September 2009, Treasury's automotive investments have, in financial terms, starkly improved. As of September 2009, the Congressional Budget Office (CBO) estimated that taxpayers would lose \$40 billion on their automotive investments. Today, CBO has reduced its loss estimate to \$19 billion, and the three largest recipients of automotive bailout funds – General Motors (GM), Chrysler, and GMAC/Ally Financial – all appear to be on the path to financial stability.

While it remains too early to tell whether Treasury's intervention in and reshaping of the U.S. automotive industry will prove to be a success, there can be no question that the government's ambitious actions have had a major impact and appear to be on a promising course. Even so, the companies that received automotive bailout funds continue to face uncertain futures, taxpayers remain at financial risk, concerns remain about the transparency and accountability of Treasury's efforts, and moral hazard lingers as a long-run threat to the automotive industry and the broader economy.

Treasury is currently unwinding its stakes in GM, Chrysler, and GMAC/Ally Financial. Of those companies, GM is furthest along in the process of repaying taxpayers. It conducted an initial public offering (IPO) on November 18, 2010, and Treasury used the occasion to sell a portion of its GM holdings for \$13.5 billion. This sale represents a major recovery of taxpayer funds, but it is important to note that Treasury received a price of \$33.00 per share – well below the \$44.59 needed to be on track to recover fully taxpayers' money. By selling stock for less than this break-even price, Treasury essentially "locked in" a loss of billions of dollars and thus greatly reduced the likelihood that taxpayers will ever be repaid in full.

Treasury has explained its decision to sell at a loss by saying that it wished to unwind government ownership of the automobile industry as quickly as possible. This justification may very well be reasonable, but it is difficult to evaluate. Because Treasury has cited different, conflicting goals for its automotive interventions at different times – saying, for example, that it wished to save American jobs, to produce the best possible return to taxpayers, or to return the company to private ownership as rapidly as possible – it is difficult for the Panel or any outside observer to judge whether Treasury's results in fact qualify as successful.

The other major automotive manufacturer to receive government assistance, Chrysler, remains a private company. Because Treasury has already absorbed \$3.5 billion in losses on

*The Panel adopted this report with a 4-0 vote on January 12, 2011.

loans made to the pre-bankruptcy Chrysler, the prospect for a full recovery of taxpayers' money depends upon Treasury's ability to sell its ownership of Chrysler at a profit. However, as Treasury owns only 10 percent of the company's stock, it has very limited ability to influence the timing of an eventual public offering. The remaining 90 percent of Chrysler was parceled out to several other parties, including the Italian automotive manufacturer Fiat, through the bankruptcy process – but while this approach may have saved Chrysler from liquidation, the result is that Treasury has little authority to act in taxpayers' interests. Another source of concern is Treasury's hasty unwinding of its position in Chrysler Financial, in which taxpayer returns appear to have been sacrificed in favor of an unnecessarily accelerated exit, further compounded by apparently questionable due diligence.

The final major recipient of automotive-related aid, GMAC/Ally Financial, represents a curious case. GMAC/Ally Financial is a financial company, not a manufacturer; it operates in many fields entirely unrelated to the automotive industry. Traditionally, however, the company has provided the bulk of financing to GM car dealerships, as well as significant financing to individual purchasers of GM vehicles. As such, Treasury saw the survival of GMAC/Ally Financial as critical to its broader automotive rescue.

Since the Panel's report on GMAC/Ally Financial in March 2010, the company has experienced three consecutive quarters of profits and has reduced the risk in its mortgage portfolio. Even so, taxpayers likely will not begin to recover their investment until GMAC/Ally Financial conducts an IPO. Treasury has had significant leverage over the IPO's timing due to its preferred stock holdings, but regrettably, Treasury has been inconsistent in acknowledging this leverage. Treasury's reluctance to recognize its own influence may represent an effort to claim a coherent "hands off" shareholder approach, despite the unique circumstances that apply to GMAC/Ally Financial.

The "hands off" approach may in itself raise questions. Treasury has asserted that, even if one of the automotive companies had announced an entirely unrealistic business plan, Treasury would not have intervened. In more practical terms, Treasury declined to block GM's purchase of AmeriCredit, a subprime financing company, even though AmeriCredit may ultimately compete against GMAC/Ally Financial and thus damage that company's ability to repay taxpayers. Although Treasury's "hands off" approach may have reassured market participants about the limited scope of government intervention, it may also have forced Treasury to leave unexplored options that would have benefited the public.

Treasury is now on course to recover the majority of its automotive investments within the next few years, but the impact of its actions will reverberate for much longer. Treasury's rescue suggested that any sufficiently large American corporation – even if it is not a bank – may be considered "too big to fail," creating a risk that moral hazard will infect areas of the economy far beyond the financial system. Further, the fact that the government helped absorb the

consequences of GM's and Chrysler's failures has put more competently managed automotive companies at a disadvantage. For these reasons, the effects of Treasury's intervention will linger long after taxpayers have sold their last share of stock in the automotive industry.

Section One:

A. Introduction

In late 2008 and early 2009, the federal government undertook the unprecedented rescue of two of the three major U.S.-based automobile manufacturers, as well as a major automotive financing company. These interventions were accomplished using resources from the Troubled Asset Relief Program (TARP), a program that Congress created with passage of the Emergency Economic Stabilization Act (EESA) in October 2008 and which was aimed primarily at preventing economic collapse by restoring stability in the financial sector. This month the Congressional Oversight Panel looks at what the TARP has accomplished in the automobile sector and the prospects for recovering the taxpayer's investments in the three rescued firms: General Motors, Chrysler, and GMAC/Ally Financial.¹

The Panel first reviewed the actions of Treasury in rescuing GM and Chrysler in a September 2009 report. That report asked whether the actions taken to that point to rescue GM and Chrysler served merely to forestall a decision ultimately to liquidate those companies or to intervene with still more government assistance to make them viable. It remains too early to render a conclusive verdict on that question. But the events of the intervening 16 months allow a tentative judgment: GM and Chrysler are both more viable firms than they were in December 2008 with GM on a credible path to recovery but Chrysler's outlook more uncertain. Likewise, the degree to which Treasury will be successful in recovering the taxpayer's investment in these firms has become more apparent for GM than for Chrysler. The intervening time since the Panel's last report on the GM and Chrysler rescues has also allowed for some greater understanding of how Treasury would behave as an investor in both firms. What remains uncertain is whether the improvement in both companies is directly attributable to Treasury's intervention or to the more general improvement of the economy. In addition, there remains a great deal of uncertainty about the long-run impact of the government's significant intervention in the operations of these private firms.

In its March 2010 report, the Panel examined the actions of Treasury, closely related to its investments in GM and Chrysler, in supporting the auto financing firm GMAC/Ally Financial. That report noted that there were lingering unresolved issues related to GMAC/Ally Financial's emerging business strategy. In the 10 months since that report was issued, the firm's operating performance has improved considerably, but Treasury's exit strategy remains unclear.

¹ Effective May 15, 2010, GMAC Financial Services changed its name to Ally Financial Inc. Except where the distinction is otherwise significant, this report refers to this company as "GMAC/Ally Financial."

The use of TARP resources to prevent the collapse of two of the three domestic automakers was and continues to be controversial. Policymakers confronting this situation in November and December 2008 had several courses of action, ranging from doing nothing to full adoption of the rescue plans proposed by the companies. It is possible that private sector financial firms, such as private equity funds or hedge funds, may have stepped up to provide financing for some of GM's or Chrysler's more desirable assets at a later date. However, it is unclear to what extent broad-based private sector emergency funding to buy both firms in their entirety was a feasible option in the midst of the credit market crisis during the fall of 2008. It was the judgment of the Bush Administration, a judgment confirmed by many knowledgeable market participants at the time, that such a private sector intervention was unlikely. Hence, the Bush Administration chose a middle-of-the-road option, providing the firms with TARP-financed loans sufficient to tide them over for a few months but leaving it to a new administration to make its own assessments as to the long-term viability of GM and Chrysler and ultimately to choose to put the firms through expedited bankruptcy proceedings.

In contrast to its interventions in the financial sector, where assistance was provided to banks without requiring sweeping changes in their management and operations, government intervention in the auto sector has been noteworthy for the major restructuring that was required as a condition for receiving government financing. While it remains too early to tell whether Treasury's intervention in and reshaping of the U.S. auto industry will prove to be a success, there can be no question that the government's ambitious actions have had a major impact. Completion of an IPO of GM stock is an especially significant milestone that serves to highlight the timeliness of an updated assessment of the TARP's performance in rescuing the U.S. auto and auto financing industries. These favorable events, however, must be thoughtfully balanced against the moral hazard risks created by the taxpayer's bailout of the three institutions and the ongoing implicit guarantee of the government. By bailing out GM, Chrysler, and GMAC/Ally Financial, the government sent a powerful message to the marketplace – some institutions will be protected at all cost, while others must prosper or fail based upon their own business judgment and acumen. We regret that Treasury has focused solely on the apparent success of the GM IPO in assessing the rescues of the three institutions to the distinct exclusion of the moral hazard risks arising from the bailouts.

B. Overview of Government Intervention

1. Summary of Government Intervention in Auto Manufacturing and Financing Industries

a. Condition of the Domestic Auto Industry in 2008

Even prior to the onset of the financial crisis, the domestic automotive industry was facing severe challenges and strains. Not only had foreign competitors steadily increased their

market share, and rising fuel prices softened demand, but Chrysler and GM faced additional challenges posed by legacy costs and a series of poor strategic decisions.

With the onset of the financial crisis, the challenges facing the auto industry – which now also included tightening credit markets, declining consumer confidence, decreased demand, and rising unemployment – became acute.² The tightened credit market was especially significant not only because it impacted the automakers’ access to debt market/bank financing, but also because 90 percent of consumers finance automobile purchases through loans, either directly from the manufacturers’ financing arms or through third-party financial institutions, all of which experienced increased difficulty in late 2008 in raising capital to finance such loans.³ The particularly weak condition of Chrysler Financial and GMAC/Ally Financial exacerbated the plummeting sales at GM and Chrysler as the credit markets seized up.⁴ Ford did not need government assistance in large part because it conducted a massive refinancing in 2006, which provided the company with a credit facility that it could draw down as needed as the credit markets tightened considerably for other auto makers.

b. Rescues of Chrysler and GM

By the beginning of December 2008, GM and Chrysler could no longer secure the credit they needed to conduct their day-to-day operations.⁵ The CEOs of Chrysler and GM appeared

² For a discussion of the factors leading up to the government’s decision to support the automotive industry, see Congressional Oversight Panel, *September Oversight Report: The Use of TARP Funds in the Support and Reorganization of the Domestic Automotive Industry*, at 7-23 (Sept. 9, 2009) (online at cop.senate.gov/documents/cop-090909-report.pdf) (hereinafter “September 2009 Oversight Report”).

³ House Judiciary, Subcommittee on Administrative Law, Written Testimony of Ron Bloom, senior advisor, U.S. Department of the Treasury, *Ramifications of Automotive Industry Bankruptcies, Part II*, at 1 (July 21, 2009) (online at judiciary.house.gov/hearings/pdf/Bloom090721.pdf).

⁴ GMAC/Ally Financial and Chrysler Financial were spun off from their parents in 2006 and 2007, respectively, but their enduring operational and economic interdependence is illustrated by the largely stable share of GM dealer financing provided by GMAC/Ally Financial and Chrysler dealer financing provided by Chrysler Financial (until GMAC/Ally Financial took over Chrysler Financial’s floorplan business in May 2009).

Relying on outside industry estimates, Treasury stated that the impact of letting GMAC/Ally Financial and Chrysler Financial fail (together with credit conditions at the time) would likely have been a further immediate decline of 1.5 to 2.5 million domestic automobile sales, primarily because of these companies’ roles in providing floorplan financing to GM and Chrysler dealers. Treasury believes that such a decline in sales would, in turn, have immediately threatened the economic viability of GM and Chrysler. Treasury conversations with Panel staff (Feb. 2, 2010); Congressional Oversight Panel, Joint Written Testimony of Ron Bloom, senior advisor to the Secretary of the Treasury, and Jim Millstein, chief restructuring officer, U.S. Department of the Treasury, *COP Hearing on GMAC Financial Services*, at 3 (Feb. 25, 2010) (online at cop.senate.gov/documents/testimony-022510-treasury.pdf).

⁵ Senate Committee on Banking, Housing and Urban Affairs, Written Testimony of Robert Nardelli, chairman and chief executive officer, Chrysler LLC, *The State of the Domestic Automotive Industry, Part II* (Dec. 4, 2008) (online at banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=c41857b2-7253-4253-95e3-5cfd7ea81393).

before Congress and appealed for government assistance to help them remain in business, but they were unable to muster sufficient congressional support to get a rescue bill through the Senate. Unless they could raise billions of dollars in new financing from private investors, they faced bankruptcy and probable liquidation.

Typically, when a firm reaches a financial crisis as severe as the ones facing GM and Chrysler in the fall of 2008, the firm files for bankruptcy in federal court. This invokes a process where there are two possible courses of action: either the firm is salvaged but reorganized using interim debtor in possession (DIP) financing, or the firm is liquidated.⁶ But the circumstances in the global credit markets in November and December 2008 were unlike any the financial markets had seen in decades. U.S. domestic credit markets were frozen in the wake of the Lehman bankruptcy, and international sources of funding were extremely limited. Cross-border lending was decreasing due to a domestic bias in lending, concerns over cross-currency and foreign exchange swap markets, and higher regulatory capital charges.⁷ In September 2008, China had already reduced its holdings of U.S. subprime mortgage-backed securities by approximately \$6 billion.⁸ Furthermore, several sovereign wealth funds that had stepped in to provide funding for U.S. firms were beginning to face losses on their investments. For example, the Abu Dhabi Investment Authority purchased \$7.5 billion worth of Citigroup convertible bonds in early November 2007,⁹ only to see the share price plummet over the next 12 months.¹⁰ Consequently, according to Treasury, bankruptcy with reorganization of the two auto companies using private DIP financing did not appear to be an option by late fall 2008, leaving liquidation of the firms as the more likely course of action absent a government rescue.

Facing the prospect of the collapse of GM and Chrysler, and with the option of a privately financed DIP bankruptcy proceeding foreclosed because of the extraordinary conditions in the credit markets, President George W. Bush on December 19, 2008 announced a government-funded rescue package for the automotive industry – the Automotive Industry

⁶ Debtor-in-possession financing is a loan made to a firm in bankruptcy to allow it to continue operating. The DIP loan is senior to the other claims on the firm in bankruptcy.

⁷ International Monetary Fund, *Global Financial Stability Report: Responding to the Financial Crisis and Measuring Systemic Risk*, at 8 (Apr. 2009) (online at www.imf.org/External/Pubs/FT/GFSR/2009/01/pdf/text.pdf).

⁸ As of June 30, 2007, the Bank of China Limited, a state-owned commercial bank, held \$8.97 billion of U.S. subprime ABS. By the end of the third quarter 2008, this amount dropped to \$3.3 billion. Bank of China Limited, *Interim Report 2007*, at 23 (online at www.boc.cn/en/investor/ir3/200812/P020081212710228274350.pdf) (accessed Jan. 11, 2011); Bank of China Limited, *Report for the Third Quarter ended 30 September 2008*, at 9 (online at www.boc.cn/en/investor/ir3/200812/P020081212712640132355.pdf) (accessed Jan. 11, 2011).

⁹ Citigroup, Inc., *Press Release: Citi to Sell \$7.5 Billion of Equity Units to Abu Dhabi Investment Authority* (Nov. 26, 2007) (online at www.citigroup.com/citi/press/2007/071126j.htm).

¹⁰ Data accessed through Bloomberg Data Service (Jan. 11, 2011).

Financing Program (AIFP). The rescue package broadened the allocation of TARP assistance to the domestic automotive industry.¹¹

The White House estimated when it made the announcement that “the direct costs of American automakers failing and laying off their workers in the near term would result in a more than 1 percent reduction in real GDP growth and about 1.1 million workers losing their jobs, including workers for automotive suppliers and dealers.”¹² This estimate was produced by the Council of Economic Advisors and reflected the direct job losses at GM and Chrysler, their suppliers, and dealerships over the short term, i.e., roughly six months.¹³ Over the longer term, it is highly likely that the assets of these firms – particularly those related to the production of the more successful truck and minivan models – would have been brought back into production by competing firms such as Ford or the international auto manufacturers that build vehicles in the United States. Alternatively, the production capacity of the remaining firms might have been expanded to supply additional vehicles and employ additional workers. Likewise, while there would have been adjustments in supplier relationships and dealer networks, these changes would have created partially offsetting new employment, as those firms sought to fill the void created by the exit from the marketplace of two large auto manufacturers.

The AIFP called for an investment of \$13.4 billion in GM and Chrysler by mid-January 2009 and additional funding for GM of up to \$4.0 billion.¹⁴ In announcing the plan, then-Treasury Secretary Henry Paulson stated that EESA provided him with the authority to make the investment, even as he acknowledged that “the purpose of [the TARP] program and the enabling

¹¹ Then-Secretary Paulson did not use the name “Automotive Industry Financing Plan” at the time of the announcement. *See generally* U.S. Department of the Treasury, *Secretary Paulson Statement on Stabilizing the Automotive Industry* (Dec. 19, 2008) (online at www.financialstability.gov/latest/hp1332.html) (hereinafter “Secretary Paulson Statement on Stabilizing the Automotive Industry”). Nonetheless, the investments to GM and Chrysler were made under this program. *See generally* U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for Period Ending February 1, 2010*, at 15 (Feb. 3, 2010) (online at www.financialstability.gov/docs/transaction-reports/2-3-10%20Transactions%20Report%20as%20of%202-1-10.pdf).

¹² *See* George W. Bush White House Archives, *Fact Sheet: Financing Assistance to Facilitate the Restructuring of Auto Manufacturers to Attain Financial Viability* (Dec. 19, 2008) (online at georgewbush-whitehouse.archives.gov/news/releases/2008/12/20081219-6.html) (hereinafter “George W. Bush White House Archives Fact Sheet”).

¹³ Panel conversations with Edward Lazear, Professor of Economics, Stanford University, and Chairman of the President’s Council of Economic Advisors, 2006-2009 (Jan. 4, 2011).

¹⁴ *See* U.S. Department of the Treasury, *Indicative Summary of Terms for Secured Term Loan Facility [GM]*, at Appendix A (Dec. 19, 2008) (online at www.treasury.gov/press-center/press-releases/Documents/gm%20final%20term%20_%20appendix.pdf); U.S. Department of the Treasury, *Indicative Summary of Terms for Secured Term Loan Facility [Chrysler]*, at Appendix A (Dec. 19, 2008) (online at www.treasury.gov/press-center/press-releases/Documents/chrysler%20final%20term%20_%20appendix.pdf).

legislation is to stabilize our financial sector.”¹⁵ This marked a reversal of the Administration’s previous stance that automakers were ineligible to receive TARP assistance.¹⁶

The terms of the loans required both Chrysler and GM to demonstrate to the government their ability to achieve financial viability, and both companies submitted their viability plans on February 17, 2009.¹⁷ The results of the Obama Administration’s review of those plans were announced on March 30, 2009.¹⁸ Both companies ultimately entered bankruptcy and, with the active involvement of the federal government, underwent radical restructurings through “363 sales” (conducted under Section 363(b) of the U.S. Bankruptcy Code), which allow a business to sell all or substantially all of its assets and leave only the remainder of the assets for distribution in a Chapter 11 plan.¹⁹ Following those restructurings and after eventually providing a total of \$63.1 billion in support, American taxpayers owned about 10 percent of what is now known as New Chrysler and 61 percent of New GM.²⁰

c. Auto Suppliers and Warranties

The TARP’s assistance to the automotive industry includes two additional initiatives. First, as a result of the downturn in the economy, automotive suppliers had great difficulty

¹⁵ Secretary Paulson Statement on Stabilizing the Automotive Industry, *supra* note 11 (“Treasury will make these loans using authority provided for the Troubled Asset Relief Program. While the purpose of this program and the enabling legislation is to stabilize our financial sector, the authority allows us to take this action. Absent Congressional action, no other authorities existed to stave off a disorderly bankruptcy of one or more auto companies”); September 2009 Oversight Report, *supra* note 2, at Section G.1.

¹⁶ House Committee on Financial Services, Testimony of Henry M. Paulson, Jr., secretary, U.S. Department of the Treasury, *Transcript: Oversight of Implementation of the Emergency Economic Stabilization Act of 2008 and of Government Lending and Insurance Facilities: Impact on the Economy and Credit Availability*, at 18-19 (Nov. 18, 2008) (online at frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:46593.pdf) (stating that “[t]he TARP was aimed at the financial system. That is what the purpose is. That is what we talked about with the TARP . . . I don’t see [preventing the failure of one or more automotive companies] as the purpose of the TARP. Congress passed legislation that dealt with the financial system’s stability.”).

¹⁷ See George W. Bush White House Archives Fact Sheet, *supra* note 12. The loans also imposed conditions related to operations, expenditures, and reporting.

¹⁸ The Administration concluded that Chrysler could not achieve viability as a stand-alone company and that it would have to develop a partnership with another automotive company or face bankruptcy. As for GM, the Administration concluded that the automaker’s financial viability plan relied on overly optimistic assumptions about the company and future economic developments.

¹⁹ In GM’s 363 sale, certain assets of Old GM (the automotive company that went into bankruptcy) were purchased by New GM (the company formed to buy the assets and financed by Treasury). As a part of this transaction, New GM also assumed certain liabilities of Old GM. Chrysler also engaged in a similar 363 sale.

For a discussion of the details of the bankruptcy, see September 2009 Oversight Report, *supra* note 2, at 7-8.

²⁰ As a result of the GM IPO on November 17, 2010, Treasury has reduced its ownership stake in GM to 33 percent. For further discussion concerning the government’s exit strategy for GM, see Section D.4, *infra*.

accessing credit. Consequently, on March 19, 2009, Treasury announced the Auto Supplier Support Program (ASSP), under which the government agreed to guarantee payment for products shipped by participating suppliers, even if the buyers went out of business.²¹ Through the ASSP, Treasury committed \$1.0 billion to Chrysler and \$2.5 billion to GM, though each company drew down smaller amounts. Those funds have since been repaid. Second, the automotive companies' widely publicized vulnerability in late 2008 and early 2009 also raised concerns that consumers might not purchase Chrysler and GM automobiles for fear that the companies could not back their warranties. Accordingly, Treasury lent Chrysler \$280 million and GM \$361 million to backstop their new vehicle warranties. Both Chrysler and GM have since repaid those loans.

d. Rescues of Chrysler Financial and GMAC/Ally Financial

Treasury states that as it considered using TARP funds to rescue Chrysler and GM, it came to the conclusion that they could not survive without Chrysler Financial's and GMAC/Ally Financial's financial underpinning, respectively. Without access to "floorplan financing" – that is, loans to auto dealers to allow them to purchase their inventories – many dealers would have been forced to close their doors. In addition, despite the relatively competitive retail lending environment, GM and Chrysler relied on GMAC/Ally Financial and Chrysler Financial, respectively, for a substantial portion of their consumer auto financing.²²

GMAC/Ally Financial's need for assistance in late 2008 arose from mortgage market investments that had incurred severe losses. On December 24, 2008, four days after President Bush announced the AIFP, the Federal Reserve Board approved GMAC/Ally Financial's application to become a bank holding company (BHC).²³ As part of this approval, the Federal Reserve required GMAC/Ally Financial to raise \$7 billion in new equity. To satisfy this requirement, Treasury provided GMAC/Ally Financial with \$5 billion in emergency funding

²¹ In order to unlock credit further, participating suppliers could also sell their receivables into the program (run through American automotive manufacturers that agreed to participate in the program) at a discount before maturity. The supplier would pay a small fee for the right to participate in the program. Although all domestic automotive manufacturers were eligible, only Chrysler and GM chose to participate.

²² For further discussion concerning the relationship between GM and GMAC/Ally Financial and Chrysler and Chrysler Financial, see Congressional Oversight Panel, *March Oversight Report: The Unique Treatment of GMAC Under the TARP*, at 57-74 (Mar. 10, 2010) (online at cop.senate.gov/documents/cop-031110-report.pdf) (hereinafter "March 2010 Oversight Report").

²³ Board of Governors of the Federal Reserve System, *Order Approving Formation of Bank Holding Companies and Notice to Engage in Certain Nonbanking Activities*, at 2 (Dec. 24, 2008) (online at www.federalreserve.gov/newsevents/press/orders/orders20081224a1.pdf).

under the AIFP on December 29, 2008, and GMAC/Ally Financial made an equity rights offering to its existing shareholders for \$2 billion.²⁴

Subsequently, GMAC/Ally Financial was one of 19 firms included in the government's "stress tests."²⁵ When the stress tests revealed that GMAC/Ally Financial needed to increase its capital, funding that it was unable to raise in the markets, the government extended further investments of \$7.5 billion in May 2009 and \$3.8 billion in December 2009.²⁶ Treasury's investment in GMAC/Ally Financial now consists of 73.8 percent of the company's common stock, \$2.7 billion in trust-preferred securities, and \$5.9 billion in mandatory convertible preferred (MCP) shares.

The assistance to Chrysler and Chrysler Financial was interwoven due to the common ownership of those two entities. On January 16, 2009, Treasury made a \$1.5 billion loan directly to Chrysler Financial, which has since been repaid.²⁷ On January 2, 2009, as part of its broader assistance to Chrysler, Treasury provided a \$4.0 billion loan to Chrysler Holding, an entity owned by Cerberus Management.²⁸ Both Chrysler and Chrysler Financial were subsidiaries of Chrysler Holding at the time. In connection with the loan to Chrysler Holding, Treasury was entitled to the first \$1.375 billion of proceeds from Chrysler Financial that would have flowed to Chrysler Holding and 40 percent of any additional proceeds that Chrysler Financial paid to Chrysler Holding after certain other distributions were made.²⁹ As part of the bankruptcy process, \$500 million of the \$4.0 billion loan was assumed by New Chrysler, leaving Chrysler Holding with a \$3.5 billion loan.

²⁴ Treasury made a loan commitment to GM, which already owned a stake in GMAC/Ally Financial, of up to \$1 billion in order to participate in the equity rights offering; however, only \$884 million was drawn and used. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010*, at 18-19 (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf) (hereinafter "Treasury Transactions Report").

²⁵ The stress tests were designed to ensure that the nation's largest financial institutions could withstand a sharp economic downturn.

²⁶ Of the \$7.5 billion investment provided in May 2009, \$4.0 billion was provided to GMAC/Ally Financial related to its partial acquisition of Chrysler Financial in May 2009. Treasury explained that it began to orchestrate the transfer of most of Chrysler Financial's business into GMAC/Ally Financial because it realized in the spring of 2009 that by July 2009, Chrysler Financial would be unable to meet its financing requirements. Treasury conversations with Panel staff (Feb. 2, 2010).

²⁷ Treasury Transactions Report, *supra* note 24, at 18-19.

²⁸ Treasury Transactions Report, *supra* note 24, at 18-19; Cerberus Capital Management, L.P., *Company Profiles: Chrysler Holding LLC* (online at webcache.googleusercontent.com/search?q=cache:bcyLZouJF04J:www.cerberuscapital.com/profiles/chrysler.html+cerberus+chrysler+holdings&cd=4&hl=en&ct=clnk&gl=us) (accessed Jan.1, 2011).

²⁹ Treasury Transactions Report, *supra* note 24, at 18-19.

On May 17, 2010, Treasury announced that it had settled with Chrysler Holding and extinguished the loan for \$1.9 billion in consideration for the government's 40 percent interest in Chrysler Financial, a settlement that it noted was above the valuation determined in an analysis by investment bank Keefe, Bruyette and Woods, but which would nevertheless result in a loss of \$1.6 billion on the initial \$3.5 billion loan.³⁰ Seven months later, on December 21, 2010, TD Bank Group announced that it had agreed to purchase Chrysler Financial from Cerberus Management for approximately \$6.3 billion.³¹ Using this sale price, Treasury's right to 40 percent of Chrysler Financial's equity would have been worth \$2.5 billion, representing a \$600 million difference from the \$1.9 billion Treasury settled for in May 2010.

The rush to exit Chrysler Financial – compounded by incomplete due diligence – may have resulted in an unnecessarily subpar return for taxpayers, preventing Treasury from recouping more of its prior \$1.6 billion loss. Presumably, Treasury's stance as a reluctant shareholder underscored the rationale for an expedited exit in this investment.³² However, such an approach was still in marked contrast to Treasury's longer-term (and generally successful) investment mentality in other instances (for example, GMAC/Ally Financial, Chrysler). Further, Treasury apparently conducted limited valuation due diligence, focusing on the merits of the offer from Cerberus in the context of an expected wind-down of the Chrysler Financial platform. Cerberus had operated Chrysler Financial in run-off mode, and Treasury had valued it as such in the context of the offer from Cerberus. While Treasury relied primarily on a valuation premised on the wind-down assumption, Treasury also states that they considered other inputs to evaluate fully the offer from Cerberus. However, aside from providing an accompanying net-present-value analysis in response to subsequent Panel requests, Treasury was unable to provide any documentation to support this claim of a multi-pronged valuation exercise that encompassed a potential bid from a strategic buyer.

After this settlement, Treasury no longer had any interest in or claim on Chrysler Financial, leaving Cerberus as the sole owner of the company. Cerberus, recognizing the inherent value of the Chrysler Financial platform to potential strategic bidders (i.e., other

³⁰ U.S. Department of the Treasury, *Chrysler Financial Parent Company Repays \$1.9 billion in Settlement of Original Chrysler Loan* (May 17, 2010) (online at www.financialstability.gov/latest/pr_05172010c.html).

³¹ Toronto-Dominion Bank, *TD Bank Group to Acquire Chrysler Financial* (Dec. 21, 2010) (online at mediaroom.tdbank.com/index.php?s=43&item=271). The \$6.3 billion sale price included \$400 million of goodwill.

³² With GMAC/Ally Financial moving quickly into the business of providing Chrysler financing, Treasury announced in late 2009 that Chrysler Financial had begun to wind down the minimal portion of its operations not assumed by GMAC/Ally Financial and aimed to complete the process by December 31, 2011. See Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Tracy Hackman, vice president, general counsel and secretary, Chrysler Financial, *Proposed Compensation Payments and Structures for Senior Executive Officers and Most Highly Compensated Employees*, Annex A, at A5 (Oct. 22, 2009) (online at www.financialstability.gov/docs/20091022%20Chrysler%20Financial%202009%20Top%2025%20Determination.pdf).

financial institutions seeking a foothold in the auto lending market), sought to cash in on the value of the franchise. Thomas Gilman, CEO of Chrysler Financial, explained that, “During this time our origination engine was idling, but we knew we had a valuable franchise and so we continue[d] to make strategic investments in the core competencies of our operations in technology, process and talent.”³³

Following Treasury’s sale, Chrysler Financial benefited from the lifting of restrictions associated with the TARP assistance provided to Chrysler Holding, as well as capital investments Cerberus made in order to enhance further the strategic options for company going forward.³⁴ As Mr. Gilman explained following the acquisition by TD Bank, “the ultimate solution for Chrysler Financial is to find a strong partner that could provide stable and long-term financing to support the needs of our customers and our dealers.”³⁵

e. Differences between Automotive Industry and Financial Institution Interventions

The Administration has articulated a set of uniform principles to govern its ownership interests in financial and automotive companies. One such set of principles is that in “exceptional cases” where the government feels it is necessary to respond to a company’s request for substantial assistance, Treasury will reserve the right to establish upfront conditions as necessary including requirements for new viability plans as well as changes to boards of

³³ Toronto-Dominion Bank, *Acquisition of Chrysler Financial by Toronto-Dominion Bank* (Dec. 21, 2010) (hereinafter “Acquisition of Chrysler Financial by Toronto-Dominion Bank”). Transcript provided by SNL Financial.

During a recent interview, Chrysler Financial CEO Tom Gilman said the company was in liquidation mode and winding down its loan portfolio for most of 2010. The company currently has 1,850 employees after eliminating over 50 percent of its staff (about 2,000 positions) during the last two years, and its loan portfolio balance declined from \$50 billion to under \$10 billion as it generally stopped underwriting new loans over the past year. David Shepardson, *TD Bank to buy Chrysler Financial*, *Detroit News* (Dec. 21, 2010) (online at detnews.com/article/20101221/AUTO01/12210375).

³⁴ Acquisition of Chrysler Financial by Toronto-Dominion Bank, *supra* note 33. Transcript provided by SNL Financial. (Thomas Gilman, Chrysler Financial CEO, said “[W]e paid all debt and we paid all the U.S. government TARP funds that we received. Obviously, any restrictions related to TARP have now been lifted.”). Restriction associated with the loan included the limitation of new business lines and major investments. U.S. Department of the Treasury, *Loan and Security Agreement By and Between The Borrower Listed on Appendix A as Borrower and The United States Department of the Treasury as Lender*, at 56 (Dec. 31, 2008) (online at www.financialstability.gov/docs/AIFP/Chrysler%20LSA%20as%20of%2005-26-10.pdf) (“No Loan Party will engage to any substantial extent in any line or lines of business activity other than the businesses generally carried on by the Loan Parties as of the Effective Date or businesses reasonably related thereto.”); *Id.* at 58 (“No Loan Party intends to make any Investment, except Permitted Investments. If any Loan Party shall make a Permitted Investment not in the ordinary course of business in an amount greater than \$100,000,000, such Loan Party shall comply with provisions”).

³⁵ Acquisition of Chrysler Financial by Toronto-Dominion Bank, *supra* note 33. Transcript provided by SNL Financial.

directors and management.³⁶ Treasury determined that seven institutions – AIG, Citigroup, Bank of America, GM, GMAC/Ally Financial, Chrysler, and Chrysler Financial – should be deemed “exceptional assistance” recipients.

In practice, however, there were clear differences between the treatment of banks and the automobile manufacturers that received TARP assistance, and even among those considered to be “exceptional cases.” Both Chrysler and GM faced government-mandated restructurings. In comparison, Treasury has generally not forced TARP recipient financial institutions to reorganize, nor, with the exception of AIG, has it changed their boards and managements.³⁷ Treasury’s assistance to Bank of America and Citigroup – two “exceptional assistance” recipients – was not conditioned on restructuring or management changes. Even in the case of GMAC/Ally Financial – a financial institution that, like GM and Chrysler, was assisted as part of the TARP’s Auto Industry Financing Program – Treasury chose not to put the firm through bankruptcy.

Moreover, while Treasury has not generally exercised a significant role in restructuring the management of most of the financial institutions that received TARP capital investments, it has done so with the largest and most distressed TARP recipients, and this is particularly true of those assisted under the AIFP – GM, GMAC/Ally Financial, and Chrysler. Of course, in the cases of GM, AIG, and GMAC/Ally Financial, Treasury’s ability to effect management changes may have been at least facilitated by its majority ownership positions. In contrast to the treatment of Chrysler and GM shareholders, who were wiped out, those with equity stakes in AIG, Citigroup, and GMAC/Ally Financial have seen their positions severely diluted by the government, but they have not been wiped out. Furthermore, unlike many creditors of the automotive companies, who were wiped out, companies with contractual ties to AIG, for instance those that owned AIG-originated credit default swap (CDS) contracts, were made whole.

³⁶ Congressional Oversight Panel, Written Testimony of Ron Bloom, senior advisor, U.S. Department of the Treasury, *COP Field Hearing on the Auto Industry* (July 27, 2009) (online at cop.senate.gov/documents/testimony-072709-bloom.pdf); The White House, *Fact Sheet: Obama Administration Auto Restructuring Initiative General Motors Restructuring* (June 30, 2009) (online at financialstability.gov/latest/05312009_gm-factsheet.html) (hereinafter “White House Fact Sheet on General Motors Restructuring”).

³⁷ As with the automotive companies, some of AIG’s management has been replaced and the company has undergone a restructuring that has resulted in two of its profitable foreign insurance divisions being spun-off and its financial products division significantly cut back. However, the Federal Reserve and Treasury chose not to use the Bankruptcy Code to restructure AIG.

f. Current State of Government's Investments

There are currently \$51.5 billion in TARP funds outstanding under the AIFP.³⁸ Figure 1 shows the current state of TARP funds used to support the auto industry. In total, U.S. taxpayers spent \$49.9 billion in support of GM, about \$12.8 billion in support of Chrysler, and \$17.2 billion in support of GMAC/Ally Financial. The assistance to automotive suppliers accounts for approximately \$3.5 billion of TARP commitments, bringing the gross TARP support for the U.S. domestic automotive industry to approximately \$84.8 billion.

Figure 1: AIFP Assistance by Company as of December 30, 2010 (millions of dollars)³⁹

	Total Invested	% of Total AIFP	Total Repaid	% of Investment Repaid	Total Lost\ Extinguished	Assistance Currently Obligated
GMAC/Ally Financial	\$17,174	21%	–	0%	–	⁴⁰ \$17,174
General Motors	49,861	61%	\$(22,717)	46%	–	27,144
Chrysler Financial	1,500	2%	(1,500)	100%	–	–
Chrysler	12,810	16%	(2,180)	17%	(\$3,488)	7,142
Total AIFP	\$81,345	–	(\$26,397)	–	(\$3,488)	\$51,459

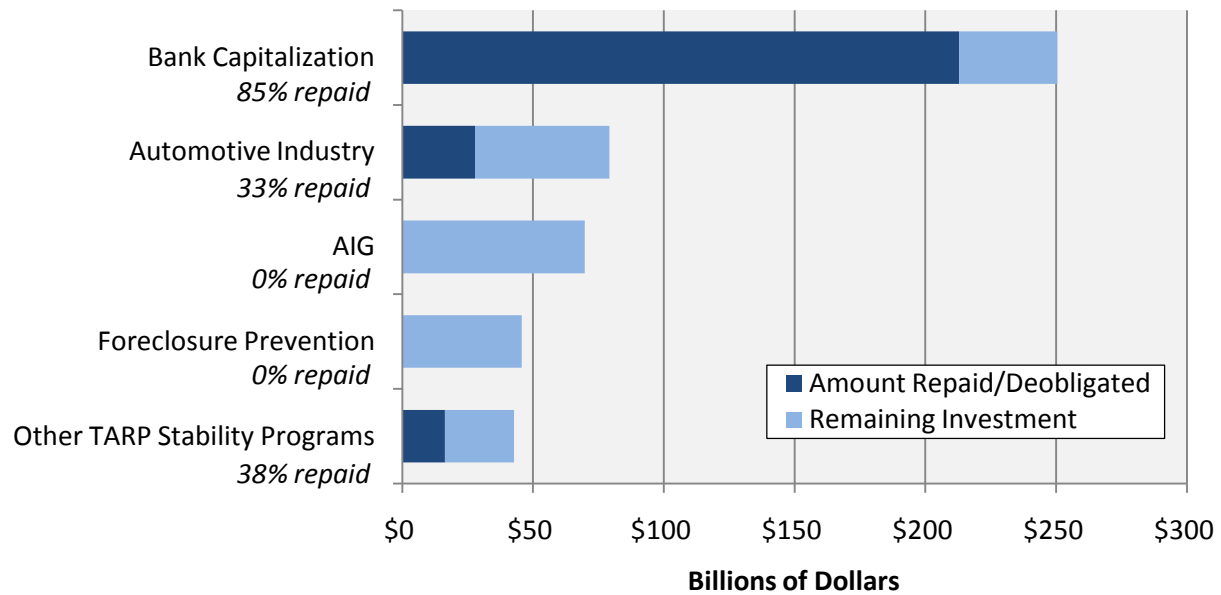
Figure 2 illustrates the proportion of TARP funds expended and repaid in support of the auto industry compared to the amounts used for other purposes.

³⁸ This figure is composed of the \$81.3 billion in total assistance provided to the automotive companies less the \$26.4 billion in repayments and less the \$3.5 billion in losses associated with the AIFP. Treasury Transactions Report, *supra* note 24, at 18-19.

³⁹ Treasury Transactions Report, *supra* note 24, at 18.

⁴⁰ As of December 30, 2010, Treasury had converted \$9.4 billion of its investment in GMAC/Ally Financial into common stock. For further information regarding these conversions, see Section F.2.b of this report.

Figure 2: TARP Funds Repaid as a Portion of Total Expended by Program Type⁴¹



As shown above, a significant amount of the AIFP assistance remains outstanding, particularly in comparison to the bank recapitalizations conducted under the TARP. In addition, compared to the TARP bank recapitalization and other stability programs, it is generally taking Treasury a longer period of time to dispose of its AIFP investments. The longer disposition process is largely the result of the nature of Treasury’s investments in each program. While most of Treasury’s banking sector investments (with the exception of investments in Citigroup and a small number of other banks) were limited to purchases of senior preferred stock or subordinated debentures (the terms of which allowed the recipient the right to redeem at any time, subject to regulatory approval), Treasury’s AIFP investments are a combination of loans, preferred stock, and common stock. Since common stock interests in GM, Chrysler, and GMAC/Ally Financial now form the majority of Treasury’s remaining AIFP investments, the disposition of these ownership interests will depend on the condition of the equity capital markets, the state of the auto sector, and the broader economic outlook. As with the disposition of Treasury’s investment in insurance giant AIG, the complete disposition of Treasury’s AIFP investments could take place over several years.

At this point, it is impossible to determine whether Treasury’s assistance through the AIFP will have a long-term financial cost or gain. The Panel examines this issue, as well as the

⁴¹ The “Foreclosure Prevention” category includes the Home Affordable Modification Program (HAMP), the Hardest Hit Fund, and the Federal Housing Administration (FHA) Short Refinance program. It should be noted that these programs were not designed to solicit repayment. The “Other Stability programs” category includes the Term Asset-Backed Loan Facility (TALF), the Public-Private Investment Partnership (PPIP), and the Small Business Administration 7(a) Securities Purchase Program.

context for government assistance and likely exit strategies for each company, in more depth below.

C. Current State of the Domestic Automotive Industry

U.S. auto companies have significantly improved their operating performance over the past year, moving from losses to profits in recent quarters. Automakers restructured during the global recession by cutting brands, closing factories, and laying off workers, positioning themselves for higher profits once consumer demand increased. Since the automakers have recently demonstrated that they can generate profits at a much lower level of sales, the industry may be well positioned to exploit any increased demand.⁴² The industry's improved efficiency has allowed automakers to become more flexible and better able to meet changing consumer demands, while still remaining profitable. Improved production procedures and lower inventory have resulted in fewer discounts on new car sales, improving the profitability on each car sold. Investor enthusiasm for GM's IPO in November 2010 demonstrates a more favorable outlook for the auto companies since the restructurings of GM and Chrysler, in large part because of structural cost reductions, resulting in leaner and more efficient business models, and boosting optimism for the possibility of more sustainable profits over the long term.

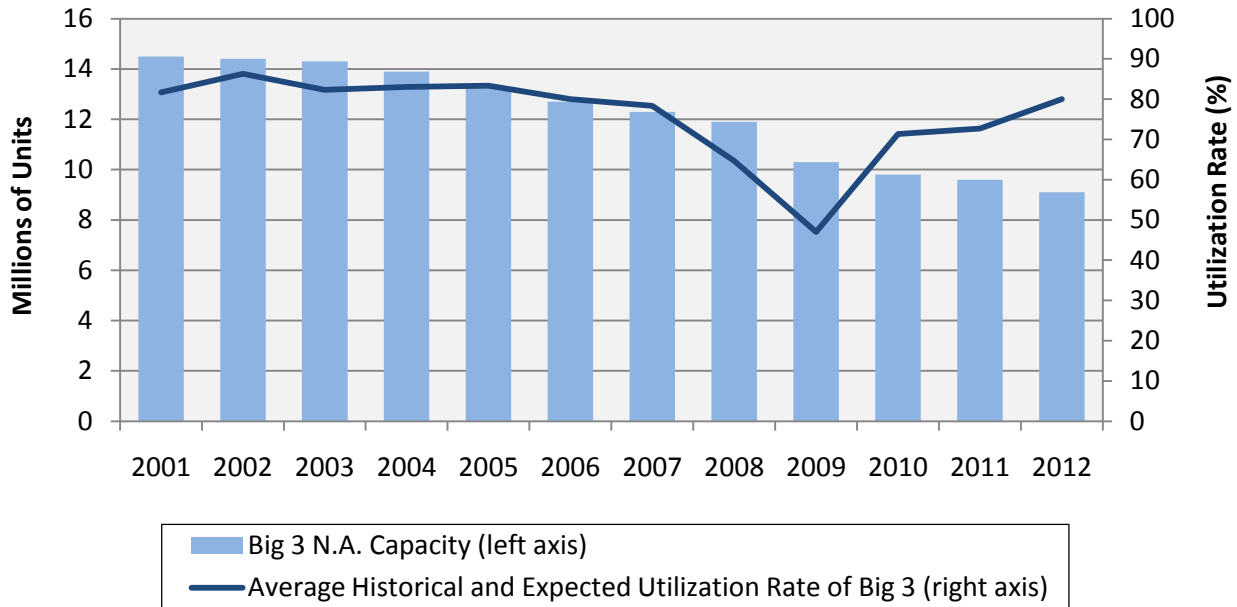
These fundamental changes across the industry are outlined below. Restructuring efforts at the individual companies are outlined in more detail in the corresponding GM, Chrysler, and GMAC/Ally Financial sections of this report.

1. Capacity Reductions

Restructuring during the economic downturn has resulted in increased factory and labor usage and reduced vehicle inventory. As Figure 3 below illustrates, the North American production capacity of the big three automakers steadily declined from 2001 to 2004, before declining more sharply in recent years. In comparison, the utilization rate, a metric that measures the degree to which companies exploit their existing production capacity, is projected to increase from a trough of 47 percent in 2009 to 80 percent in 2012. The reduction in production capacity, combined with a more efficient use of inputs, demonstrates that the nation's largest three automakers have taken steps to align their size and production with a more subdued market backdrop.

⁴² For further discussion concerning the outlook for the auto industry, see Section C.5, *infra*.

Figure 3: North American Capacity of Big 3 Automakers Compared to Capacity Utilization Rate⁴³



2. Lower Labor Costs

Industry-wide labor costs are also substantially lower, primarily due to the following:

- A reduction in the number of salaried employees;⁴⁴
- Salary declines resulting from the hiring of Tier 2 workers, who are new hires with average wages of \$33 per hour. Tier 1 employees, who have been employed for longer, have average wages of \$58 per hour;
- A shift in responsibility for employee health-care costs as a result of a 2007 agreement with the UAW;⁴⁵ and

⁴³ Capacity is defined here as two 8-hour work shifts per day times the average number of work days (240) per year at the maximum possible facility line rate (vehicles produced per hour). Utilization is production divided by capacity. Data provided by CSM.

⁴⁴ For example, GM's U.S. salaried headcount is currently 24,000, versus 30,000 in 2008 and 34,000 in 2007 (down 20 percent and 29 percent, respectively). GM's U.S. hourly workforce, which is almost completely made up of UAW members, is currently 46,000, down from 62,000 in 2008 and 78,000 in 2007. (Deutsche Bank Investment Research).

⁴⁵ In large part due to the shifting of healthcare costs to the UAW in the 2007 agreement, hourly labor costs within Chrysler, Ford, and GM have now declined to approximately \$58 per hour, approaching the levels at U.S. plants operated by Japanese automakers and falling below historical levels of \$65 per hour. Colin Langan, *10%*

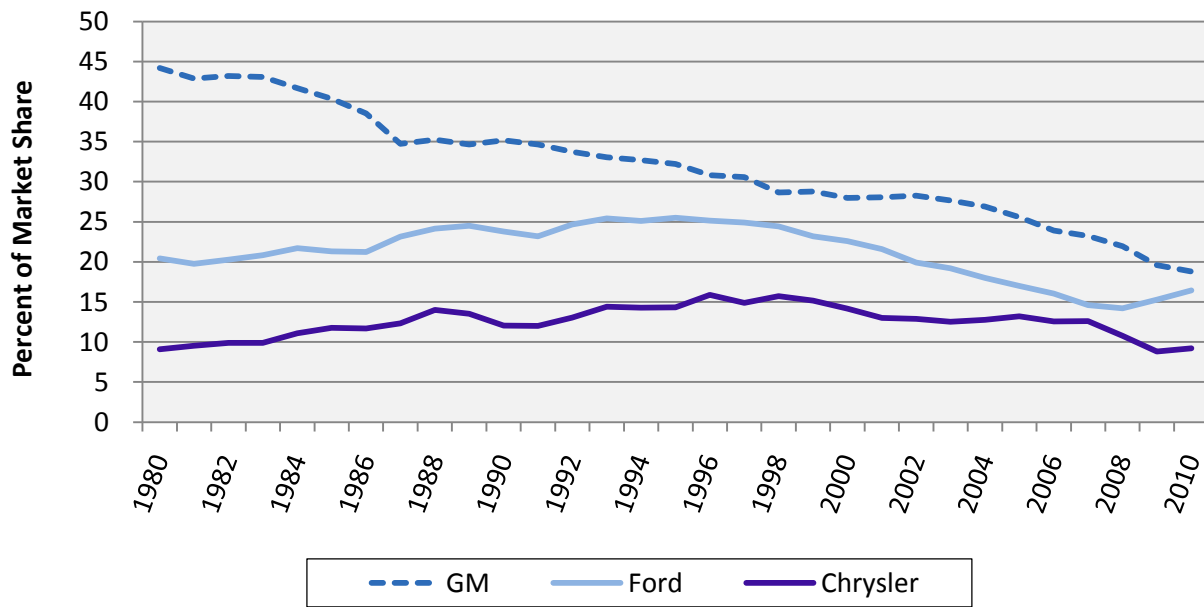
- Streamlined job classifications, which help improve assembly line productivity.

Overall, the cost bases at Chrysler, Ford, and GM are some 35 percent lower in 2010 than they were in 2005 and 20 percent lower than they were in 2007.⁴⁶

3. Resiliency in Market Share

Since the 1980s, American automakers have been losing ground in their home market, but they started to reverse that trend in 2010, at the expense of their Japanese rivals. This reflects gains in the U.S. auto market by Ford and a retreat by Toyota after a series of Toyota recalls over the past year. After shedding or eliminating four brands as part of its restructuring, GM’s share has fallen from 19.7 percent in 2009 to 18.3 percent at present,⁴⁷ while Chrysler’s share has slightly improved from 9.0 percent in 2009 to approximately 9.5 percent. Chrysler’s improvement in market share has been aided by a shift to lower-margin sales of “fleet” vehicles to rental car agencies and other commercial buyers.

Figure 4: Big 3 Total U.S. Market Share, 1980 to 2010⁴⁸



Margins in the “New” US Auto Industry, UBS Investment Research, at 5 (Nov. 15, 2010) (hereinafter “UBS Investment Research Paper”).

⁴⁶ *Id.* at 1. UBS states that automakers “are now profitable at very low levels of utilization, which bodes well for operating leverage as sales demand continues to recover.”

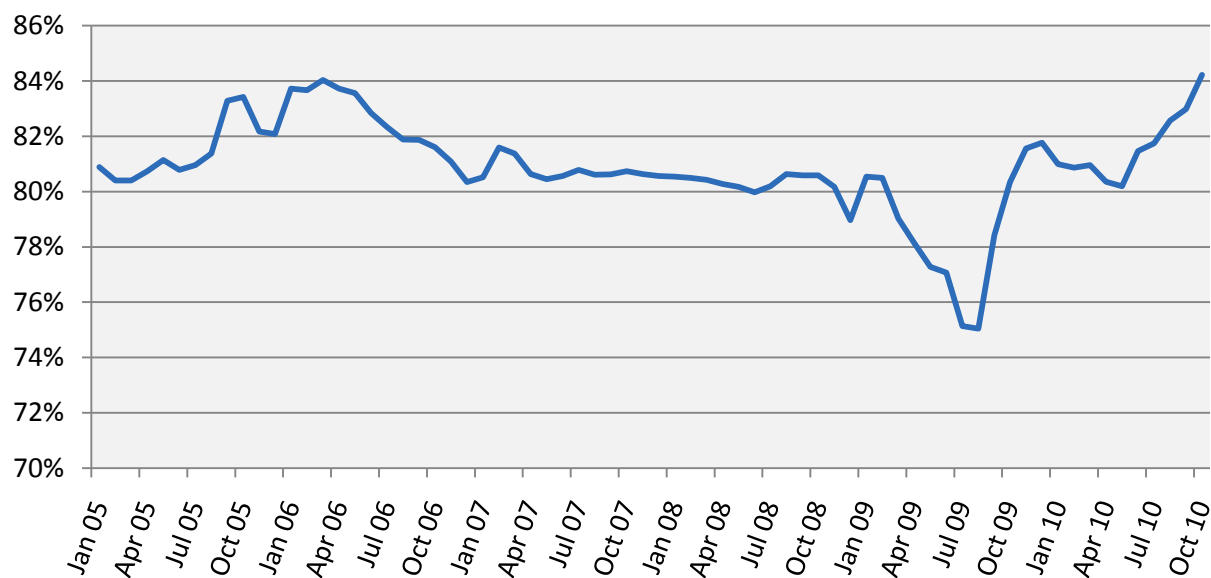
⁴⁷ General Motors Company, *Q3 2010 Results*, at 6 (Nov. 10, 2010) (online at media.gm.com/content/dam/Media/gmcom/investor/2010/Q3-Chart-Set.pdf) (hereinafter “GM Q3 2010 Results”).

⁴⁸ Data provided by Wards Auto.

4. Pricing

Finally, the industry has also benefited from a reduction in sales promotions (as its inventory management has improved, in line with a more sustainable utilization rate), which has resulted in a steadily higher average transaction price per vehicle sold. Figure 5 below shows the average transaction price per vehicle as a percentage of the Manufacturer Suggested Retail Price (MSRP). This measure reached a trough of 75 percent in August of 2009 as the industry struggled to unload unsold inventory, but has since increased to 84 percent in October 2010, eclipsing pre-crisis levels.

Figure 5: Transaction Price as a Percentage of MSRP⁴⁹



5. Outlook

Putting all of the aforementioned factors together, the industry's financial outlook has improved considerably over the past two years. Despite a historically weak backdrop of U.S. sales, the industry is now reporting strong profits. The combination of greatly reduced capacity, generally stable market share, and improved pricing has more than offset persistently weak (but improving) demand. Thus, many industry observers believe that an improvement in the economy will result in a disproportionate increase in profitability, as the industry will be able to increase production without incurring meaningful new investment costs. Meanwhile, sales

⁴⁹ Data compiled by CNW Research. MSRP is defined as Manufacturer Suggested Retail Price. The MSRP is the average sticker price of vehicles sold; Transaction Price excludes taxes, fees, and aftermarket products.

outside the United States – particularly in the emerging markets of Brazil, Russia, India, and China – are pacing an improving long-term sales outlook, as these markets overtake the United States as the key driver of incremental industry demand.

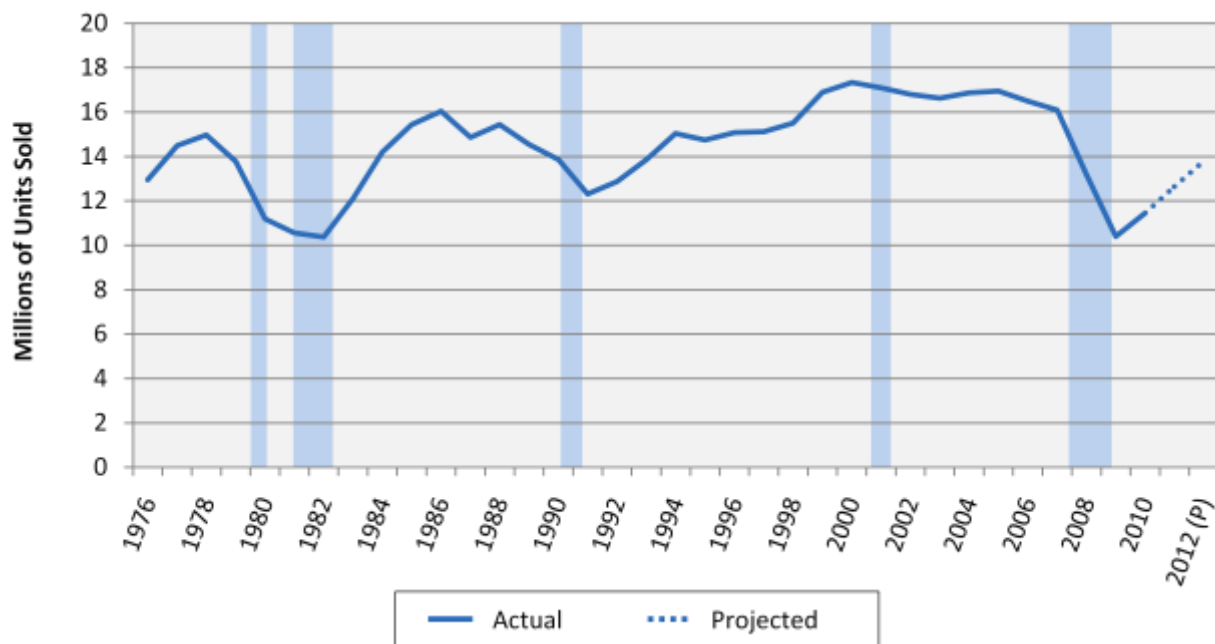
The auto industry’s average U.S. seasonally adjusted annual rate (SAAR) for the year-to-date period through the end of December 2010 is 12.5 million sales. This compares to 11.1 million in the corresponding year-ago period.⁵⁰ However, this level is still 29 percent below the average SAAR of 16.3 million in the 10 years preceding 2006. Nonetheless, the industry’s lower cost base has made it possible for the auto companies to return to profitability at this level.⁵¹ Industry experts forecast improvements in sales of roughly one million units per year for both 2011 and 2012.⁵²

⁵⁰ Bureau of Economic Analysis, *Supplemental Data: Auto Vehicles* (Instrument: Light Total – seasonally adjusted at annual rates (Millions)) (online at www.bea.gov/national/xls/gap_hist.xls) (accessed Jan. 11, 2011). Standard & Poor’s views on the extent of the sales rebound are conservative given the sluggish economic recovery, but it expects sales to improve again in 2011 to approximately 12.8 million units. Despite the improvement, this figure is still below the 2008 sales numbers. PricewaterhouseCoopers (PwC), while noting concerns about the “waning strength” of an economic recovery and “dimming prospects for marked improvement in 2011,” states that North America’s light vehicle landscape has continued to produce “convincing signs of near-term stability in terms of sales and assembly.” PricewaterhouseCoopers, *North America Analyst Briefing* (Nov. 2010). For its part, Goldman Sachs is forecasting 2011 and 2012 sales at 13 million and 14 million, respectively, as it believes that additional pent-up demand “will help drive a steeper recovery in auto sales as some of these macro concerns abate.” The Goldman Sachs Group, Inc., *Americas: Automobiles: See Upside to 3Q Consensus Post Our Volume Driven Est. Revisions* (Oct. 19, 2010) (hereinafter “Goldman Sachs Estimate Revisions”). In late October, Goldman Sachs also projected a 2013 SAAR estimate of 15 million. It is important to underscore, however, that these levels are still well below historic “normalized” sales.

⁵¹ Standard & Poor’s anticipates that recovering light vehicle sales and inventory rebuilding in the United States will boost production volumes by more than 10 percent in 2010. Standard & Poor’s, *Industry Report Card: Busy Production Lines Are Fueling Global Automakers’ Operating Profits And Credit Quality* (Oct. 4, 2010).

⁵² An average of five analyst forecasts for SAAR improves from 11.6 million vehicles sold in 2010 to 12.6 million in 2011. The same analysts estimate that the 2012 SAAR will be 13.8 million vehicles. Averages are comprised of forecasts from PricewaterhouseCoopers Autofacts, CSM Worldwide, IHS Global Insight, J.D. Power, and IRN. Original Equipment Suppliers Association, *The State of the Supplier Industry*, at 8 (Nov. 10, 2010) (hereinafter “The State of the Supplier Industry”).

Figure 6: Light Vehicle Sales, Autos and Trucks, Millions of Units Sold (SAAR)⁵³



As noted earlier, the auto industry is also benefitting from rising global sales. According to estimates by J.D. Power & Associates, worldwide light vehicle sales may rise to 71.1 million vehicles, surpassing the previous record of 70.3 million units in 2007. These forecasts highlight the importance of non-U.S. markets to the viability and profitability of the U.S. auto companies: GM sells far more cars outside the United States than it does domestically. While GM North America delivered 661,000 vehicles in the third quarter of 2010, GM delivered 567,000 vehicles in China alone, an additional 391,000 in Europe, and another 447,000 in the rest of the globe. GM holds 18.3 percent of Brazil’s market share, same as its U.S. market share.⁵⁴ (However, earnings overall are still strongly driven by North America. GM reported in the third quarter of 2010 that \$2.1 billion of its earnings before interest and taxes (EBIT) came from its North American branch, whereas its European branch lost \$0.6 billion, and the rest of its international operations only earned \$0.6 billion.) This global growth in sales has been paced by rapid increases in demand in Brazil, Russia, India, and China, which now account for 34 percent of

⁵³ Bureau of Economic Analysis, *Auto and Truck Seasonal Adjustment Data* (Dec. 2, 2010) (online at bea.gov/national/xls/gap_hist.xls); Shaded areas reflect periods of economic recession as defined by the National Bureau of Economic Research. See National Bureau of Economic Research, *U.S. Business Cycle Expansions and Contractions* (online at www.nber.org/cycles/cyclesmain.html) (accessed Jan. 11, 2011). 2011 and 2012 data is an average projection comprised of SAAR projections from PricewaterhouseCoopers Autofacts, CSM Worldwide, IHS Global Insight, J.D. Power & Associates, and IRN. The State of the Supplier Industry, *supra* note 52.

⁵⁴ GM Q3 2010 Results, *supra* note 47, at 6, 11, 15.

industry sales, compared to 9 percent in 2000.⁵⁵ Within the next five years, the percentage of sales in these countries and other developing markets is forecast to outstrip that of mature markets (North America, Europe, and Japan).⁵⁶

Some industry analysts are very bullish on the U.S. auto recovery, taking the view that improved capacity usage, reduced labor costs, and global platforms can produce sustainable profits.⁵⁷ The global auto industry, however, is highly cyclical and sensitive to changes in consumer sentiment, employment, interest rates, gasoline prices, and general economic activity.⁵⁸ In the absence of any improvements in the United States in employment, housing, credit-based spending, and the equity markets, a near-term recovery in demand for automobiles may be harder to achieve.⁵⁹

D. General Motors

1. Context

a. Background and the Government Intervention

One of America's largest and most storied corporations, GM enjoyed a highly profitable stretch during the 1990s. Its stock price peaked above \$93 in April 2000, up from \$27.50 in late 1991. This decade of success was built largely on sales of GM's light trucks and sport utility vehicles (SUVs), as well as the high profit margins generated by GMAC/Ally Financial, a finance arm that initially focused on automobiles, but over time evolved into a more diversified

⁵⁵ UBS Investment Research, *US (not BRIC) is Key NT Growth Market* (Nov. 11, 2010) (hereinafter "UBS Investment Research Paper on Growth Market").

⁵⁶ As recently as 2006, the United States accounted for more than a quarter of the global market, whereas in 2010, the United States accounted for a mere 16.3 percent of global demand. J.D. Power & Associates, however, predicts that China's share of the world market will climb from 10 percent in 2006 to 21 percent in 2013. Efraim Levy, *Industry Surveys: Autos & Auto Parts*, Standard & Poor's Research, at 15-16 (June 24, 2010).

⁵⁷ UBS points out that "significant structural changes made by the U.S. auto market in the last year have already resulted in enhanced operating margins, despite the low levels of sales." While the United States has not historically been a profitable market for domestic automakers, UBS estimates profitability will be approximately 10 percent for the industry going forward, based on the combination of capacity reductions, reduced labor costs, and improved outlook. In UBS' view, "[c]ombined with the ongoing sales recovery, these cost cuts paint a very bright picture for the 'new' North American auto industry over the next five years." UBS Investment Research Paper on Growth Market, *supra* note 55; UBS Investment Research Paper, *supra* note 45.

⁵⁸ Goldman Sachs concludes that the key risk for the auto sector "remains the pace of sales growth whose outlook is tied intimately to consumer sentiment and the outlook for housing and employment in the U.S." PricewaterhouseCoopers notes that while consumer credit has thawed substantially over the past year, and lending standards have eased, many consumers "are voluntarily and involuntarily absent from the new vehicle market," due in large part to widespread deleveraging and lenders' limited capacity to extend financing to potential buyers with "newly tarnished credit." Goldman Sachs Estimate Revisions, *supra* note 50. See also UBS Investment Research Paper, *supra* note 45.

⁵⁹ PricewaterhouseCoopers, North America Analyst Briefing (Nov. 2010).

financial services firm. By 2005, though, GM was losing money. High gasoline prices had dampened consumer demand for its vehicles, which lagged behind competitors in fuel efficiency, and its market share declined. GM was also hurt by an unsustainable cost structure, largely due to the high cost of its retiree health care and pension benefits. GM's investment in automobile design lagged behind competitors, which led to further erosion in the company's market share. It all added up to a spiral of decline.

In 2006, GM sold much of its ownership in GMAC/Ally Financial, which at the time remained profitable. The two firms remained highly interdependent under agreements that kept GMAC/Ally Financial as the largest financier of GM automobile purchases. But the sale of GMAC/Ally Financial proved to be a stop-gap measure for GM, since in 2007 the automaker posted a staggering loss of more than \$38 billion. The recession that began in December 2007 took a toll on all manufacturers in the highly cyclical auto industry, but GM, with its high fixed costs and increasingly uncompetitive vehicles, was particularly vulnerable. In the fall of 2008, amid the credit crisis, the firm was unable to fund its operations using private-sector lenders, and appealed to Congress for an emergency bailout.

The Bush and Obama Administrations provided multiple rounds of TARP assistance to GM, culminating in a rapid bankruptcy restructuring in June 2009.⁶⁰ Out of this process, a new company emerged: General Motors Company (New GM).⁶¹ This new entity shed Old GM's least valuable assets and most burdensome liabilities.⁶² To help achieve the transition to a new, leaner company, Treasury invested a total of \$49.9 billion in GM.⁶³

⁶⁰ September 2009 Oversight Report, *supra* note 2, at 3,19.

⁶¹ The company effectively came into being on July 10, 2009, when GM sold its "good" assets under Section 363 of the Code to a new, government-owned entity, General Motors Company (New GM). Order (I) Authorizing Sale of Assets Pursuant to Amended and Restated Master Sale and Purchase Agreement with NGMCO, Inc., a Treasury-Sponsored Purchaser; (II) Authorizing Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection with the Sale; and (III) Granting Related Relief, *In Re* General Motors Corp., S.D.N.Y. (No. 09-50026 (REG)) (July 5, 2009) (online at docs.motorsliquidationdocket.com/pdf/lib/2968_order.pdf). See also September 2009 Oversight Report, *supra* note 2, at 19.

⁶² See White House Fact Sheet on General Motors Restructuring, *supra* note 36. For purposes of this report, the General Motors that existed prior to the 2009 restructuring is referred to as "Old GM." Its formal name is now Motors Liquidation Company.

⁶³ This figure includes investments in both Old GM and New GM. Treasury Transactions Report, *supra* note 24, at 18-19. Foreign governments provided assistance as well. The governments of Canada and Ontario invested a net of \$9.5 billion in loans to GM, resulting in an 11.7 percent ownership stake. GM also arranged a revolving bridge facility with the German federal government with a commitment amount of €1.5 billion, equivalent at the time to \$2.1 billion. That loan was repaid, in full, and extinguished on November 24, 2009. September 2009 Oversight Report, *supra* note 2, at 31; General Motors Company, *Amendment No. 9 to Form S-1: Preliminary Prospectus*, at 61 (Nov. 17, 2010) (online at www.sec.gov/Archives/edgar/data/1467858/000119312510262471/ds1a.htm) (hereinafter "GM Amendment No. 9 to Form S-1: Preliminary Prospectus").

b. Impact of Changes in Tax Rules

Like certain other TARP recipients, GM may receive additional benefits from the government as a result of certain Treasury-issued guidance⁶⁴ concerning the rules applicable to carrying forward net operating losses (NOLs).⁶⁵ The ability to carry forward an NOL allows corporations to offset future taxable income with losses from prior years, thereby reducing future tax liabilities.⁶⁶ However, the use of NOL carryforwards is subject to various limitations. One provision in the Internal Revenue Code limits the amount of taxable income that a corporation may offset in years following an ownership change.⁶⁷

This limitation would have had a significant impact on numerous TARP recipients, since several of them experienced a change in ownership, as a result of government investments and the disposition of those investments. Treasury issued several notices that applied only to TARP recipients, and addressed the application of the ownership change rules in the context of the government's investment in TARP recipients.⁶⁸ These notices established the definition of

⁶⁴ The so-called EESA Notices, in reference to the law that established the TARP, include: Notice 2008-100, which concerned recipients of TARP funds under the Capital Purchase Program; Notice 2009-14, which extended the guidance in Notice 2008-100 to instruments issued under the Targeted Investment Program and the Automotive Industry Financing Program; Notice 2009-38, which extended the prior guidance to the Asset Guarantee Program and the Systemically Significant Failing Institutions Program, among other actions; and Notice 2010-2, which in part provides guidance on the impact of Treasury's sale of stock that it was issued under the TARP programs covered by the prior guidance. In the American Recovery and Reinvestment Act of 2009, Congress provided an exception to the section 382 limitations on loss carryovers for certain ownership changes of certain TARP recipients, including GM. See *American Recovery and Reinvestment Act of 2009*, Pub. L. No. 111-5, at § 382(n) (2009).

⁶⁵ A net operating loss (NOL) is the excess of a corporation's deductions over its taxable income. The future benefit of an NOL is considered a deferred tax asset for financial accounting purposes.

⁶⁶ Under Section 172 of the Internal Revenue Code, a corporation is allowed to carry forward the amount of any unrecognized net operating loss in the current taxable year to be recognized in future taxable years. In general, Section 172 provides that a net operating loss for the current taxable year may be carried back two taxable years, and carried forward for up to 20 taxable years. For financial accounting purposes, limitations on the use of an NOL carryforward may reduce the amount a corporation is able to reflect as a deferred tax asset on its financial statements, and in turn could negatively affect value of such corporation.

⁶⁷ In general, an ownership change occurs if the percentage of a corporation's stock owned by one or more "5-percent shareholders" increases by more than 50 percentage points over the lowest percentage of stock of such corporation owned by such shareholders at any time during the three-year period that ends on the date of the triggering event. Some events that can increase the percentage of stock owned by a 5-percent shareholder include a merger or acquisition of the corporation, sales of stock to 5-percent shareholders, redemptions, and new issuances of stock. A "5 percent shareholder" is any shareholder that owns 5 percent or more of the stock of the corporation. The stock owned by all shareholders who are not 5-percent shareholders is treated as being owned by one or more "public groups," which may be treated as 5-percent shareholders.

⁶⁸ The Secretary possesses the authority to issue income tax notices under 12 U.S.C. § 5211(c)(5). In addition, Section 382(m) specifically authorizes the Secretary to issue "such regulations as may be necessary or appropriate to carry out the purposes of this section." 26 U.S.C. § 382(m). See also Congressional Oversight Panel, *January Oversight Report: Exiting TARP and Unwinding Its Impact on the Financial Markets*, at 16-20 (Jan. 13, 2010) (online at cop.senate.gov/documents/cop-011410-report.pdf) (hereinafter "January 2010 Oversight Report").

“change in ownership” as applied to TARP recipients, in general ignoring changes in the government’s equity ownership in determining whether a “change in ownership” has occurred. GM was a beneficiary of the tax notices, while Chrysler and GMAC/Ally Financial did not benefit because they were limited liability companies at the time they received government funds and were treated as pass-through entities for federal income tax purposes.

GM has reported approximately \$9.1 billion in U.S. federal and state NOL carry-forwards.⁶⁹ The actual financial impact of Treasury’s tax notices to GM is difficult to determine and will depend on the company’s future income.⁷⁰ Nonetheless, the favorable rules provided in the notices are likely to affect GM’s value.

It is important to note that the change-in-ownership restrictions were intended to prevent companies from buying other firms for the purpose of benefitting from their tax losses. GM’s situation following the government rescue was a different case, since the government did not invest in GM with the purpose of benefitting from GM’s tax losses. Nonetheless, the Panel has noted previously with respect to TARP-recipient banks that the favorable tax guidance pitted “Treasury’s responsibilities as TARP administrator, regulator, and tax administrator against one another,” and that these notices fuel “the perception that income tax flexibility is especially, and quickly, available for large financial institutions at a time of general economic difficulty.”⁷¹ This observation would appear to apply with equal validity to Treasury’s rescue of GM. On the other hand, it is possible that the favorable tax guidance will contribute to greater profitability and market value of GM, which will in turn enhance the value, and improve the recovery, of the taxpayers’ investment.⁷²

⁶⁹ Total operating loss and tax credit carryforwards as of December 31, 2009 were \$18.9 billion, of which \$9.1 billion related to U.S. federal and state net operating loss carryforwards. General Motors Company, *Amendment No. 5 to Form S-1: Preliminary Prospectus*, at F-123 (Nov. 3, 2010) (online at www.sec.gov/Archives/edgar/data/1467858/000119312510246019/ds1a.htm) (hereinafter “GM Amendment No. 5 to Form S-1: Preliminary Prospectus”).

⁷⁰ See January 2010 Oversight Report, *supra* note 68, at 16-22.

⁷¹ January 2010 Oversight Report, *supra* note 68, at 22. The Special Inspector General for the Troubled Asset Relief Program (SIGTARP) has initiated an evaluation of Treasury’s decision-making process in providing TARP recipients a waiver from the NOL carry-forward rules. SIGTARP seeks to determine the rationale behind the waiver, whether Treasury was aware of any tax effect that might result from the waiver, the identity of the decision-makers involved in issuing the waiver, and the extent to which Treasury’s policy to dispose of TARP investments in a timely manner factored into the decision to issue a waiver. Office of the Special Inspector General for the Troubled Asset Relief Program, *Engagement Memo – Review of the Section 382 Limitation Waiver for Financial Instruments Held by Treasury* (Aug. 10, 2010) (online at www.sig tarp.gov/reports/audit/2010/Engagement%20Memo%20-%20Review%20of%20the%20Section%20382%20Limitation%20Waiver%20for%20Financial%20Instruments%20Held%20by%20Treasury.pdf).

⁷² In addition, although the notices permit certain TARP recipients to enjoy a tax benefit that they would have otherwise been denied, other carry-forward benefits have been denied to TARP recipients. As discussed in more detail in the Panel’s May 2010 report, TARP recipients were excluded from the extension of the NOL benefit

2. More Recent Developments

Following the formation of New GM, approximately \$39.3 billion of Treasury's original investment was converted into common equity, resulting in a government stake representing 60.8 percent of GM's common equity.⁷³ The remaining government investment was split between \$7.1 billion in debt, \$2.1 billion in New GM preferred stock, and \$986 million in the form of a loan to Old GM. In a series of payments between July 2009 and April 2010, GM repaid the \$7.1 billion in debt that it owed to Treasury.⁷⁴ New GM has also repurchased from Treasury the \$2.1 billion in New GM preferred stock.⁷⁵ The \$986 million government loan to Old GM remains outstanding.

After GM's bankruptcy, Treasury officials played a significant role in the selection of a new CEO, Edward Whitacre, Jr., who was named to the position on December 1, 2009.⁷⁶ Treasury also appointed four members of the GM board.⁷⁷ On August 12, 2010, GM announced that Mr. Whitacre would step down as CEO on September 1, 2010 and be replaced by Daniel Akerson, a Treasury-appointed member of GM's board of directors.⁷⁸ As a recipient of

that was included in the Worker, Homeownership, and Business Assistance Act of 2009. The Act permitted taxpayers with net operating losses in 2008 and 2009 to apply those losses to tax payments made in five preceding tax years, rather than only to payments made in the two preceding tax years. As the Panel noted, this exclusion may have contributed to the development of the TARP "stigma," as "bank industry sources have stated that when banks accepted TARP funds, they had no reason to anticipate that their status as TARP recipients would cause them to be denied access to subsequent benefits afforded to their non-TARP competitors." Congressional Oversight Panel, *May Oversight Report: The Small Business Credit Crunch and the Impact of the TARP*, at 71 (May 13, 2010) (online at cop.senate.gov/documents/cop-051310-report.pdf). See also Internal Revenue Service, *Questions and Answers for The Worker, Homeownership, and Business Assistance Act of 2009 – Section 13 5-year Net Operating Loss (NOL) Carryback* (Feb. 24, 2010) (online at www.irs.gov/newsroom/article/0,,id=217370,00.html).

⁷³ September 2009 Oversight Report, *supra* note 2, at 64, 69.

⁷⁴ Treasury Transactions Report, *supra* note 24, at 18-19.

⁷⁵ U.S. Department of the Treasury, *General Motors Repays Taxpayers \$2.1 Billion, Completing Repurchase of Treasury Preferred Stock* (Dec. 15, 2010) (online at www.financialstability.gov/latest/pr_12152010.html). The preferred stock was Series A fixed-rate cumulative perpetual, which paid a 9 percent dividend. General Motors Company, *Form 10-Q for the Quarterly Period Ended September 30, 2010*, at 36 (Nov. 10, 2010) (online at www.sec.gov/Archives/edgar/data/1467858/000119312510255233/d10q.htm) (hereinafter "GM Form 10-Q").

⁷⁶ See Steven Rattner, *Overhaul*, at 250 (2010).

⁷⁷ Following the bankruptcy proceedings, five new members were appointed to the 12-member board of New GM. Treasury's four appointments were Daniel Akerson (now GM's CEO), managing director of the private equity firm Carlyle Group; David Bonderman, co-founding partner of TPG Capital; Robert Krebs, retired chairman and chief executive of Burlington Northern Santa Fe railroad; and Patricia Russo, former chief executive of telecommunications company Alcatel-Lucent. To represent its stake, the Canadian government appointed Carol Stephenson, dean of Richard Ivey School of Business at the University of Western Ontario, to the Board. GM Amendment No. 9 to Form S-1: Preliminary Prospectus, *supra* note 63, at 196.

⁷⁸ Mr. Akerson had served on the board since July 2009 and had previously served as a managing director of the Carlyle Group. General Motors Company, *GM Announces CEO Succession Process* (Aug. 12, 2010) (online at

“exceptional financial assistance,” GM is also subject to the executive compensation determinations of Patricia Geoghegan, Treasury’s Special Master of TARP Executive Compensation, who replaced Kenneth Feinberg as “pay czar.”⁷⁹

On July 22, 2010, GM announced the \$3.5 billion acquisition of AmeriCredit, an automotive finance firm that specializes in subprime auto lending.⁸⁰ Several of GM’s competitors, such as Ford and Toyota, have in-house financing divisions, which are often called “captive” financing arms. And following GM’s sale of GMAC/Ally Financial in 2006, industry analysts cited GM’s lack of a captive financing arm as a competitive disadvantage.⁸¹ Now that GM has acquired AmeriCredit, GM says that it still considers GMAC/Ally Financial to be a key strategic partner, but that AmeriCredit provides GM with more financial alternatives, and that AmeriCredit provides an auto financing platform that GM can build out.⁸²

media.gm.com/content/media/us/en/news/news_detail.brand_gm.html/content/Pages/news/us/en/2010/Aug/0812_transition).

⁷⁹ In addition, the Special Master will continue to oversee GM’s compensation practices until the company repays all of the funds it received under the AIFP. See *TARP Standards for Compensation and Corporate Governance*, 31 CFR § 30.1 (June 15, 2009) (online at ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=188bec27fb299580f359697139ae586a&rgn=div5&view=text&node=31:1.1.1.1.28&idno=31) (defining “exceptional financial assistance” as “any financial assistance provided under the Programs for Systemically Significant Failing Institutions, the Targeted Investment Program, the Automotive Industry Financing Program, and any new program designated by the Secretary as providing exceptional financial assistance.”). The Special Master had authority to render individual compensation determinations for the top 25 most highly paid employees at GM, as well as to review compensation structures for the next 75 employees. On October 23, 2009, he released his determinations for the top 25, which reduced cash compensation by 31 percent compared to 2008 and by 46 percent compared to 2007. Total direct compensation decreased by 24.7 percent compared to 2008. Letter from Kenneth R. Feinberg, special master for TARP executive compensation, to Gregory E. Lau, executive director for Global Compensation, General Motors, *Proposed Compensation Payments and Structures for Senior Executive Officers and Most Highly Compensated Employees*, at Exh. 1 (Oct. 22, 2009) (online at www.financialstability.gov/docs/20091022%20GM%202009%20Top%2025%20Determination.pdf).

⁸⁰ General Motors Company, *GM to Acquire AmeriCredit* (July 22, 2010) (online at media.gm.com/content/media/us/en/news/news_detail.brand_gm.html/content/Pages/news/us/en/2010/July/0722_ameriCredit). The deal closed effective October 1, 2010. General Motors Company, *General Motors Announced Its Acquisitions of AmeriCredit Corp. Will Close Effective October 1, 2010* (Sept. 29, 2010) (online at www.gm.com/investors/announcements-events/event.jsp?id=3533539). SIGTARP has initiated an audit that will look at Treasury’s role in reviewing, approving, or otherwise participating in GM’s decision to acquire AmeriCredit. Office of the Special Inspector General for the Troubled Asset Relief Program, *Engagement Memo – Review of Treasury’s Investment in General Motors Company* (Oct. 26, 2010) (online at www.sigtar.gov/reports/audit/2010/Engagement%20Memo%20-%20Review%20of%20Treasury%27s%20Investment%20in%20General%20Motors%20Company.pdf).

⁸¹ See Congressional Oversight Panel, Testimony of Michael Ward, analyst, Soleil-Ward Transportation Research, *Transcript: COP Hearing on GMAC Financial Services*, at 87 (Feb. 25, 2010) (online at frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_senate_hearings&docid=f:56723.pdf).

⁸² General Motors Company conversations with Panel staff (Dec. 3, 2010).

Throughout much of 2010, GM was preparing for an initial public offering (IPO), a process that promised to allow Treasury to sell its stake in GM's common stock.⁸³ The final underwriting agreement consisted of 35 underwriters, both large and small firms.⁸⁴ Treasury negotiated an underwriting fee of 0.75 percent, as opposed to a more customary figure of 2 or 3 percent for an IPO of comparable size.⁸⁵ Although the IPO was expected to price at a range of between \$26 and \$29, strong investor enthusiasm during the company's road show presentations resulted in the offering being six times oversubscribed.⁸⁶ Subsequently, the price was increased to \$33.⁸⁷

The IPO took place on November 18, 2010, when GM common stock began trading under the ticker "GM" on the New York Stock Exchange (NYSE).⁸⁸ Total funds generated in

⁸³ An initial public offering (IPO) occurs when a private company issues stock to the public for the first time. Prior to the IPO, the issuing institution works with an underwriting firm to determine the type of security to issue, the price, and the timing of the offering.

⁸⁴ Underwriters market shares to their clients. The underwriting syndicate included Morgan Stanley, J.P. Morgan, Merrill Lynch, Citigroup, Barclays Capital, Credit Suisse, Deutsche Bank, Goldman Sachs & Co., RBC Capital Markets, Banco Bradesco BBI, CIBC World Markets, Commerz Markets, BNY Mellon Capital Markets, ICBC International Securities, Itau BBA USA Securities, Lloyds TSB Bank, China International Capital Corporation HK Securities, Loop Capital Markets, Williams Capital Group, Soleil Securities Corporation, Scotia Capital (USA), Piper Jaffray & Co., SMBC Nikko Capital Markets, Sanford C. Bernstein & Co., Cabrera Capital Markets, Castle Oak Securities, CF Global Trading, C.L. King & Associates, FBR Capital Markets, Gardner Rich, Leberthal & Co., M.R. Beal & Company, Muriel Siebert & Co. and Samuel A. Ramirez & Company. UBS was omitted from the final list amid reports that a sales analyst within the firm distributed an unauthorized e-mail to an institutional client regarding the valuation of GM. Morgan Stanley and J.P. Morgan Securities served as the primary book runners.

⁸⁵ Bill Canis, Baird Webel, and Gary Shorter, *General Motors' Initial Public Offering: Review of Issues and Implications for TARP*, Congressional Research Service, at 12-13 (Nov. 10, 2010) (online at www.crs.gov/Products/R/PDF/R41401.pdf) (hereinafter "GM's Initial Public Offering: Implications for TARP").

⁸⁶ GM Amendment No. 5 to Form S-1: Preliminary Prospectus, *supra* note 69. See General Motors Company, *General Motors Announces Increase in Size of Public Offering of Common Stock* (Nov. 17, 2010) (online at media.gm.com/content/media/us/en/news/news_detail.brand_gm.html/content/Pages/news/global/en/2010/1117_amendment). See also GM's Initial Public Offering: Implications for TARP, *supra* note 85, at 12. According to press reports, in the run-up to the IPO, senior officials within the company marketed the IPO to a wide range of international investors in order to attract the broadest investor base possible. These investors included GM's partner in China – SAIC – as well as several sovereign wealth funds. See David Welch and Jeffrey McCracken, *GM Said to Approach Sovereign Wealth Funds to Boost Stock Sale*, Bloomberg News (Oct. 5, 2010) (online at www.bloomberg.com/news/2010-10-05/gm-is-said-to-approach-sovereign-wealth-funds-to-boost-initial-stock-sale.html); Clare Baldwin, Soyung Kim, and Philipp Halstrick, *GM IPO Multiple Times Oversubscribed*, International Business Times (Nov. 12, 2010) (online at www.ibtimes.com/articles/81505/20101112/gm-ipo-multiple-times-oversubscribed-sources.htm).

⁸⁷ General Motors Company, *Amendment No. 8 to Form S-1: Preliminary Prospectus* (Nov. 16, 2010) (online at www.sec.gov/Archives/edgar/data/1467858/000119312510261467/ds1a.htm).

⁸⁸ GM also began trading under "GMM" on the Toronto Stock Exchange.

this offering were \$23.1 billion, before accounting for underwriting fees and commissions.⁸⁹ Based on total funds raised, the IPO was the largest IPO in U.S. history.⁹⁰

GM's stock performed well throughout its first day of trading, with the common stock settling at a price of \$34.19.⁹¹ President Obama applauded the IPO, noting that "American taxpayers are now positioned to recover more than my administration invested in GM."⁹² He stated that because GM's management had made the "tough decisions necessary to make themselves more competitive in the 21st century – the American auto industry – an industry that's been the proud symbol of America's manufacturing might for a century; an industry that helped to build our middle class – is once again on the rise."⁹³

On November, 26, 2010, GM announced that its underwriters exercised in full their so-called over-allotment options to purchase an additional 71.7 million shares of common stock from the selling stockholders, for a total of \$2.37 billion, plus an additional 13 million shares of mandatory convertible junior preferred stock from the company, for a total of \$650 million.⁹⁴

Net proceeds from the sale of common stock for existing GM shareholders totaled \$18.0 billion. Net proceeds from the sale of preferred stock were \$4.9 billion, which compared favorably to GM's November 17 estimate of preferred stock proceeds of \$3.9 billion-\$4.4 billion,⁹⁵ bringing the total net proceeds to \$22.9 billion. Some of GM's proceeds from the sale of the preferred shares went to redeem Treasury's \$2.1 billion in preferred stock holdings. GM anticipates that it will contribute \$2.0 billion in common stock to its U.S. hourly and salaried pension plans, in addition to a \$4.0 billion cash contribution to the pension plans that it announced on December 2, 2010.⁹⁶

⁸⁹ In addition to \$18.1 billion in common equity, the company issued \$5.0 billion in preferred stock. The preferred stock issuance consisted of Series B mandatory convertible junior preferred shares, which pay a dividend of 4.75 percent. Data accessed from Bloomberg on Nov. 19, 2010.

⁹⁰ While the GM common stock offering was second only to Visa's 2008 IPO, the total funds raised by GM exceeded those raised by Visa. See Visa Investor Relations, *Visa Inc., Largest IPO in US History* (Mar. 19, 2008) (online at phx.corporate-ir.net/phoenix.zhtml?c=129145&p=irol-newsArticle&ID=1120295&highlight=).

⁹¹ Shares of preferred stock closed at \$50.45. Data accessed from Bloomberg on November 19, 2010.

⁹² The White House, *Remarks by the President on General Motors* (Nov. 18, 2010) (online at www.whitehouse.gov/the-press-office/2010/11/18/remarks-president-general-motors).

⁹³ *Id.*

⁹⁴ General Motors Company, *General Motors Announces Underwriters' Exercise of Over-allotment Options* (Nov. 26, 2010) (online at www.gm.com/news-article.jsp?id=/content/Pages/news/us/en/2010/Nov/1126_exercise.html).

⁹⁵ GM Amendment No. 9 to Form S-1: Preliminary Prospectus, *supra* note 63, at 9.

⁹⁶ GM anticipated that it would use approximately 43 percent of the preferred proceeds to purchase Treasury's Series A preferred holdings. It planned to use the remainder of the proceeds – supplemented with cash on hand – to make the cash pension contribution. See General Motors Company, *Form 424B1: Final Common*

In total, the sales of GM stock produced \$13.5 billion in receipts to the Treasury.⁹⁷ Including exercise of the over-allotment option, Treasury sold over 412 million shares of the total 550 million shares sold. Treasury still holds more than 500 million shares, or 33.3 percent ownership of GM.⁹⁸ During its first three weeks on the NYSE, GM's stock traded at between \$33.17 and \$34.89 per share. Figure 7 shows the amount and current status of the government's various investments in GM. Of the \$49.9 billion in government assistance, \$27.2 billion currently remains outstanding.

Prospectus, at 38 (Nov. 18, 2010) (online at www.sec.gov/Archives/edgar/data/1467858/000119312510263484/d424b1.htm) (hereinafter "GM Form 424B1: Final Common Prospectus"); General Motors Company, *GM Makes \$4 Billion Pension Plan Contribution* (Dec. 2, 2010) (online at www.gm.com/news-article.jsp?id=/content/Pages/news/us/en/2010/Dec/1202_pension.html) (hereinafter "GM Makes \$4 Billion Pension Plan Contribution").

⁹⁷ U.S. Department of the Treasury, *Taxpayers Receive Additional \$1.8 Billion in Proceeds from GM IPO* (Dec. 2, 2010) (online at www.financialstability.gov/latest/pr_12022010.html).

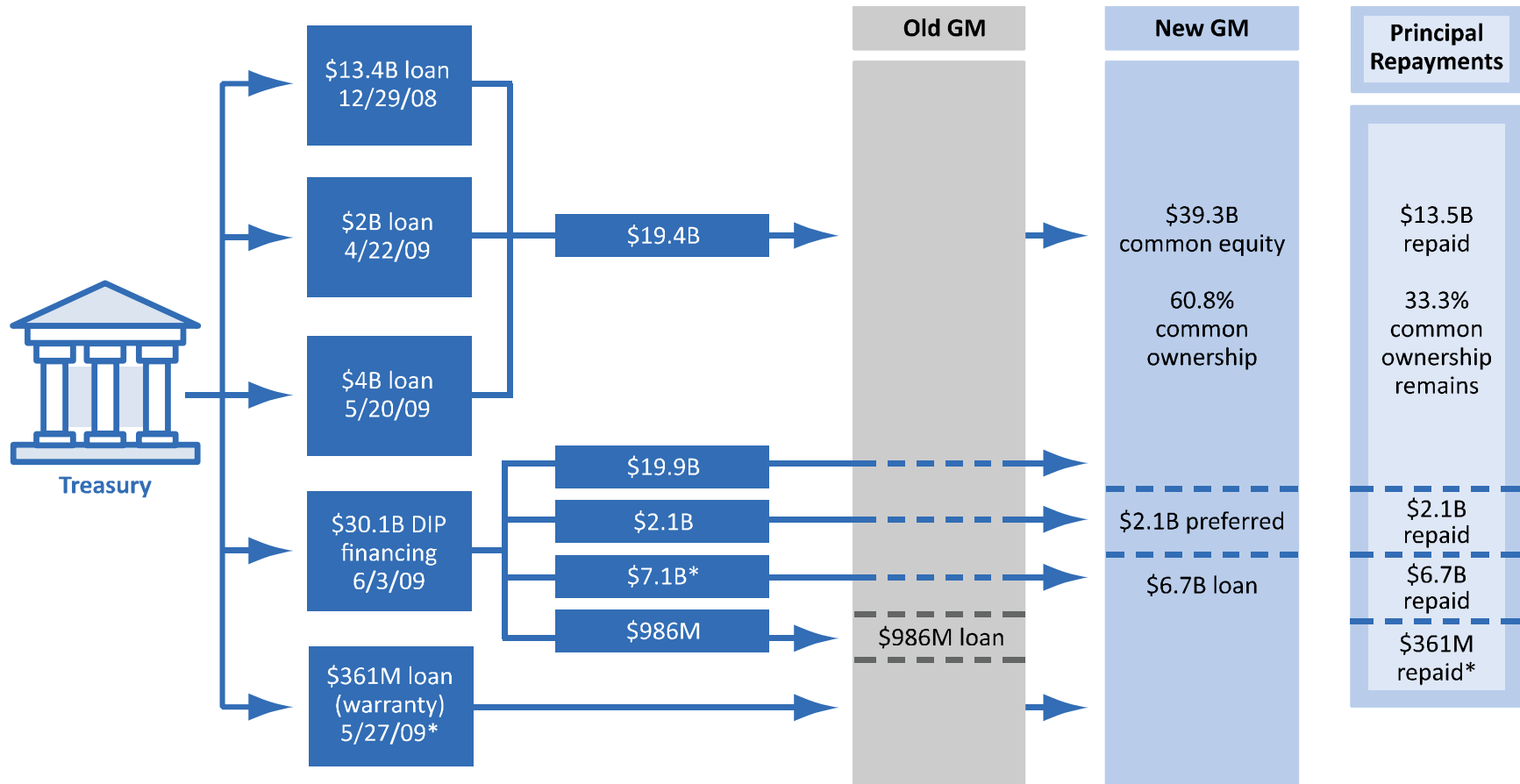
⁹⁸ An over-allotment option is an agreement between an issuer and its underwriter granting the underwriter the option to purchase and then resell additional shares to the investing public. Usually the over-allotment option is exercised by the underwriter if the demand before and after pricing is strong. Treasury's 33.3 percent ownership stake in GM is calculated on a basic – not fully diluted – share basis.

Figure 7: TARP Investment in GM (millions of dollars)

Original Investment Date	Original Assistance Amount	Original Investment Type	Exchange	Current Investment Type	Cumulative Investment Amount	Amount Repaid
12/29/2008	\$884	Loan	Exchanged for GMAC Equity	–	–	
12/31/2008	13,400	Loan with additional notes	Old GM debt credit bid; New GM equity received	New GM common equity	\$13,400	
4/22/2009	2,000	Loan with additional notes	Old GM debt credit bid; New GM equity received	New GM common equity	2,000	
5/20/2009	4,000	Loan with additional notes	Old GM debt credit bid; New GM equity received	New GM common equity	4,000	
5/27/2009	361	Loan with additional notes	Old GM debt credit bid; New GM equity received	New GM common equity	361	\$361
6/3/2009	30,100	Loan with additional notes (see breakdown below)			30,100	
			<i>Old GM debt credit bid; New GM equity received</i>	<i>New GM common equity</i>	<i>19,942</i>	
			<i>Became New GM loan</i>	<i>New GM loan</i>	<i>7,072</i>	<i>6,712</i>
			<i>Became New GM preferred stock</i>	<i>New GM preferred stock</i>	<i>2,100</i>	<i>2,139</i>
			<i>Remained Old GM loan</i>	<i>Old GM loan</i>	<i>986</i>	
Total	\$50,745				\$49,861	⁹⁹ \$22,717

⁹⁹ This figure includes \$13.5 billion in proceeds from the GM IPO that are not directly tied to a particular tranche of investment made in GM prior to its bankruptcy. Therefore, these funds are not accounted for as a line item, but instead are credited solely to the total line.

Figure 8: TARP Funds Committed to GM



* The three boxes with asterisks were part of a transaction executed as part of GM's bankruptcy. The \$361 million to Old GM, which was used to provide a government backstop on warranties for GM vehicles, was credit bid into New GM debt as part of the bankruptcy and then repaid on July 10, 2009, using funds from the \$7.1 billion portion of the government's bankruptcy financing of GM.

3. Outlook

While Treasury's investment in GM provided a backstop for a company on the brink of failure, the rescue forced taxpayers to bear considerable risk, risk they will continue to bear until Treasury disposes of the remainder of its investment in the company. This section examines the viability of GM, an issue that will impact the outcome of the government's investment in the company.

a. GM's Emerging Business Model

GM's strategy for improving its business model focuses on four key areas: (1) streamlining operations so as to improve capacity utilization;¹⁰⁰ (2) reducing labor costs; (3) strengthening competitiveness in international markets; and (4) reducing financial leverage in order to improve the company's balance sheet.¹⁰¹

i. Streamlining Operations

GM is taking a number of steps in order to streamline its operations. First, it plans to reduce the total number of plants it operates in the United States from the 47 it had in 2008 to 34 by the end of 2010 and to 31 by 2012.¹⁰²

Second, GM has reduced the number of brands it offers in the United States from eight to four. GM's four core brands are Chevrolet, GMC, Cadillac, and Buick, which is the fastest growing automotive brand in the United States.¹⁰³ GM has discontinued or divested Pontiac, Saturn, Saab, and Hummer.¹⁰⁴ October 2010 calendar-year-to-date retail sales for GM's four core brands were up 15 percent, and total sales were up 22 percent.¹⁰⁵ Year-to-date through

¹⁰⁰ The capacity utilization rate measures the amount of output currently being produced by the firm relative to the maximum amount of output it could produce given its current inputs.

¹⁰¹ See General Motors Company, *GM Retail Roadshow*, at 5, 10, 17 (Nov. 18, 2010) (online at cop.senate.gov/documents/gm-publicoffering.pdf) (hereinafter "GM Retail Roadshow"); GM conversations with Panel staff (Dec. 3, 2010). GM's CEO and CFO have stated in the media that their goal is to get GM to zero debt. See CNBC, *GM Aiming for No Debt on Balance Sheet: CEO* (Nov. 18, 2010) (online at classic.cnbc.com/id/40251271/). GM's CFO, Chris Liddell, stated that this goal could realistically be reached in three to five years. See The Inside Track with Deirdre Bolton & Erik Schatzker, *Interview with GM CFO Chris Liddell*, Bloomberg News (Nov. 18, 2010) (findarticles.com/p/news-articles/ceo-wire/mi_8092/is_20101118/chris-liddell-bloomberg-tv/ai_n56320173/?tag=content;coll).

¹⁰² GM Form 424B1: Final Common Prospectus, *supra* note 96, at 55, 60.

¹⁰³ General Motors Company, *Q2 2010 Results*, at 6 (Aug. 12, 2010) (online at media.gm.com/content/dam/Media/gmcom/investor/2010/Q2-Chart-Set.pdf) (hereinafter "GM Q2 2010 Results").

¹⁰⁴ GM Form 424B1: Final Common Prospectus, *supra* note 96, at 19.

¹⁰⁵ General Motors Company, *Form 8-K for the Period Ended November 3, 2010*, at 5 (Nov. 5, 2010) (online at www.sec.gov/Archives/edgar/data/1467858/000119312510249908/d8k.htm).

October, GM's four core brands sold 85,737 more units than its eight brands sold during the same period in 2009.¹⁰⁶

Third, GM has also announced a goal of reducing its number of domestic dealerships from approximately 5,000 as of September 30, 2010 to 4,500 by the end of 2010. GM expects these reductions to produce cost savings over time, but it also recognizes that they could also have the effect of reducing GM's U.S. market share.¹⁰⁷ Despite these closings, GM continues to maintain an independent international network of 21,000 dealers.¹⁰⁸

As a result of these efforts, as well as an underlying improvement in sales, UBS estimates that GM's capacity utilization, which measures the company's actual output as a percentage of its potential output, will improve from 43 percent in 2009 to 74 percent in 2010.¹⁰⁹ UBS expects GM's capacity utilization to fall in 2011 before rising again in 2012 and beyond.¹¹⁰

ii. Reducing Labor Costs

GM has sought to use the restructuring to reduce the cost of its hourly labor force.¹¹¹ More specifically, it has reduced the number of its employees, restructured its labor agreement, and transferred its health care obligations to the UAW's Voluntary Employee Benefit Association (VEBA).¹¹² Overall, GM states that it has reduced its U.S. hourly labor costs from \$16 billion in 2005 to \$5 billion in 2010.¹¹³ It also states that it has reduced the number of

¹⁰⁶ *Id.* at 5.

¹⁰⁷ GM Form 424B1: Final Common Prospectus, *supra* note 96, at 19. These closings are substantially fewer in number than GM initially announced. See Office of the Special Inspector General for the Troubled Asset Relief Program, *Factors Affecting the Decisions of General Motors and Chrysler to Reduce Their Dealership Networks*, at 1 (July 19, 2010) (SIGTARP 10-008) (online at www.sig tarp.gov/reports/audit/2010/Factors%20Affecting%20the%20Decisions%20of%20General%20Motors%20and%20Chrysler%20to%20Reduce%20Their%20Dealership%20Networks%207_19_2010.pdf) (stating that GM announced on June 2, 2009 that it planned to "wind down" 1,454 of its 5,591 dealerships by October 2010).

¹⁰⁸ GM maintains that the scale of this dealer network strengthens its ability to compete in markets outside the United States. See GM Form 424B1: Final Common Prospectus, *supra* note 96, at 3.

¹⁰⁹ UBS Investment Research Paper, *supra* note 45, at 4.

¹¹⁰ UBS Investment Research, *General Motors Company: Why Buy Now?* (Dec. 15, 2010) (hereinafter "UBS Investment Research Paper").

¹¹¹ GM Form 424B1: Final Common Prospectus, *supra* note 96, at 3.

¹¹² GM Form 424B1: Final Common Prospectus, *supra* note 96, at 3.

¹¹³ The 2010 labor cost figure is an estimate that GM used in its retail roadshow. GM Retail Roadshow, *supra* note 101, at slide 17. See also Moody's Investors Service, *Credit Opinion: General Motors Company* (Oct. 29, 2010) (hereinafter "Moody's Credit Opinion: General Motors Company") ("This shift in the industry's operating structure has been the result of significant headcount reductions, the elimination of excess capacity, and the implementation of a new UAW contract.").

hourly employees in the United States from 111,000 in 2005 to 50,000 in 2010.¹¹⁴ Since 2008, the company has reduced its global workforce by about 35,000 employees, including about 11,000 hourly employees in United States,¹¹⁵ though the number of employees has risen since GM emerged from bankruptcy in 2009. The company believes, and industry analysts concur, that a more competitive cost structure will allow GM to compete better for market share.

iii. Improving International Competitiveness

GM also states that is enhancing its competitiveness in international markets. According to the presentation GM used in its retail road show,¹¹⁶ it is refocusing on emerging markets, with a particular focus on Brazil, Russia, India, and China.¹¹⁷ In 2009, 72 percent of GM's total sales volume came from outside the United States, including 39 percent from emerging markets.¹¹⁸ GM's market share in Brazil, Russia, India, and China grew from 9.8 percent in 2004 to 12.7 percent in 2009.¹¹⁹ It has the number one market share position in those four nations as a whole, and it occupies the top spot in China as well.¹²⁰ GM projects that Brazil, Russia, India, and China have the largest growth potential of any markets in the world.¹²¹

iv. Reducing Leverage

GM is seeking to reduce its leverage in order to lower the cost of servicing its debt and become less vulnerable to the ups and downs of the automotive industry's business cycle.¹²² GM also intends to fund its pension plans fully. To that end, GM on December 2, 2010, announced the aforementioned voluntary \$4 billion cash contribution to its U.S. pension plans.¹²³ More broadly, the company stated in its November 2010 public offering presentation that it has \$24 billion in available liquidity, as compared to about \$35 billion in underfunded pension

¹¹⁴ The 2010 employee figure is an estimate that GM used in its retail roadshow. GM Retail Roadshow, *supra* note 101, at slide 17.

¹¹⁵ UBS Investment Research Paper, *supra* note 110, at 6.

¹¹⁶ A roadshow is a presentation to potential institutional or retail investors prior to the initial stock offering.

¹¹⁷ GM Retail Roadshow, *supra* note 101, at slide 10.

¹¹⁸ GM Form 424B1: Final Common Prospectus, *supra* note 96, at 1.

¹¹⁹ GM Form 424B1: Final Common Prospectus, *supra* note 96, at 3.

¹²⁰ In the BRIC countries, GM had a share of 13 percent in 2009, compared to 11 percent for Volkswagen, 4 percent for Toyota, and 3 percent for Ford. The company's market share in China, specifically, was 13.3 percent in 2009. GM Retail Roadshow, *supra* note 101, at slide 9; GM Form 424B1: Final Common Prospectus, *supra* note 96, at 3.

¹²¹ GM Retail Roadshow, *supra* note 101, at slide 10.

¹²² General Motors Company conversations with Panel staff (Dec. 3, 2010).

¹²³ GM Makes \$4 Billion Pension Plan Contribution, *supra* note 96.

obligations, debt, and perpetual preferred shares.¹²⁴ Reducing its debt burden should allow GM to strengthen its credit rating; the company is seeking to achieve a strong investment grade rating.¹²⁵

b. Results

GM's most recent financial statements provide four key indicators of improvement in overall performance: revenue and sales, credit ratings, market share, and access to financing.¹²⁶ While it may be too soon in the business cycle to discern trends, GM's initial financial and operating ratios are improving. Both return on assets and return on sales have increased gradually through 2010.¹²⁷ In total, GM sold 8.2 million units worldwide during the 12-month period ending September 30, 2010.¹²⁸ Net revenue totals for each of the first three quarters of 2010 were more than \$30 billion.¹²⁹ (These revenue totals are comparable to GM's revenue results in 2009. In the second half of 2009, GM's total net sales and revenue were \$57.5 billion.)¹³⁰ However, as analysts have noted, the company is able to sell its products at higher prices and has improved its margins materially.¹³¹ In North America specifically, sales in the third quarter of 2010 were \$21.5 billion versus \$14.4 billion in the same quarter a year prior.¹³² In addition, GM expanded its North American operations by adding 3,000 employees between

¹²⁴ The \$35 billion consists of \$13 billion in underfunded U.S. pension obligations, \$10 billion in underfunded non-U.S. pension obligations, \$7 billion in perpetual preferred stock, and \$5 billion in debt. GM Retail Roadshow, *supra* note 101, at slide 19.

¹²⁵ GM Retail Roadshow, *supra* note 101, at slide 19.

¹²⁶ In its presentation to retail investors for its upcoming IPO, the company presented guidance for the following metrics: earnings before interest and taxes (EBIT), EBIT margin, and free cash flow for both the middle of the business cycle and at the high end of the cycle. These projections provide insight into how management foresees GM's performance in 2011 and beyond. The company's EBIT mid-point projections are \$12 billion at mid-cycle and \$18 billion at high-cycle. The company's midpoint projections for free cash flow are \$9 billion at mid-cycle and \$15 billion at high cycle. GM Retail Roadshow, *supra* note 101, at slide 18.

¹²⁷ See General Motors Company, *Q3 Financial Highlights*, at 6, 7 (2010) (online at media.gm.com/content/dam/Media/gmcom/investor/2010/Q3-Financial-Highlights.pdf); General Motors Company, *Q2 Financial Highlights*, at 6, 7 (2010) (online at media.gm.com/content/dam/Media/gmcom/investor/2010/Q2-Financial-Highlights.pdf); GM Form 10-Q, *supra* note 75, at 1, 2. Return on assets is defined as net income divided by total assets. Profit margin is defined as net income divided by sales. These metrics are computed by taking the following data points from the quarterly filings: net income, total assets, and net sales.

¹²⁸ GM Retail Roadshow, *supra* note 101, at slide 9.

¹²⁹ GM Q3 2010 Results, *supra* note 47, at 2.

¹³⁰ General Motors Company, *Form 10-K for the Fiscal Year Ended December 31, 2009*, at 39 (Apr. 7, 2010) (online at www.sec.gov/Archives/edgar/data/1467858/000119312510078119/d10k.htm).

¹³¹ David Whiston, *General Motors Company Has Reinvented Itself*, Morningstar, at 5, 15 (Nov.18, 2010).

¹³² Joseph Amaturio, *A Lot of "Old" GM in the "New" GM*, Buckingham Research Group, at 47 (Dec. 6, 2010) (hereinafter "Buckingham Research Group Paper").

January 1 and September 30, 2010.¹³³ On November 30, GM announced plans to hire an additional 1,000 engineers and researchers in Michigan.¹³⁴

On October 6, 2010, the credit rating agency Fitch gave GM the Issuer Default Rating¹³⁵ of BB-, non-investment grade or speculative, the same as Ford.¹³⁶ While GM has considerably less debt than Ford, Fitch noted that GM's large pension obligations dwarf those of Ford. GM is rated as having a stable outlook by four different credit agencies.¹³⁷ While it is not clear what GM's credit ratings would be absent government support, Standard & Poor's states that it does not give GM a ratings boost because of the government's investment.¹³⁸

GM is seeking to lower its "breakeven point," the number of cars that the company needs in order for its revenues to equal its costs. Doing so, will enable GM to remain profitable even at the bottom of the business cycle. In its U.S. operations, GM has reduced its break-even point from an industry-wide sales total of 15.5 million units in the third quarter of 2007 to less than 11 million units in the fall of 2010.¹³⁹ In 2007, GM needed a 25 percent market share, or roughly 3.88 million vehicles sold out of a market of 15.5 million, in order to break even. Today, GM needs a market share of less than 19 percent, or approximately 2.09 million vehicles sold out of a market of 11 million.¹⁴⁰ In sum, GM is now able to break even with a smaller share of a smaller market. This improvement has been driven in part by the reduction in labor costs, in addition to improvements in vehicle pricing.¹⁴¹ For example, average transaction prices for the Chevrolet

¹³³ GM Form 424B1: Final Common Prospectus, *supra* note 96, at 190.

¹³⁴ General Motors Company, *GM to Add 1,000 Electric Vehicle Engineering and Development Jobs in Michigan* (Nov. 30, 2010) (online at media.gm.com/content/media/us/en/news/news_detail.brand_gm.html/content/Pages/news/us/en/2010/Nov/1130_jobs.html).

¹³⁵ The issuer default rating is an indicator given by credit rating agencies to potential investors of debt securities, which estimates the likelihood of default and relative creditworthiness of securities issued by a certain company.

¹³⁶ Fitch Ratings, *Fitch Assigns Initial [BB-] IDR to General Motors* (Oct. 6, 2010) (online at www.businesswire.com/news/home/20101006006853/en/Fitch-Assigns-Initial-BB-IDR-General-Motors).

¹³⁷ The ratings agencies include DBRS, Fitch, Moody's, and Standard & Poor's. GM Form 424B1: Final Common Prospectus, *supra* note 96, at 134.

¹³⁸ Standard & Poor's does, however, refer to GM as a government-related entity, albeit one whose importance to the government is limited because of the expectation that the government will reduce its ownership in GM. Standard & Poor's, *Global Credit Portal RatingsDirect: General Motors Co.*, at 2-3 (Nov. 11, 2010); E-mail from Standard & Poor's to Panel staff (Dec. 9, 2010).

¹³⁹ GM Form 424B1: Final Common Prospectus, *supra* note 96, at 3. *See also* Moody's Credit Opinion: General Motors Company, *supra* note 113, at 1 ("GM's Ba2 CFR reflects the company's strong position in developing markets, a competitive cost structure in North America, an improving domestic product portfolio, and a significantly stronger balance sheet and liquidity position as a result of the bankruptcy reorganization process.").

¹⁴⁰ *See* GM Retail Roadshow, *supra* note 101, at slide 16.

¹⁴¹ GM Q3 2010 Results, *supra* note 47, at 10.

Equinox are up \$3,900 from 2009 to 2010, and Buick LaCrosse average transaction prices are up \$7,500 over the same period.¹⁴²

GM's overall market share has been falling in both the United States and Europe. In the United States, GM's market share fell from 28.6 percent in 2002 to 22.2 percent in 2008, and then to an estimated 19.0 percent in 2010. In Europe, GM's market share fell from 10.2 percent in 2000 to 9.3 percent in 2008, and then to 8.1 percent in 2010.¹⁴³ GM's post-bankruptcy declines in market share likely stem at least in part from the company's decision to discontinue certain brands and to reduce consumer incentives for vehicle purchases.

4. Treasury's Exit Strategy

Between April and November 2010, Treasury interacted closely with GM in an attempt to ensure that Treasury had all relevant market demand information prior to the IPO to help determine how much of its stock it should sell and at what price.¹⁴⁴ Treasury conducted due diligence, relying heavily on the input of its advisor, Lazard Ltd. Lazard also handled many of the direct interactions with the IPO's underwriters. In making determinations about the volume and price of its stock sales, Treasury states that it sought to abide by its shareholder principles, balancing the desire to exit as soon as practicable against its objective of maximizing the value of the taxpayers' investment. Consistent with these principles, according to Treasury, it sought to leave GM in charge of day-to-day management decisions, including the selection of underwriters and timing of the IPO. Treasury also worked closely with the underwriters – rather than the company – to determine the timing and pricing of the government's sale of GM stock.¹⁴⁵ GM states that it decided the timing of the IPO, though it did have discussions with Treasury about the issue. The company also states that Treasury's primary role was related to how many shares it would eventually choose to sell.¹⁴⁶

Treasury sold nearly 40 percent of its equity stake through the IPO. Despite the possibility that the value of GM's equity could increase within the next year as a result of a continued market recovery, the seasoning of GM's management, and a slate of new automobiles due to be released, Treasury maintains that it decided not to postpone the sale of its shares – or revise the amount being offered – for several reasons. While market risk and execution risk were two significant concerns, Treasury also said that it was important to signal to the market that the

¹⁴² GM Retail Roadshow, *supra* note 101, at slide 6.

¹⁴³ UBS Investment Research Paper, *supra* note 110, at 11-15.

¹⁴⁴ For a more detailed discussion of the government's shareholder principles and their implementation, see Section B, *infra*.

¹⁴⁵ Treasury conversations with Panel staff (Nov. 22, 2010).

¹⁴⁶ General Motors Company conversations with Panel staff (Dec. 3, 2010).

government intended to exit its investment and return the funding of the company to private hands.¹⁴⁷

After the offering, Treasury's total stake in the company fell from 60.8 percent to 36.9 percent. When the underwriters exercised their over-allotment option on November 26, Treasury's stake fell to 33.3 percent.¹⁴⁸ As is customary for many IPOs, Treasury will be unable to begin selling the remainder of its investment for 180 days following the IPO. After this lock-up period ends, Treasury maintains that it will look to sell the remainder of its shares in accordance with its shareholder principles and subject to market events.¹⁴⁹

a. Analysis of Treasury's Exit Strategy

The strong investor demand for GM's IPO stands in stark contrast to the company's predicament in the fall of 2008. Yet despite the improvements that GM has achieved in a relatively short period of time, there is still uncertainty regarding the taxpayers' investment in GM. This section examines GM's efforts to transform itself into a far more viable entity. While the outlook is more positive than it was two years ago, the GM investment is still likely to result in an overall loss for taxpayers.

i. GM Emerged from the Restructuring as a Far More Viable Business

According to industry analysts, GM has emerged from the restructuring as a far more viable business, positioned to take advantage of its streamlined cost structure and a competitive labor situation to return to profitability.¹⁵⁰ That GM is a much improved business is evidenced by its results from the first three quarters of 2010,¹⁵¹ as well as the strong demand for shares in the IPO.¹⁵² The company has successfully executed many of its core objectives for the restructuring: streamlining its capacity, shedding labor costs, and refocusing its efforts on high-growth international markets. Although, significant uncertainty remains for the company, the company's efforts to refocus its business strategy and shed costs have substantially increased the

¹⁴⁷ See Moody's Investors Service, *GM's IPO – A Better Balance Sheet and Maybe Even More Car Customers*, at 1 (Nov. 22, 2010) (hereinafter "Moody's Paper on GM's Balance Sheet"); Treasury conversations with Panel staff (Nov. 22, 2010). Treasury also expressed concern that shareholders from Old GM could disrupt the pricing process had they gained control of their shares before the IPO.

¹⁴⁸ GM Form 424B1: Final Common Prospectus, *supra* note 96, at 236.

¹⁴⁹ Treasury conversations with Panel staff (Nov. 22, 2010).

¹⁵⁰ See, e.g., Moody's Paper on GM's Balance Sheet, *supra* note 147, at 1 ("This progress on the product portfolio front is supported by the IPO's positive messages about both the improving financial health of GM and the reduction in government ownership of the company.").

¹⁵¹ See Section D.3.b.

¹⁵² See Section D.2.

likelihood that taxpayers will suffer minimal losses on their investment, or perhaps even be repaid in full.

ii. Uncertainty Remains

The Panel has identified three sources of uncertainty that could have a negative impact on GM's stock price: international markets, GM's long-term competitive viability, and GM's long-term obligations and legacy liabilities. From the perspective of U.S. taxpayers, this uncertainty is important because Treasury is likely to continue to hold a stake in GM through most of 2011 and perhaps into 2012.

International Markets

The company still faces uncertainty with respect to certain operating units going forward, particularly in Europe, which accounts for 22 percent of the company's sales.¹⁵³ GM has a restructuring plan for its European operations, similar to its U.S. plan, that seeks to cut European capacity by 20 percent, reduce labor costs by about \$320 million per year, and improve the weak image of the Opel brand among European consumers.¹⁵⁴ But GM's restructuring plans in Europe are lagging behind its American efforts – the company will not complete the European restructuring for at least a year.¹⁵⁵ In the meantime GM is generating significant losses in Europe.¹⁵⁶

In addition, competition will likely increase in many of GM's higher growth markets. GM's market share in developing nations has been growing: the company is first in Chinese market share, third in Brazilian market share, and third in Russian market share. But analysts believe that GM's foothold in these markets is somewhat unstable, given the sharp competition, and they project that GM's market share in Brazil and China will decline by 2015.¹⁵⁷ Early indicators suggest that this trend may have already begun, as reflected in a market share decline in Brazil from 19.9 percent to 18.3 percent during 2010.¹⁵⁸ Furthermore, the potential upside for GM in China is limited by the fact that it is required to operate as a joint venture that only takes a proportional share of the profits.¹⁵⁹ On the other hand, GM starts from a strong position in China, Brazil, and Russia, and any future losses in market share may be more than offset by the growth of those markets.

¹⁵³ Buckingham Research Group Paper, *supra* note 132, at 2.

¹⁵⁴ See UBS Investment Research Paper, *supra* note 110, at 11-12.

¹⁵⁵ Moody's Credit Opinion: General Motors Company, *supra* note 113, at 2.

¹⁵⁶ See Moody's Credit Opinion: General Motors Company, *supra* note 113, at 2.

¹⁵⁷ UBS Investment Research Paper on Growth Market, *supra* note 55, at 11-12.

¹⁵⁸ GM Q3 2010 Results, *supra* note 47, at 15.

¹⁵⁹ See UBS Investment Research Paper on Growth Market, *supra* note 55, at 1.

Competitive Viability

There are also questions about the competitive viability of GM over both the short term and the long term. In the short term, the questions involve what is generally seen as a lackluster product launch schedule in 2011, particularly in the United States, where its market share faces pressure from Ford.¹⁶⁰ GM launched 28 new vehicles in 2010, but just four of those launches were in the United States. The story for 2011 is similar, with 27 product launches planned, of which four are for the United States. GM's product lineup is expected to improve in later years, with 37 product launches, including 15 U.S. launches, planned for 2013.¹⁶¹

Over the long term, there are still questions about GM's ability to develop new products that respond to – or drive – market demand. In particular, the company must be able to compete in the development of fuel-efficient technologies. To that end, it is encouraging that the electric Chevrolet Volt was recently named Motor Trend's 2011 Car of the Year,¹⁶² but the outcome of GM's large investment in the Volt remains unclear. The Volt will compete against an increasingly crowded field of fuel-efficient vehicles, including the new Nissan Leaf. It is unclear whether the Volt, which uses lithium batteries that will eventually need to be replaced, will prevail over the hybrid technology being pursued by competitors.¹⁶³

Senior officials at GM expect the Chevrolet Cruze to become an alternative to the Ford Focus, Honda Civic, and Toyota Corolla in the small-car segment – traditionally a less profitable but rather large segment of U.S. car sales – but at this point the newly launched Cruze lacks a significant track record of sales in the United States. Moreover, while it is encouraging that average transaction prices have increased in GM's crossover segment – vehicles that combine elements of cars and SUVs – such increases have not been as widespread in GM's car and truck portfolios.¹⁶⁴

Long-Term Obligations and Legacy Liabilities

While GM shed many of its most onerous liabilities during the restructuring, several long-term obligations remain. Estimates differ on how much money GM will need to contribute to underfunded pensions and other post-retirement employee benefits (OPEB) over the short and long term. The company has disclosed that as of September 30, 2010, its underfunded pension

¹⁶⁰ See UBS Investment Research Paper, *supra* note 110, at 1-3.

¹⁶¹ GM Retail Roadshow, *supra* note 101, at slide 13.

¹⁶² Motor Trend, *2011 Motor Trend Car of the Year: Chevrolet Volt* (online at www.motortrend.com/oftheyear/car/1101_2011_motor_trend_car_of_the_year_chevrolet_volt/index.html).

¹⁶³ See Buckingham Research Group Paper, *supra* note 132, at 30-31.

¹⁶⁴ Average Transaction Price (ATP) increases are as follows: crossovers are 11 percent, cars are 9 percent, and trucks are 6 percent. GM Q2 2010 Results, *supra* note 103, at 8.

liability was \$29.4 billion.¹⁶⁵ At the same time, GM's underfunded OPEB stood at \$9.4 billion.¹⁶⁶ The company expects to disburse nearly \$8.4 billion per year from 2011-2014 in net benefit payments for its U.S. pension plans, plus \$1.4 billion per year for its non-U.S. pensions plans.¹⁶⁷

Old GM, whose remaining assets include unsold manufacturing plants and equipment, also has significant legacy liabilities that could eventually impose costs on taxpayers. Old GM has created four separate trusts to pay off environmental claims, unsecured creditors, asbestos claims, and litigation claims. More than 70,000 claims for more than \$275 billion have been made against all four Old GM trusts, but more than \$150 billion in claims have been resolved or eliminated.¹⁶⁸ It is unclear what the recovery rate on claims will be. In August 2010, Old GM proposed a bankruptcy plan that would make \$536 million available to handle environmental claims. In October 2010, Old GM agreed to a \$773 million settlement to resolve its liabilities at 89 Old GM sites.¹⁶⁹ The company anticipates the majority of the environmental remediation will be completed or under way in five years.¹⁷⁰

In the event that there are more than \$35.0 billion in unsecured claims against Old GM, New GM will be obligated to issue shares of its common stock to Old GM, diluting Treasury's and other shareholders' stakes in New GM.¹⁷¹ Treasury also continues to have direct exposure to Old GM as a result of its \$986 million loan to the company.

iii. Taxpayers Likely to Suffer Some Losses on Their Investment in GM

To date, Treasury has provided only aggregate data on projected losses across the auto sector, and it has not yet provided data on projected losses by each individual institution. On September 30, 2010, Treasury estimated an overall loss of \$14.7 billion to the government from

¹⁶⁵ GM Q3 2010 Results, *supra* note 47, at 20.

¹⁶⁶ GM Q3 2010 Results, *supra* note 47, at 20.

¹⁶⁷ GM Form 424B1: Final Common Prospectus, *supra* note 96, at 138.

¹⁶⁸ Motors Liquidation Company, *Motors Liquidation Company Files Joint Chapter 11 Plan*, at 1-2 (Aug. 31, 2010) (online at www.motorsliquidation.com/PressReleases.aspx) (hereinafter "Motors Liquidation Company Files Joint Chapter 11 Plan").

¹⁶⁹ U.S. Environmental Protection Agency, *Motors Liquidation Company (f/k/a General Motors (GM) Corporation) Bankruptcy Settlement* (Oct. 20, 2010) (online at www.epa.gov/compliance/resources/cases/cleanup/cercla/mlc/index.html).

¹⁷⁰ Motors Liquidation Company Files Joint Chapter 11 Plan, *supra* note 168, at 2.

¹⁷¹ The \$35.0 billion threshold refers specifically to unsecured claims that do not have a priority on Old GM's assets and are allowed as part of the bankruptcy proceeding. GM Amendment No. 5 to Form S-1: Preliminary Prospectus, *supra* note 69, at 11. Of course, the dilution to Treasury would occur only if Treasury remains a shareholder at that point.

federal support of GM, Chrysler, and GMAC/Ally Financial.¹⁷² Speaking more recently to the Automotive Press Association, Steven Rattner, former head of the Presidential Task Force on the Auto Industry, estimated Treasury's loss exposure on the entire automotive rescue at less than \$10 billion.¹⁷³ While it is not clear precisely how much Treasury expects to lose on its GM investment specifically, its aggregate projections suggest that it envisions at least some losses on GM.¹⁷⁴

Pricing the GM IPO far below the break-even price may have had the effect of greatly reducing the likelihood that taxpayers will be fully repaid, as full repayment will not be possible unless the government is able to sell its remaining shares at a far higher price. However, it is impossible to know if a longer-term investment horizon by the government (via an IPO at a later date) would have allowed Treasury to sell its shares at a more favorable price, closer to its break-even cost basis. Prior to the IPO, Treasury needed to sell each of its shares for an aggregate price of \$44.59 in order to break even.¹⁷⁵ After the initial public offering and the exercising of the over-allotment option by the underwriters, Treasury will need to sell its remaining stake – 500,065,254 shares – for an average of \$52.75 in order to recoup fully its investment.¹⁷⁶ If one subtracts out the value of GM's various dividend and interest payments to Treasury, the break-even share price rises to \$54.28.

However, the Panel recognizes that it is impossible to time the market, and that delaying the IPO would have exposed Treasury to the risk that the price that buyers were willing to pay for GM stock would fall. Moreover, as detailed in Section H.1, retaining the stock for a long period could have conflicted with the government's stated objective of disposing of its shares "as soon as practicable." There was also the possibility that a delay would have resulted in uncertainty in the market, as Treasury was concerned about how Old GM bondholders – who received 10 percent of the stock in New GM – would exercise their rights in the wake of the

¹⁷² U.S. Department of the Treasury, *Office of Financial Stability Agency Financial Report: Fiscal Year 2010*, at 11 (Nov. 15, 2010) (online at www.financialstability.gov/docs/2010%20OFS%20AFR%20Nov%2015.pdf) (hereinafter "OFS Agency Financial Report").

¹⁷³ See Christine Tierney, David Shepardson, and Christina Rogers, *Rattner Predicts 'Huge Success' for GM IPO*, *The Detroit News* (Nov. 16, 2010) (online at detnews.com/article/20101116/AUTO01/11160370/Rattner-predicts-%E2%80%98huge-success%E2%80%99-for-GM-IPO).

¹⁷⁴ Treasury maintains that it does not expect that the IPO will change the loss rate on the AIFP because Treasury had carried GM at book value on its books. Treasury conversations with Panel staff (Nov. 22, 2010).

¹⁷⁵ Panel staff estimates are derived from the amount of debt converted to equity divided by the common shares given to Treasury.

¹⁷⁶ Panel staff estimates. The break-even price includes underwriting commissions and discounts paid in order to sell Treasury's common shares in the initial public offering (IPO) of GM in November. The break-even price also includes dividend and interest payments on the debt and preferred stock portion of Treasury's investment, payments received from Motors Liquidation Company, GM Supplier program, and the premium paid to redeem its Series A preferred stock.

restructuring.¹⁷⁷ Aside from a delay, Treasury had two additional alternatives: to sell a smaller percentage of its holdings in an IPO and a larger portion in subsequent secondary offerings, or to use the IPO to dispose of as many shares as possible, no matter the price.

While it is difficult to ascertain whether the government could have been more flexible in its timing, or whether a delayed timeline would have resulted in a higher return for taxpayers, the decision to sell a large number of shares below the break-even price decreased the chances that taxpayers will be repaid in full.¹⁷⁸

E. Chrysler

1. Context

a. Background and the Government Intervention

Chrysler, long the smallest of the “Big Three” U.S. automakers, first faced bankruptcy and turned to the U.S. government for help in the late 1970s. At that time, Chrysler petitioned for and received \$1.5 billion in federal government loan guarantees. The loans were then repaid in 1983, ahead of schedule. In 1984, Chrysler introduced the minivan, which has remained a major source of sales for the company ever since. In 1987, Chrysler bought American Motors Corporation (AMC), including the Jeep brand, another important contributor to the company’s sales.¹⁷⁹ In 1997, following several years of strong performance, Chrysler was acquired by Daimler-Benz of Germany for \$37 billion, in what was the largest foreign takeover of a U.S. firm to that date. In 2007, after several years of losses, Daimler effectively paid for Cerberus Capital, a U.S. private equity fund, to assume control of Chrysler, in an 80-20 partnership.

Following several years of losses, Chrysler faced imminent bankruptcy in late 2008, having lost \$5.3 billion in the first three quarters of that year alone.¹⁸⁰ Chrysler’s losses were due to its poor sales performance and high fixed costs. In December 2008, the Bush

¹⁷⁷ Treasury conversations with Panel staff (Nov. 22, 2010).

¹⁷⁸ Estimating the likelihood and size of losses may be complicated by GM’s reporting practices. In its recent regulatory filings, the company disclosed that internal controls relating to its financial reporting may present a risk going forward. It stated that “[w]e have determined that our disclosure controls and procedures and our internal control over financial reporting are currently not effective. The lack of effective internal controls could materially adversely affect our financial condition and ability to carry out our business plan.” GM Form 424B1: Final Common Prospectus, *supra* note 96, at 30. Treasury maintains that it is comfortable with the sufficiency of the company’s reporting, that investors did not raise concerns about this issue during the roadshow, and that the company’s board and management are devoting time and energy to addressing the issue. Treasury conversations with Panel staff (Nov. 22, 2010).

¹⁷⁹ Chrysler Group LLC, *Chrysler Historical Timeline* (online at www.media.chrysler.com/newsrelease.do?id=2210&mid=) (accessed Jan. 11, 2011).

¹⁸⁰ Data provided by Chrysler (Jan. 11, 2011).

Administration announced that it would use the TARP to assist Chrysler.¹⁸¹ On January 2, 2009, Treasury loaned \$4 billion to Chrysler Holdings, the parent of Old Chrysler,¹⁸² as a temporary measure, while Chrysler prepared a longer-term viability plan. The viability plan prepared by Chrysler was rejected by President Obama's Auto Task Force on March 30, 2009, which concluded that Chrysler required a partner to achieve long-term viability.¹⁸³ Fiat, the Italian automobile manufacturer, was selected to take management control of Chrysler.¹⁸⁴ As detailed further below, in order to entice Fiat to take control of Chrysler's management, Fiat was offered a path to majority ownership of the company through various agreements signed as part of the restructuring. Consequently, Fiat is very much in control of how Chrysler's continued viability and valuation will evolve.

As part of Chrysler's pre-planned bankruptcy, Treasury provided financing that ultimately reached \$3.8 billion, of which \$1.9 billion was disbursed.¹⁸⁵ To capitalize New Chrysler, which came into existence on June 10, 2009, Treasury provided an additional loan facility of \$6.6 billion repayable in two tranches under the First Lien Credit Agreement.¹⁸⁶ In addition, New Chrysler assumed \$500 million of the \$4 billion loaned to Chrysler Holdings, bringing the total face value of the Treasury loan exposure to New Chrysler to \$7.1 billion. Treasury has effectively written off \$3.5 billion associated with its Chrysler investment. This total includes the \$1.6 billion portion of the loan to Chrysler Holdings that was not assumed by New Chrysler due to bankruptcy law and financial reasons, as well as the entirety of the \$1.9 billion in DIP financing.¹⁸⁷ Treasury received a 9.8 percent equity stake in New Chrysler pursuant to the restructuring agreements.¹⁸⁸

¹⁸¹ See Section B for a description of the initial decision to support the automakers.

¹⁸² Old Chrysler is used to refer to the automaker before June 10, 2009. The assets that did not carry over to New Chrysler, including the Chrysler name, remained in a company now known as Old Carco.

¹⁸³ The White House, *Determination of Viability Summary: Chrysler, LLC* (Mar. 30, 2009) (online at www.whitehouse.gov/assets/documents/Chrysler_Viability_Assessment.pdf).

¹⁸⁴ The White House, *Obama Administration New Path to Viability for GM & Chrysler* (Mar. 30, 2009) (online at www.whitehouse.gov/assets/documents/Fact_Sheet_GM_Chrysler.pdf).

¹⁸⁵ Treasury Transactions Report, *supra* note 24. On April 29, 2009, an additional \$280,130,642 was lent to Chrysler Holdings to support a Special Purpose Vehicle (SPV) for Chrysler's warranties.

¹⁸⁶ Treasury Transactions Report, *supra* note 24; Chrysler Group LLC, *Consolidated Financial Statements as of December 31, 2009 and for the Period from June 10, 2009 to December 31, 2009*, at 20 (Apr. 21, 2010) (online at www.chryslergroupllc.com/pdf/news/2009_q4_year_end.pdf). Two billion dollars is due on December 10, 2011 and pays an interest rate of the London Interbank Offered Rate (LIBOR) plus 5 percent; this is referred to as the Tranche B loan. Of the remaining \$4.6 billion, half is due on June 10, 2016 and the remainder on June 10, 2017. This remainder pays an interest rate of LIBOR plus 7.91 percent, and is referred to as the Tranche C Commitments.

¹⁸⁷ U.S. Department of the Treasury, *First Lien Credit Agreement Between Chrysler Group LLC and the U.S. Department of the Treasury* (June 10, 2009) (online at

As with its other AIFP investments, Treasury’s current primary focus with respect to Chrysler is to recover the TARP funds it has provided to that firm. However, the manner in which the investment was structured limits Treasury’s ability to control the course of events at Chrysler. In addition to Fiat and Treasury, there are two other participants in the Chrysler restructuring: the UAW’s VEBA and the Canadian government. These actors have their own sets of interests and incentives, which adds an additional layer of complexity to the transaction and may further constrain Treasury’s ability to exercise its rights fully. Moreover, as detailed below, the complex and interrelated contractual arrangements involving the various parties make it difficult to assess the level of recovery for the taxpayers under various possible future scenarios, including a potential Chrysler IPO.

The government is likely to recover the TARP loans provided to Chrysler directly,¹⁸⁹ but any additional recovery will depend on when and under what conditions Treasury will be able to sell its equity stake. This section examines the structure of the government’s investment in Chrysler, as well as the most likely potential exit scenarios and their consequences.

For a table summarizing the monies paid to the various Chrysler entities over time, see Figure 9 below.

www.financialstability.gov/docs/AIFP/New%20Chrysler%20through%20Fourth%20Amendment.pdf); Treasury conversations with Panel staff (Dec. 22, 2010); Treasury Transactions Report, *supra* note 24.

¹⁸⁸ U.S. Department of the Treasury, *Amended and Restated Limited Liability Company Operating Agreement of Chrysler Group LLC*, at 86 (June 10, 2009) (online at www.financialstability.gov/docs/AIFP/Binder1%20-%20Chrysler%20redacted%20corporate%20docs%20as%20posted%2012-09.pdf) (hereinafter “Chrysler LLC Operating Agreement”).

¹⁸⁹ See Section E.3 for a detailed discussion.

Figure 9: TARP Investments in Chrysler (millions of dollars)¹⁹⁰

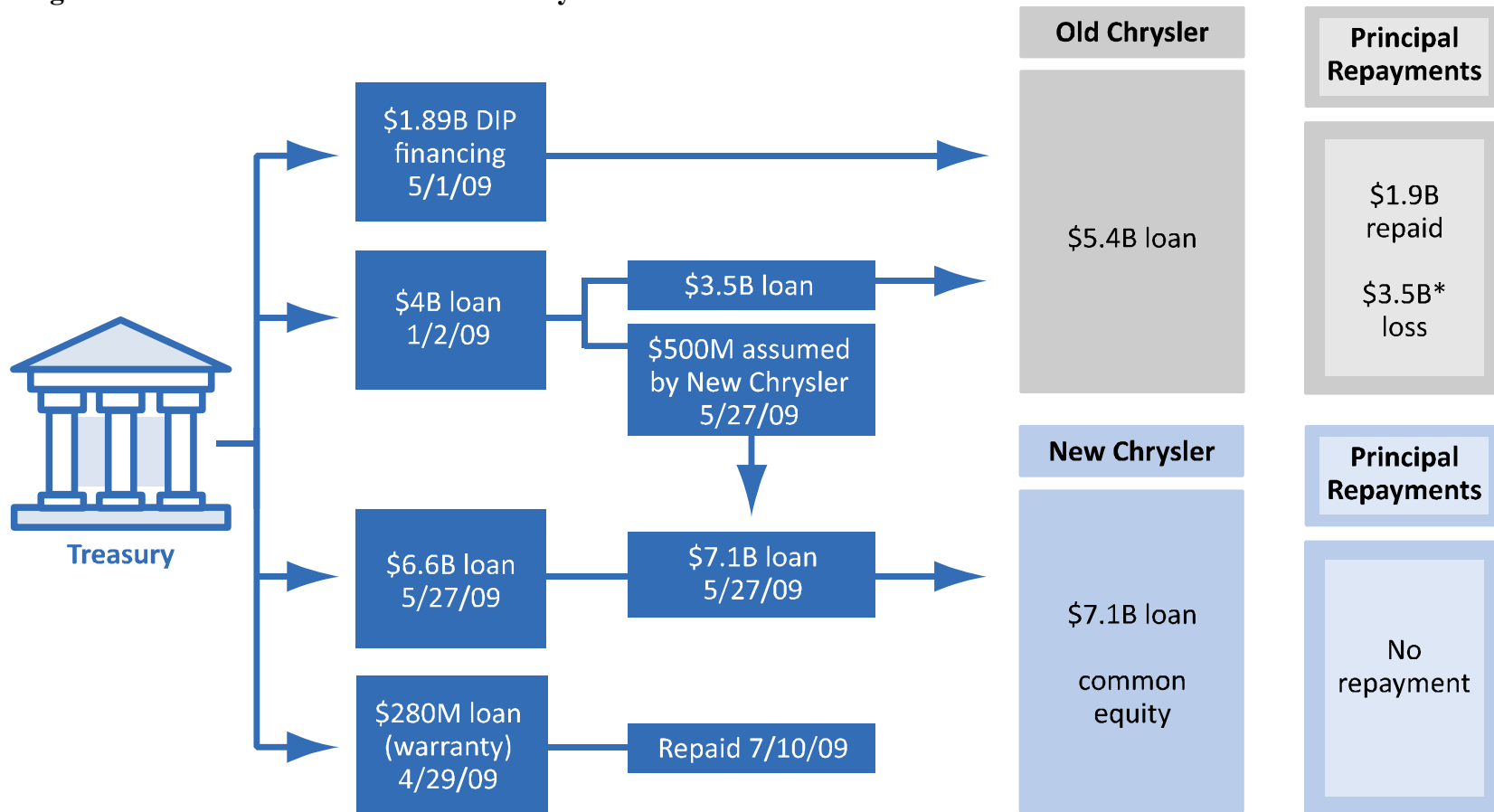
Original Investment Date	Original Assistance Amount	Original Investment Type	Exchange	Current Investment Type	Cumulative Investment Amount	Amount Repaid	Amount Lost
1/2/2009	\$4,000	Debt Obligation w/ Additional Note	\$500 million assumed by New Chrysler on 5/27/09	Loan	\$3,500	\$1,900	\$(1,600)
4/29/2009	280	Debt Obligation w/ Additional Note		Loan	280	280	
5/1/2009	1,888	Debt Obligation w/ Additional Note		Loan	1,888		¹⁹¹ (1,888)
5/27/2009	6,642	Debt Obligation w/ Additional Note	\$500 million assumed by New Chrysler on 5/27/09	Loan	¹⁹² 7,142		
Total	\$12,810				\$12,810	\$2,180	\$(3,488)

¹⁹⁰ Treasury Transactions Report, *supra* note 24.

¹⁹¹ While Treasury does not account for this loan as a loss due to potential recoveries in the future, it has stated that it does not expect material returns. As of December 30, 2010, \$48.1 million has been recovered from asset sales associated with this loan. Treasury Transactions Report, *supra* note 24.

¹⁹² As of September 30, 2010, \$4.6 billion of this total has been drawn down and is outstanding. Chrysler Group LLC, *Unaudited Interim Condensed Consolidated Financial Statements as of September 30, 2010 and for the Three and Nine Months Ended September 30, 2010*, at 15 (Nov. 8, 2010) (online at www.chryslergroupllc.com/pdf/business/q3_2010_financial_statements.pdf) (hereinafter “Chrysler Consolidated Financial Statements”).

Figure 10: TARP Funds Committed to Chrysler¹⁹³



* While Treasury has only announced losses of \$1.6 billion associated with its \$3.5 billion Old Chrysler loan, it has noted that a material recovery on its \$1.89 billion DIP financing is highly unlikely. As of December 30, 2010, only \$48.1 million has been recovered.

¹⁹³ Treasury Transactions Report, *supra* note 24.

b. Current Ownership Structure and Possible Changes

Chrysler is currently owned by four parties: Treasury, the Canadian Government, the UAW's VEBA, and Fiat. Each of these parties contributed funds or resources to New Chrysler and received equity and/or debt claims on Chrysler in exchange for its contribution. Furthermore, several agreements between these four parties give specific parties the right to increase their equity stakes in Chrysler. In particular, Fiat has a variety of options to achieve majority ownership of the company.

Fiat owns a 20 percent equity stake, along with management control of Chrysler, which it received in exchange for Chrysler gaining access to various Fiat technologies and Fiat's international distribution networks.¹⁹⁴ Fiat did not make any cash contribution in exchange for this equity stake in Chrysler. The Canadian government invested in New Chrysler, through a \$2.2 billion loan,¹⁹⁵ and received 2.5 percent of the equity.¹⁹⁶ Also as part of the restructuring, the UAW's VEBA took a note with a face value of \$4.7 billion,¹⁹⁷ and 67.7 percent of the equity in New Chrysler,¹⁹⁸ in exchange for various concessions on wages and benefits,¹⁹⁹ and the assumption of responsibility for health care costs for retired UAW Chrysler workers. This initially left Treasury with the remaining 9.8 percent of equity.²⁰⁰

The four equity owners of Chrysler are all party to the Amended and Restated Limited Liability Company Operating Agreement of Chrysler Group LLC (Operating Agreement), which governs how Chrysler is currently being strategically managed.²⁰¹ This agreement, signed on June 10, 2009,²⁰² contains numerous clauses that can lead to a change in Chrysler's ownership

¹⁹⁴ This discussion does not reflect the impact of the January 10, 2011 announcement that Chrysler has met one of three incentive goals and thereby Fiat has increased its equity ownership position from 20 to 25 percent. Chrysler Group LLC, *Chrysler Group LLC Meets First of Three Performance Events; Fiat Increases Ownership to 25 percent* (Jan. 10, 2011) (online at www.media.chrysler.com/newsrelease.do?id=10453&mid=2) (hereinafter "Chrysler Meets First of Three Performance Events").

¹⁹⁵ U.S. Department of the Treasury, *Obama Administration Auto Restructuring Initiative* (Apr. 30, 2009) (online at www.financialstability.gov/latest/tg_043009.html). For every three U.S. dollars that Treasury loaned Chrysler, the Canadian government loaned one Canadian dollar to the company. The U.S. dollar amount of the Canadian government loan has fluctuated over time with changes in the exchange rate between the U.S. and Canadian dollars.

¹⁹⁶ Chrysler LLC Operating Agreement, *supra* note 188, at 86.

¹⁹⁷ Chrysler Consolidated Financial Statements, *supra* note 192, at 11.

¹⁹⁸ Chrysler LLC Operating Agreement, *supra* note 188, at 86.

¹⁹⁹ The White House, *Obama Administration Auto Restructuring Initiative* (Apr. 30, 2009) (online at www.whitehouse.gov/the-press-office/obama-administration-auto-restructuring-initiative) (hereinafter "Obama Administration Auto Restructuring Initiative").

²⁰⁰ Chrysler LLC Operating Agreement, *supra* note 188, at 86.

²⁰¹ Chrysler LLC Operating Agreement, *supra* note 188, at 86.

²⁰² The Equity Subscription Agreement, The VEBA Call Option Agreement, The UST Call Option Agreement, The Equity Recapture Agreement, The Master Transaction Agreement, and The First Lien Credit

structure. Several clauses give Fiat certain rights to increase its equity, while others grant certain rights to the other parties, including Treasury. These agreements work with each other, and actions by one party in some cases are necessary to trigger the right of other parties to exercise their respective options. Going forward, much will depend on whether and when a Chrysler IPO occurs.

i. Fiat's Options to Increase its Equity Share

Fiat may increase its equity ownership in Chrysler in a number of ways. It is important to note, however, that Fiat may only acquire a controlling interest after Chrysler repays all TARP and Canadian government loans extended to it. First, the Operating Agreement provides that Fiat's equity stake will increase by 5 percent if and when each of the following performance targets²⁰³ is met:

- Chrysler builds a 40 mile-per-gallon (MPG) car in the United States;
- Chrysler builds a next-generation engine in a U.S. factory, based on Fiat technology;²⁰⁴
- Fiat sells Chrysler vehicles through its international distribution network.²⁰⁵

If all three targets are met, then Fiat's equity stake will increase by 15 percent, and it will own 35 percent of Chrysler's equity – without having to make any payments to the other equity holders. As Fiat's ownership share increases to 35 percent, that of the other three owners will be diluted; the VEBA will then directly own 55 percent of the equity, Treasury 8 percent, and the Canadian government 2 percent.²⁰⁶

To date, the company has not met any of the targets that would trigger an increase in Fiat's equity stake of New Chrysler. However, it is generally expected that these targets will ultimately be reached.²⁰⁷

Agreement were also signed on June 10, 2009 and collectively determine the interests, rights, and obligations of all the parties under the various possible scenarios.

²⁰³ These performance targets are referred to as "Class B Events." See Chrysler LLC Operating Agreement, *supra* note 188, at Section 3.4.

²⁰⁴ This discussion does not reflect the impact of the January 10, 2011 announcement that Chrysler has met one of three incentive goals and thereby Fiat has increased its equity ownership position from 20 to 25 percent. Chrysler Meets First of Three Performance Events, *supra* note 194.

²⁰⁵ Obama Administration Auto Restructuring Initiative, *supra* note 199.

²⁰⁶ Chrysler LLC Operating Agreement, *supra* note 188, at 86.

²⁰⁷ This discussion does not reflect the impact of the January 10, 2011 announcement that Chrysler has met this incentive goal and thereby Fiat has increased its equity ownership position from 20 to 25 percent. Chrysler Meets First of Three Performance Events, *supra* note 194.

In addition to meeting these performance targets, Fiat has other avenues to increase its equity ownership, providing the opportunity to gain majority control of Chrysler. The following options are available to Fiat:

- Fiat has the right to increase its equity stake by up to 16 percent, under certain conditions, diluting the other three parties proportionally (the Incremental Equity Call Option).²⁰⁸ The exercise of this option may occur before, simultaneous to, or after a Chrysler IPO, provided that Chrysler has repaid the TARP and Canadian government loans. The price for this option is set at a market-based formulaic price prior to the IPO or a market price after the IPO.
- Fiat also has a right to buy up to 40 percent of the VEBA's equity stake at a market-based formulaic price prior to the IPO or a market price after the IPO, subject to an adjustment for taxes (the VEBA Call Option).²⁰⁹
- Fiat has a right to buy any and all equity interest that Treasury may have in Chrysler (the Treasury Call Option).²¹⁰ This option may be exercised by Fiat during the 12-month period following the repayment in full of all TARP loans at an exercise price equal to a market price in the event that a Chrysler IPO takes place, or using a “dueling investment banks” method to determine the price otherwise.²¹¹ Even though this agreement makes use of market prices in the event an IPO has happened, it nevertheless gives Fiat certain control over when Treasury could sell any remaining equity it might have. This could conflict with Treasury's ability to maximize its return from the investment, because Fiat controls the timing of the event.

All analyst reports on Fiat reviewed in Section E.2.c., for example, assume Fiat's stake to be at least 35 percent. Chrysler has indicated that it believed the three targets would be reached. Chrysler Group LLC conversations with Panel staff (Dec. 8, 2010).

²⁰⁸ Chrysler LLC Operating Agreement, *supra* note 188, at Section 3.5.

²⁰⁹ *VEBA Call Option Agreement* (June 10, 2010). This option gives Fiat the right to buy up to 4.4 percent of Chrysler's diluted equity (assuming all Class B events have occurred) no more than once every six months, starting July 1, 2012 and running until either (1) June 30, 2016, (2) 22 percent of the equity has been so purchased, or (3) the Treasury exercises its right to call the VEBA's equity under the Equity Recapture Agreement.

²¹⁰ U.S. Department of the Treasury, *UST Call Option Agreement Regarding Equity Securities of New Carco Acquisition LLC*, at 183 (June 10, 2009) (online at www.financialstability.gov/docs/AIFP/Chrysler%20LLC%20Corporate%20as%20of%2012-01-10.pdf).

²¹¹ *Id.* at 183. The “dueling investment banks” method is as follows: both the buyer and seller select an investment bank to value the claim. If the two valuations are within 10 percent of each other, then the average is taken as the sale price. If the two estimates differ by more than 10 percent, then a third investment bank is appointed and the average of the closest two valuations is used as the sale price.

ii. Treasury's Rights

The various options and rights granted to some of the parties in other agreements, beyond those mentioned above, mean that the current equity ownership percentages do not necessarily reflect the true economic interests of the various entities. One such agreement is the Equity Recapture Agreement, signed between Treasury and the UAW's VEBA on June 10, 2009. This agreement entitles Treasury to all proceeds from the sale of any of the VEBA's equity stake in Chrysler above a threshold amount, set at \$4.25 billion and growing from January 1, 2010 at 9 percent per year (Threshold Amount).²¹² The agreement also gives Treasury the right to acquire the entirety of the VEBA's equity stake for the then-applicable Threshold Amount.²¹³ This means that if the equity valuation of Chrysler exceeds a certain level, then Treasury and not the VEBA would be the majority economic beneficiary of such an increase in valuation.²¹⁴ As a practical matter, with the expiration of the TARP, Treasury does not currently have funds available to exercise its call option absent further congressional action to appropriate resources to Treasury's Auto Industry Financing Program.²¹⁵ As described above, Treasury will still passively benefit from any sales by the VEBA of its equity above the Threshold Amount, but in this case the VEBA will control the timing and volume of any sales. Hence, the expiration of the TARP may effectively preclude Treasury from following a more aggressive course of action to maximize the taxpayer's return on their investment in Chrysler. A private investor would likely choose the more aggressive path to maximizing profits. However, as described further below,

²¹² U.S. Department of the Treasury, *Equity Recapture Agreement*, at 161 (June 10, 2009) (online at www.financialstability.gov/docs/AIFP/Chrysler%20LLC%20Corporate%20as%20of%2012-01-10.pdf) (hereinafter "Equity Recapture Agreement"). The Equity Recapture Agreement also gives Treasury the right to receive payments in 2014, 2016, and 2018 from the VEBA based on the value of the option, if the Threshold Amount has not yet been reached at those dates.

²¹³ Under the terms of the agreement, Treasury can buy the asset, the VEBA's equity in Chrysler, at any time for the Threshold Amount, less any cash already received by the VEBA for Chrysler equity sold. However, an agreement between Treasury and the Canada Development Investment Corporation (CDIC) requires that 20 percent of any receipts to Treasury under the Equity Recapture Agreement be transferred to the CDIC. U.S. Department of the Treasury, *April 30, 2009 Letter Agreement*, at 178 (June 10, 2009) (online at www.financialstability.gov/docs/AIFP/Chrysler%20LLC%20Corporate%20as%20of%2012-01-10.pdf).

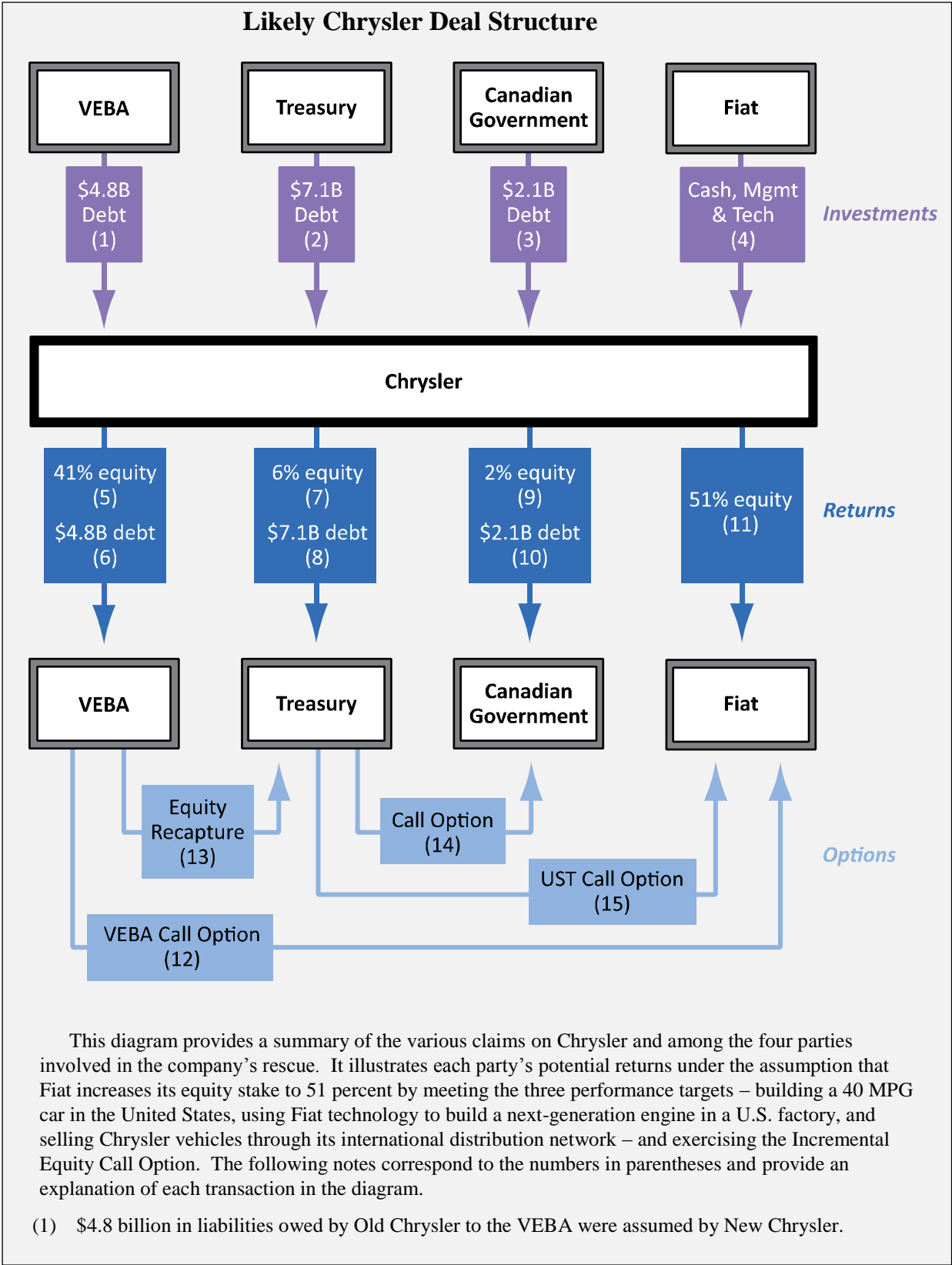
²¹⁴ For example, if the equity valuation of Chrysler reaches a required multiple of the Threshold Amount (approximately \$10 billion on January 1, 2012), then Treasury would be entitled to the benefit of 52 cents for each subsequent dollar increase in Chrysler's valuation. In other words, should Chrysler succeed and be valued at such a level, or higher, Treasury would be the marginal beneficiary of 80 percent of the VEBA's 55 percent equity interest (with CDIC owning 20 percent of this interest), which would bring Treasury's total economic interest in Chrysler to 52 percent, a majority.

²¹⁵ U.S. Department of the Treasury, *Troubled Asset Relief Program – Two year Retrospective* (Oct. 2010) (online at www.financialstability.gov/docs/TARP%20Two%20Year%20Retrospective_10%2005%2010_transmittal%20letter.pdf) ("October 3, 2010 marked the second anniversary of the Emergency Economic Stabilization Act that created the Troubled Asset Relief Program (TARP) and the end of the authority to make new financial commitments").

Treasury, as a government entity, is not merely an investor and has a number of competing policy priorities to take into consideration.²¹⁶

The accompanying box shows the various claims on Chrysler and among the four parties at the present time. It also illustrates how Fiat and the other stakeholders are likely to exercise the options they hold going forward over the next two years.

²¹⁶ See analysis in Section E.



- (2) Treasury committed financing. The total loan facility was \$6.6 billion, of which \$4.6 billion has been drawn down by Chrysler. New Chrysler also assumed \$500 million of debt from Old Chrysler that was owed to Treasury.
- (3) The Canadian government contributed financing in parallel to that committed by Treasury. The total loan facility was \$2.1 billion, of which \$1.5 billion has been drawn down by Chrysler.
- (4) Fiat contributed management and technology to New Chrysler. Fiat did not contribute any financing. If Fiat exercises the Incremental Equity Call Option, as this graphic assumes, it will have to contribute money to Chrysler. This could be between \$0.5 billion and \$2 billion and will depend on several factors.
- (5) The 41 percent equity shown here assumes that Chrysler and Fiat meet all three of the performance targets and that Fiat exercises its rights under the Incremental Equity Call Option.
- (6) The VEBA Note is payable out to 2023, with most of the principal to be repaid after the U.S. and Canadian governments have been repaid.
- (7) The 6 percent equity shown here assumes that Chrysler and Fiat meet all three of the performance targets and that Fiat exercises its rights under the Incremental Equity Call Option.
- (8) \$2.1 billion is due by December 10, 2011 and of the remainder, half is due on June 10, 2016, and the balance is due on June 10, 2017.
- (9) The 2 percent equity shown here assumes that Chrysler and Fiat meet all three performance targets and that Fiat exercises its rights under the Incremental Equity Call Option.
- (10) The Canadian loans are due on June 10, 2017. The U.S. dollar value of the debt fluctuates with the exchange rate between U.S. and Canadian dollars.
- (11) The 51 percent equity shown here assumes that Chrysler and Fiat meet all three performance targets and that Fiat exercises its rights under the Incremental Equity Call Option.
- (12) This option gives Fiat the right to buy 4.4 percent of Chrysler's diluted equity (assuming all three performance targets have been met) no more than once every six months, starting July 1, 2012 and running until either (1) June 30, 2016, (2) 22 percent of the equity has been so purchased, or (3) Treasury exercises its right to call the VEBA's equity under the Equity Recapture Agreement. The price is based on the Enterprise Value/Earnings Before Interest, Tax, Depreciation, and Amortization (EV/EBITDA) multiple method described in the Operating Agreement for the Incremental Equity Call Option, prior to an IPO, and a market price after an IPO. In either case, the amount is adjusted for any tax liability that Fiat might have to assume.
- (13) The Equity Recapture Agreement gives Treasury an economic interest in the VEBA's equity stake in Chrysler above a Threshold Amount of \$4.25 billion, growing at 9 percent per year from January 1, 2010. Treasury can actively exercise this right by buying the VEBA's equity for the Threshold Amount less any proceeds received by the VEBA for equity already sold, or selling the rights to one or more third parties. Treasury can also passively benefit from this right, receiving all cash from sales of the VEBA's equity above the Threshold Amount.
- (14) The Canadian government is entitled to 20 percent of any proceeds received by Treasury under the Equity Recapture Agreement.
- (15) This option gives Fiat the right to buy any and all equity interest that Treasury may have in Chrysler. This option may be exercised by Fiat during the 12-month period following the repayment in full of all TARP loans at an exercise price equal to a market price in the event that a Chrysler IPO has taken place, or otherwise using a "dueling investment banks" method to determine the price.

2. Outlook

a. Company Business Plan

Chrysler has changed numerous aspects of its business as part of its emergence from bankruptcy and its new relationship with Fiat. It has restructured its brands, reduced its U.S. dealership network, introduced new models, improved its U.S. market share, reduced its capacity, and negotiated lower labor costs.²¹⁷ Following initial cutbacks, Chrysler has recently begun to add employees. All of these actions, together, have returned Chrysler to operational profitability, although it continues to report net losses stemming from the interest expense on the TARP loans.²¹⁸

On November 4, 2009, Chrysler unveiled its five-year business plan.²¹⁹ Chrysler stated that it plans to have four brands – Dodge, Ram Trucks, Jeep, and Chrysler – but to have them sold through unified dealerships. Ram had been a sub-brand of Dodge for nearly 30 years. Unlike GM, Chrysler has not closed any of its pre-bankruptcy brands, although Chrysler had only three brands pre-bankruptcy, compared to eight at GM.

Like GM, Chrysler has reduced its number of dealers in the United States. The logic is that with fewer dealers, the remaining dealers will sell more vehicles, reach a higher level of profitability, and so be able to afford a greater level of investment in their dealerships. This investment, which Chrysler is pushing under the name “Project Genesis,” aims to create more customer-friendly showrooms.²²⁰

Chrysler has introduced several new models since emerging from bankruptcy on June 10, 2009. The most significant from a revenue perspective has been the new Jeep Grand Cherokee introduced in May 2010.²²¹ This model has sold 66 thousand units to date.²²² Discussions have begun to use the same underlying platform to produce a luxury SUV under Fiat’s Maserati brand.²²³ Chrysler is also preparing to launch the Chrysler 200, which will replace the Chrysler Sebring. The Ram truck brand has had some critical success, notably winning Texas Truck of

²¹⁷ For exact figures, see Section E.

²¹⁸ Chrysler Consolidated Financial Statements, *supra* note 192, at 2.

²¹⁹ Chrysler Group LLC, *Our Plan Presentation* (Nov. 4, 2009) (online at www.chryslergroupllc.com/business/) (hereinafter “Chrysler Plan Presentation”).

²²⁰ Chrysler Group LLC, *Our Plan Presentation: Presentation 9 – U.S. Network Development* (Nov. 4, 2009) (online at www.chryslergroupllc.com/pdf/business/us_network_development.pdf).

²²¹ Chrysler Group LLC, *Chrysler Group LLC Celebrates Production Launch of All-new 2011 Jeep® Grand Cherokee at Detroit Plant; Announces Second Shift* (May 21, 2010) (online at www.chryslergroupllc.com/news/archive/2010/05/21/chrysler_celebrates_prod_launch_2011jgc_05212010).

²²² Data provided by Chrysler for full year 2010 worldwide sales (Jan. 10, 2011).

²²³ Chrysler Plan Presentation, *supra* note 219.

the Year,²²⁴ but its sales performance has failed to match that of the GM and Ford pickup lines in 2010.²²⁵ Overall truck sales for Chrysler are up 13 percent for the first 11 months of 2010 as compared to the same period in 2009. Equivalent sales, however, have increased 17 percent at GM and 22 percent at Ford for the same period.²²⁶ Chrysler's minivan segment saw a revamped model introduced for model year 2011.

Figure 11 below shows the evolution over the last eight years of Chrysler's sales in the United States, by far its largest market. The importance to Chrysler of the light truck segment, which includes the minivan, pickup, and SUVs, is clear, as this segment has consistently been responsible for the majority of Chrysler's sales in the United States. Chrysler's market share has seen a slight uptick in 2010 year-to-date versus 2009, which has been driven by its performance in the car market.²²⁷ Additionally, Chrysler's average transaction price has increased \$1,900 since March 2009.²²⁸

²²⁴ Chrysler Group LLC, *Ram, Jeep Bring Home High Honors at Texas Truck Rodeo* (Oct. 24, 2010) (online at blog.chryslergroupllc.com/blog.do?id=1215&p=entry).

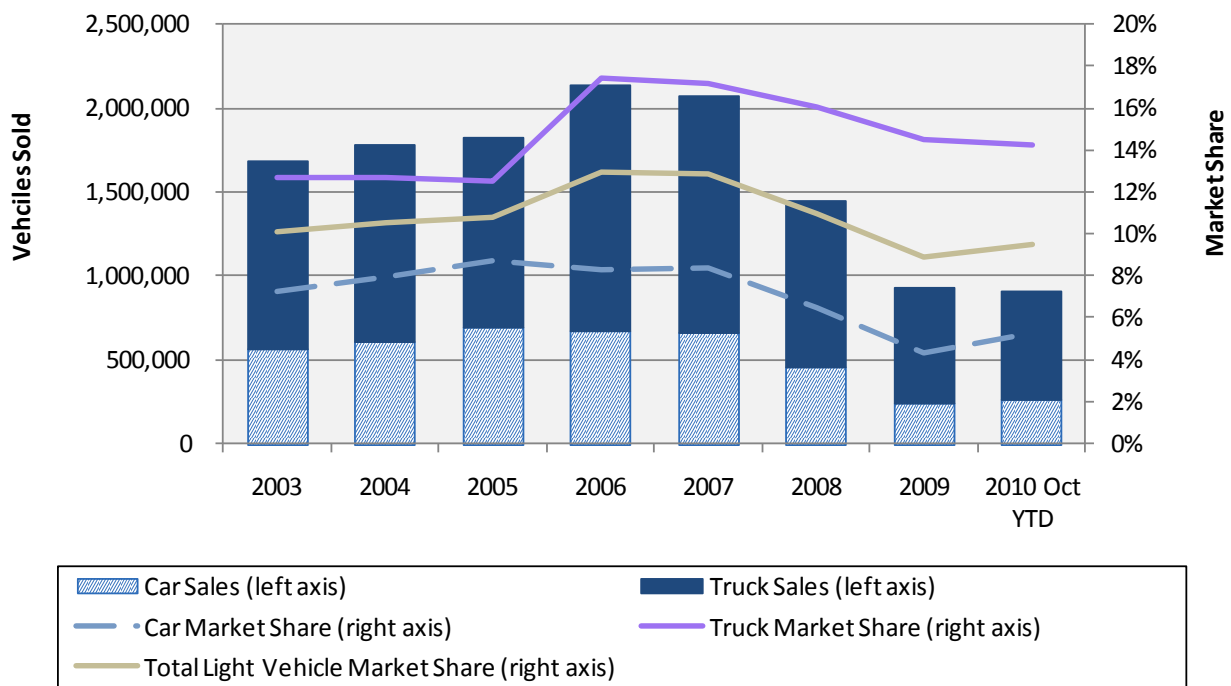
²²⁵ UBS Investment Research, *Retail & Fleet Registrations Q3 2010*, at 15 (Dec. 16, 2010).

²²⁶ Automotive News, *Data Center* (Instrument: U.S. light-vehicle sales by nameplate, Nov. & YTD) (Dec. 1, 2010) (hereinafter "Automotive News Data Center").

²²⁷ *Id.* As of November, 2010, Chrysler's U.S. car market share was 5.1 percent, up from 4.3 percent in 2009. On the other hand, Chrysler's U.S. truck market share actually declined from 14.4 percent in 2009 to 14.1 percent as of November, 2010.

²²⁸ As of June 2010, the average transaction price was \$27,300. Data provided by Chrysler (Jan. 10, 2011).

Figure 11: Chrysler U.S. Vehicle Sales by Segment, 2003 to Present²²⁹



Operationally, Chrysler now has one fewer plant than it did prior to bankruptcy, but it should be noted that this reflects both the closure of four major plants offset by Chrysler’s purchase of a bankrupt supplier’s three factories.²³⁰ This capacity reduction, together with contractual changes that have reduced labor costs, has lowered the volume at which Chrysler breaks even to 1.65 million units.²³¹

Fiat has also begun its efforts to re-enter the U.S. market. On November 17, 2010, Chrysler announced 130 dealerships that have been selected to sell Fiat vehicles.²³² These dealerships will be distinct from the dealerships that sell the Chrysler family of vehicles, although some Fiat dealerships were sold to existing Chrysler dealers. Chrysler began building

²²⁹ The 2010 data includes information through November 2010. Automotive News Data Center, *supra* note 226.

²³⁰ Data provided by Chrysler (Jan. 10, 2011).

²³¹ Chrysler Group LLC, *Our Plan Presentation: Presentation 16 – Financial Review* (Nov. 4, 2009) (online at www.chryslergroupllc.com/pdf/business/financial_review.pdf) (hereinafter “Chrysler Plan Presentation: Presentation 16 – Financial Review”).

²³² Chrysler Group LLC, *Chrysler Group LLC Selects Dealers to Represent Fiat Brand in the U.S.* (Nov. 17, 2010) (online at www.media.chrysler.com/newsrelease.do?id=10325&mid=2).

the Fiat 500, also known as the Cinquecento, in the fourth quarter of 2010, and will start selling the vehicles in North America in 2011.

Since emerging from bankruptcy, Chrysler's financial performance has been burdened by the significant and costly debt it still carries, much of it related to the TARP.²³³ Figure 12 below shows several key financial and operational metrics for Chrysler and how they have evolved before and after bankruptcy.

Figure 12: Chrysler Financial and Operational Results, Mid-2007 to Q3 2010²³⁴

Period	Vehicles Sold (000s)	Vehicles Sold, U.S. (000s)	Revenue (USD millions)	Modified EBITDA (USD millions) ²³⁵	Net Income (USD millions)	Cash Flow (USD millions)	Employees at end of Period (000s)
8/4/07 to 12/31/07	1,081	828	26,561		(639)		76
2008	2,007	1,453	48,477		(16,844)		56
1/1/09-6/30/09 ²³⁶	656	471	11,082		(4,425)		50
Q4 2009	318	216	9,434	398	(2,691)		48
Q1 2010	334	235	9,687	787	(197)	1,498	50
Q2 2010	407	292	10,478	855	(172)	481	52
Q3 2010	401	293	11,018	937	(84)	419	52

b. Government Exit Strategy

Treasury currently has both debt and equity claims on Chrysler. Treasury's total outstanding debt claims on New Chrysler, including additional notes and payment-in-kind interest considerations, have a total face value of \$5.8 billion.²³⁷ Furthermore, Chrysler still retains the right to draw up to an additional \$2.1 billion in funding pursuant to the original loan agreement.²³⁸ These loans are due to be paid back in tranches, with the last tranche due in

²³³ Chrysler's TARP loans have a weighted, based on carrying value, average effective interest rate of 9.36 percent. Chrysler Consolidated Financial Statements, *supra* note 192, at 12.

²³⁴ Data provided by Chrysler (Jan. 11, 2011).

²³⁵ Chrysler Group LLC, *Q3 2010 Results Review*, at 4 (Nov. 8, 2010) (online at www.chryslergroupllc.com/pdf/business/q3_2010_webcast_presentation.pdf).

²³⁶ The following metrics for this time period are as of June 9, 2009: vehicles sold, revenue, and net income data. Data provided by Chrysler (Jan. 11, 2011).

²³⁷ Chrysler Consolidated Financial Statements, *supra* note 192, at 12.

²³⁸ Chrysler Consolidated Financial Statements, *supra* note 192, at 15. In addition to the \$500 million in debt New Chrysler assumed from Old Chrysler, the company has drawn \$4.6 billion of the \$6.6 billion made available to the company on May 27, 2009, leaving \$2.1 billion available for the company to draw down.

2017.²³⁹ Given Chrysler's efforts to refinance its TARP loans,²⁴⁰ its stated desire to repay the TARP loans by 2014,²⁴¹ its pending application for loans from Department of Energy's Advanced Technology Vehicles Manufacturing Loan Program (ATVM),²⁴² and the continued positive cash flow from the automotive business,²⁴³ it is likely that all the loans extended to Chrysler under the TARP will be repaid, possibly in advance of the contractual due dates. Therefore, most of the uncertainty regarding Treasury's financial return on the Chrysler intervention stems from the unpredictability of Treasury's ultimate recovery from its equity stake.

Plans for the sale of Treasury's equity stake have not been formally divulged. Chrysler is currently a privately held company with no publicly traded equity against which to value Treasury's equity stake.²⁴⁴ Sergio Marchionne, the CEO of Chrysler and Fiat, has publicly stated that he expects to take Chrysler public via an IPO sometime in 2011. How much, if any, of Treasury's stake could be sold at that point is unclear. The eventual monies received by Treasury for its investments in Chrysler will depend on Chrysler's financial and operational performance, if and when Chrysler's equity becomes publicly traded and, to a large degree, the actions of Fiat and the VEBA. If Chrysler's equity does not immediately become publicly traded after the TARP loans get repaid, then the return on investment will depend to an even bigger extent on the actions of Fiat and could be lower as a result.²⁴⁵ In his most recent comments, the Fiat CEO has indicated that he considers it possible that Fiat will go over the 50 percent ownership mark in 2011.²⁴⁶

c. Valuing Chrysler's Equity

Determining an appropriate valuation for Chrysler's equity, in the absence of trading of its equity on a public exchange, is difficult and involves a large amount of subjective assessment.

²³⁹ Chrysler Consolidated Financial Statements, *supra* note 192, at 12.

²⁴⁰ Chrysler Plan Presentation, *supra* note 219.

²⁴¹ Chrysler Plan Presentation: Presentation 16 – Financial Review, *supra* note 231.

²⁴² See footnote 259, *infra*, for a discussion of the ATVM loan program and Chrysler's application for funds from the program.

²⁴³ Chrysler Consolidated Financial Statements, *supra* note 192, at 4.

²⁴⁴ As of December 30, 2010, Treasury held 9.8 percent of the equity in Chrysler, but this will be diluted to 8 percent if and when Chrysler and Fiat meet the performance targets for Fiat's increased equity stake. Treasury also has an effective economic interest in 80 percent of the VEBA's 55 percent equity stake, see Section E.1.b.ii for details.

²⁴⁵ For analysis of Treasury's likely exit scenarios, see Section E.3, *infra*.

²⁴⁶ Bloomberg Data Service, *Fiat May Increase Chrysler Stake to 51% Before IPO* (Jan. 3, 2011) (hereinafter "Bloomberg Data Service") ("I think it is possible. I don't know whether it is likely, but it is possible that we'll go over the 50 percent mark if Chrysler decides to go to the markets in 2011," Sergio Marchionne, 58, told reporters at the Milan stock exchange today. "It will be advantageous if that happens.").

However, there are ways of estimating a value: (1) the Operating Agreement contains a pricing formula for several of Fiat's options to buy additional equity of Chrysler, and (2) equity research analysts who cover Fiat have estimated values for Fiat's stake in Chrysler. Under most of these valuations, Treasury's rights under the Equity Recapture Agreement have positive value.

The Operating Agreement provides a valuation method to be used in the absence of public trading. The valuation is the product of the most recent four quarters' earnings and a market-assigned "multiple," which relies on valuations of other comparable automobile manufacturers, and deducts the company's debt according to certain rules.²⁴⁷ Applying that valuation methodology to Chrysler's financial results for the third quarter of 2010 results in an estimate of Treasury's equity stake in Chrysler of \$2.8 billion.²⁴⁸

This result is very sensitive to the earnings period and the pool of comparable firms. In particular, earnings for the fourth quarter of 2009 were particularly bad for Chrysler.²⁴⁹ Further, the Operating Agreement provides that the multiple used for the valuation of Chrysler may not exceed Fiat's multiple,²⁵⁰ which is currently the lowest in the industry.²⁵¹ This effectively limits the implied valuation of Chrysler. And according to analyst reports, certain plans announced by Fiat will further lower Fiat's – and in turn Chrysler's – multiple,²⁵² for the purposes of assessing

²⁴⁷ Chrysler LLC Operating Agreement, *supra* note 188 (see the Definitions Addendum).

²⁴⁸ Calculations were done based on the formula in the Operating Agreement, using third quarter 2010 (Q3 2010) financial results for Chrysler and other automotive manufacturers, as subsequently described. The average EV/EBITDA T12M (Enterprise Value to Earnings Before Interest, Tax, Depreciation, and Amortization on a Trailing 12 Month basis) (the market "multiple") for all Reference Automotive Manufacturers is 7.96 through Q3 2010. Excluding the outliers, as per the Operating Agreement formula, lowers the figure to 6.84, which is still higher than the Fiat EV/EBITDA T12M Multiple of 4.68 as of the end of the third quarter of 2010. Bloomberg Financial Service.

Chrysler's EBITDA in the 12 months prior to the end of the third quarter of 2010 were \$2,977 million (\$398 million + \$787 million + \$855 million + \$937 million). Chrysler Group LLC, *Unaudited Interim Condensed Consolidated Financial Statements as of September 30, 2010 and for the Three and Nine Months Ended September 30, 2010*, at 15 (Nov. 8, 2010) (online at www.chryslergroupllc.com/pdf/business/q3_2010_financial_statements.pdf); Chrysler Group LLC, *Chrysler Group LLC Reports Financial Results for the Period Ended March 31, 2010* (Apr. 21, 2010) (online at www.chryslergroupllc.com/news/archive/2010/04/21/2010_q1_press_release). Applying the 4.68 Fiat Multiple to Chrysler's EBITDA of \$2,977 million yields an enterprise value of \$13,932 million, less net debt of \$3,766 million, which gives a total equity value for Chrysler of \$10,166 million. The value to Treasury is the 9.8 percent of \$10,166 million, or \$1.0 billion for the direct equity, and approximately \$1.8 billion for the proceeds to Treasury under the Equity Recapture Agreement.

²⁴⁹ Chrysler Group LLC, *Chrysler Group LLC First Quarter (Q1) 2010 Financial Results Analyst Webcast*, at 2 (May 10, 2010) (online at www.chryslergroupllc.com/pdf/business/may10_presentation.pdf).

²⁵⁰ Chrysler LLC Operating Agreement, *supra* note 188 (see the Definitions Addendum).

²⁵¹ Bloomberg Data Service.

²⁵² On April 21, 2010, Fiat announced its plans to "demerge" its industrial goods divisions from the automotive divisions. See Sergio Marchionne, *Fiat Investor Day: The Five Year Plan* (online at www.fiatgroup.com/en-us/mediacentre/press/Documents/2010/THE%20FIVE%20YEAR%20PLAN%20

how much Fiat must pay to acquire additional equity in Chrysler using several of the options it has.

Equity analysts who cover Chrysler provide another source of valuation estimates. Figure 13 below shows the values attributed to Fiat's stake in Chrysler in the most recent research notes published by four firms.

Figure 13: Analyst Evaluations of Chrysler Equity Value

Firm	Date	Size of Fiat's Equity Stake	Valuation of Fiat's Stake (USD millions)	Valuation of Chrysler Equity (USD millions)
Goldman Sachs ²⁵³	Sept. 24, 2010	35%	2,857	8,162
Kepler ²⁵⁴	April 26, 2010	51%	5,225	10,245
Credit Agricole ²⁵⁵	April 23, 2010	35%	4,319	11,459
Deutsche Bank ²⁵⁶	April 22, 2010	35%	0	0

As for the debt owed by Chrysler, as part of the five-year business plan announced on November 4, 2009, Chrysler detailed its plan to repay its obligations to Treasury, as well as those owed to the Canadian government.²⁵⁷ Chrysler projected repaying all TARP loans by the end of 2014. This would be several years in advance of when the loans mature. Chrysler's desire to end its connection with the TARP ahead of time reflects its desire to achieve a cheaper source of

%20Adress%20from%20Sergio%20Marchionne.pdf) (accessed Jan. 11, 2011). Analysts predict this will further lower the overall multiple applied to Fiat. The Goldman Sachs Group, Inc., *Breaking Up is Easy to Do; Reiterating Conviction Buy*, at 32 (Sept. 24, 2010) (hereinafter "Goldman Sachs Paper on Fiat"). A lower multiple for Fiat would further limit the implied valuation of Chrysler under the Operating Agreement. Fiat's possible divestment of Ferrari would also lower the Fiat multiple. Barclays Capital, *Fiat SPA – Crystallising Option Value – Move to I-OW*, at 8 (Dec. 7, 2010) (hereinafter "Barclays Capital Paper on Fiat"). Treasury has not discussed this with any of the Operating Agreement parties, including Fiat. Treasury conversations with Panel staff (Nov. 28, 2010).

²⁵³ Goldman Sachs Paper on Fiat, *supra* note 252, at 32. Figures converted from Euros to U.S. dollars using the U.S. Treasury's rate of exchange as of December 31, 2010. U.S. Department of the Treasury, *Treasury Reporting Rates of Exchange* (Instrument: Euro Zone – Euro) (accessed Jan. 11, 2011) (online at www.fms.treas.gov/intn.html#rates) (hereinafter "Treasury Reporting Rates of Exchange").

²⁵⁴ Kepler Research, *Wishful Thinking*, at 6 (Apr. 26, 2010).

²⁵⁵ Cheuvreux: Credit Agricole Group, *A New Fiat in the Making*, at 2 (Apr. 23, 2010) (online at www.borsaitaliana.it/bitApp/viewpdf.bit?location=/media/star/db/pdf/86353.pdf). Figures converted from Euros to U.S. dollars using the U.S. Treasury's rate of exchange as of December 31, 2010. Treasury Reporting Rates of Exchange, *supra* note 253.

²⁵⁶ Deutsche Bank, *The Great Divide – Initial Thoughts*, at 3 (Apr. 22, 2010) (online at www.borsaitaliana.it/media/star/db/pdf/88399.pdf).

²⁵⁷ Chrysler Plan Presentation: Presentation 16 – Financial Review, *supra* note 231. Chrysler has reiterated this plan in conversations with Panel staff. Chrysler conversations with Panel staff (Dec. 10, 2010).

financing going forward.²⁵⁸ However, the five-year business plan also projected that Chrysler would receive \$3 billion in Department of Energy loans, \$1 billion in each year from 2010 to 2012.²⁵⁹

If Chrysler succeeds in meeting its five-year business plan, and with potential help from any Department of Energy loans extended to Chrysler, the TARP will have all the debt owed to it repaid by 2014, in advance of Chrysler's contractual obligations.²⁶⁰

3. Analysis of the Government's Exit Strategy Based on Likely Repayment Scenarios

For a successful government exit to be carried out, all TARP loans would need to be repaid, and Treasury would need to divest its equity stake in Chrysler and recover sufficient value to compensate the taxpayer for the Chrysler-related losses of \$3.5 billion. As noted earlier, much will depend on Treasury's ability to maximize its return from the sale of its equity stake and whether or not Chrysler has an IPO.

Treasury currently has debt instruments outstanding to Chrysler with a total face value of \$5.8 billion. Under the scenarios laid out above, Treasury is likely to recover the full amount of its outstanding TARP loans to Chrysler ahead of time whether or not an IPO occurs.²⁶¹ In addition, Treasury has lost \$3.5 billion on loans made to Old Chrysler. For Treasury to recover all the funds that it has invested in Chrysler, both Old and New, then all the loans have to be repaid, and Treasury's equity stake would have to yield at least \$3.5 billion to make up for the losses to date. Based on just the 8 percent of Chrysler's equity that will be directly held by Treasury at the time of any potential sale, Chrysler would have to be valued at approximately

²⁵⁸ Chrysler conversations with Panel staff (Dec. 10, 2010).

²⁵⁹ The loans, under the Advanced Technology Vehicle Manufacturing (ATVM) program, charge an interest rate equivalent to Treasury's cost of funds, which is lower than interest on the TARP loans. See U.S. Department of Energy, *Advanced Technology Vehicles Manufacturing Incentive Program*, 73 Federal Register 66721 (Nov. 12, 2008) (interim final rule). Based on the current difference between these interest rates, the cost savings to Chrysler, and the associated loss to Treasury, would be worth approximately \$180 million per year. The ATVM loans have the potential to extend beyond 2017, the current date by which Chrysler must repay all of its obligations to the TARP.

²⁶⁰ When Sergio Marchionne was asked about the use of ATVM funds on an analyst call he said: "As you well know, cash is fungible. So to the extent that we produce cash from operations, cash can be used, not to be redeployed in the investment cycle, but to go back and repay existing indebtedness. So at the end of the day, we need to have those funds [ATVM loans] targeted for capital and engineering and development efforts, but in the scheme of things, they will all end up in the same pot and how we use that cash to repay who is really up to Chrysler." Chrysler Plan Presentation, *supra* note 219, at 61st minute. The Panel notes that if ATVM funds were used to repay TARP loans, this result would reflect policy choices made pursuant to the ATVM program and does not appear to violate either the terms of the ATVM program or the terms of EESA, even though it may raise concerns regarding Chrysler's financial health.

²⁶¹ See Section E.2.b, *supra*, for a discussion.

\$44 billion to cover the losses to date.²⁶² This is roughly in line with the amount reported in the Panel's September 2009 report, which calculated the break-even valuation of Chrysler at \$57.5 billion.²⁶³ For comparison, when Chrysler was acquired by Daimler in 1998, it was valued at \$37 billion, which adjusted for inflation would equate to \$49 billion today.²⁶⁴ Prior to that acquisition, Chrysler had never been so highly valued.²⁶⁵

As discussed above, the Equity Recapture Agreement between Treasury and the VEBA may change the picture because of the additional economic interest it grants to Treasury. If Treasury were able to exercise fully its rights under this agreement, then Treasury's stake would be a considerably larger share of Chrysler. This in turn would mean that it would be possible for the valuation of Chrysler to be significantly lower in order for the TARP to recoup fully its investment and maximize return for the taxpayers.²⁶⁶ Exact calculations are difficult as they depend on the date of sale. Assuming a January 1, 2012 sale date for the entire equity stakes of both Treasury and the VEBA, for example, Chrysler's equity would have to be valued at approximately \$14.5 billion for Treasury to recoup the \$3.5 billion that it has lost on Chrysler-related loans to date, which would make it easier for Treasury to recover all of its investments in Chrysler.

As noted above, Treasury does not currently have the ability to appropriate funds to acquire the VEBA's equity. If Chrysler does well financially and the VEBA's sales of equity reach the Threshold Amount, then any equity sales above that level will benefit Treasury.²⁶⁷ In this case, however, the VEBA and not Treasury will have control over the timing and execution of these sales. In addition, Fiat's ability to control the timing of the exercise of its option to buy Treasury's entire equity stake in Chrysler after repayment of the TARP loans could limit the ability of Treasury to recoup the maximum possible amount from its equity stake and its claims to the VEBA's equity stake.

²⁶² This figure is derived as follows: (\$3.5 billion (amount written off on Old Chrysler and Chrysler Holdings loans) / 8 percent (Treasury's equity stake, assuming all three performance targets are met)). Consideration of the time value of money and/or the riskiness of the securities held by Treasury would push the break-even point higher.

²⁶³ September 2009 Oversight Report, *supra* note 2, at 46. The difference is due to Chrysler-related losses being lower than were expected in 2009.

²⁶⁴ This calculation uses Consumer Price Index data for May 1998 and October 2010. U.S. Department of Labor, *Consumer Price Index: All Urban Consumers* (Nov. 17, 2010) (online at <ftp://ftp.bls.gov/pub/special.requests/cpi/cpiait.txt>).

²⁶⁵ Bloomberg Data Service.

²⁶⁶ See Section E.1.b for an analysis of the various exit strategies and their respective costs and benefits to the taxpayers.

²⁶⁷ For a discussion of Treasury's rights to the VEBA's equity, see Section E.1.b, *supra*.

Figure 14 below includes the key dates when the various rights take effect to facilitate the following discussion of possible repayment scenarios.

Figure 14: Chrysler Timeline

Date	Event	Source
12/10/2011	\$2.08 billion of loan to Chrysler from Treasury is due; \$500 million CAD from Canadian loan is also due	Chrysler Group LLC financial statements
7/1/2012	VEBA Call Option activates, allowing Fiat to purchase up to 40 percent of VEBA's equity stake in Chrysler	VEBA Call Option Agreement
1/1/2013	Fiat's Class B rights, the performance targets, expire; after this date Fiat may acquire a stake equivalent to that it could have acquired under the Class B rights, but by paying a price equivalent to that of the Incremental Equity Call Option – this is the Alternative Call Option	Operating Agreement
1/1/2013	Starting on this date, a simple majority, 51 percent, of Chrysler's equity holders can force an IPO	Operating Agreement
6/10/2016	Half of the remaining balance on Treasury loans to Chrysler are due	Chrysler Group LLC financial statements
7/1/2016	VEBA Call Option expires	VEBA Call Option Agreement
6/10/2017	Remaining balance on Treasury loans to Chrysler are due	Chrysler Group LLC financial statements

a. Possible Scenarios for a Sale of Treasury's Equity Stake

It appears that Treasury has a chance to recover some or all of the previously lost amounts through gains on the equity stake. Treasury is guided by a number of different principles for its involvement in private companies and, as with GM, it needs to balance its desire to exit as soon as practicable against its objective of maximizing the value of the taxpayers' investment.²⁶⁸ The level of return Treasury can realize for the taxpayers, however, is uncertain at this point. In addition to unpredictable market developments, the complex nature of the restructuring transaction and the competing and potentially conflicting sets of interests among the parties may constrain Treasury's freedom to act in the best interest of the taxpayers. As noted earlier, much will depend on the conditions under which Treasury and the VEBA will be able to dispose of their equity stakes. Two possible scenarios are described below.

i. Large IPO Exit Scenario

As discussed above, repayment in full of Chrysler's government loans is a pre-condition for Fiat to gain majority control of the company. An IPO may happen whether or not Fiat has a

²⁶⁸ See a summary of Treasury's principles in Section H.1, *infra*.

majority ownership of Chrysler's shares, but if Fiat can reach a 51 percent equity stake in Chrysler before January 1, 2013, it will have sole control over the timing of a Chrysler IPO.²⁶⁹ In Fiat's second quarter 2010 analyst call, its CEO stated that the priority for the IPO was to allow the VEBA to sell its stake in Chrysler for cash that it can use to invest and meet its obligations for the health care of the retired UAW workers.²⁷⁰ Chrysler also expects the other equity owners eventually to sell their stakes.²⁷¹

An IPO would likely take place in late 2011 or 2012.²⁷² Fiat would have the option to increase its equity stake to a majority by exercising the Incremental Equity Call Option either prior to or concurrently with the IPO. For this to happen, Chrysler would need to have repaid all of its government loans by that time. In a large IPO package scenario Fiat would exercise its option simultaneously with the IPO, and Treasury would be able to sell its entire direct equity stake at that time. The ultimate level of recovery for Treasury would depend on the market for Chrysler's shares and, to some degree, on the VEBA's actions.²⁷³

ii. Delayed IPO

As discussed earlier, Fiat has a number of ways to increase its equity stake to a majority position, which can precede a Chrysler IPO.²⁷⁴ The main reason why Fiat may prefer to delay an IPO is to be able to have Chrysler repay its loans²⁷⁵ and so allow Fiat to exercise the entire Incremental Equity Call Option more cheaply prior to an IPO.²⁷⁶ This would save Fiat a

²⁶⁹ Chrysler LLC Operating Agreement, *supra* note 188, at Section 14.1. Starting January 1, 2013 a simple majority of Chrysler's equity owners can force the company to have an IPO.

²⁷⁰ Chrysler Plan Presentation, *supra* note 219.

²⁷¹ Chrysler Group LLC conversations with Panel staff (Dec. 9, 2010).

²⁷² Chrysler Group LLC conversations with Panel staff (Dec. 9, 2010).

²⁷³ The VEBA is unlikely to be able to dispose of its entire equity stake at once, but since Treasury gets the benefit of the VEBA sales above the Threshold Amount, it will be affected by the volume and timing of these sales. For a discussion see Section E.1.b. Treasury's right to receive income from such sales survives its exit as a shareholder of Chrysler. Moreover, as noted above, if Treasury did increase its equity stake by exercising its rights under the VEBA option agreement, Treasury could realize a higher return on its investment. VEBA's actions are not under Treasury's control, but the Panel notes that the lack of resources for Treasury to exercise fully its rights may limit the level of return to the taxpayer.

²⁷⁴ See Section E.1.b, *supra*.

²⁷⁵ To prepay the TARP and Canadian government loans, Chrysler would need the approval of a simple majority of its Board of Directors. Assuming that all three performance targets are met, Fiat would only need the agreement of one more director, either the VEBA director, the Canadian director, or one of the three Treasury directors. Chrysler LLC Operating Agreement, *supra* note 188, at Sections 5.1 and 5.8.

²⁷⁶ Chrysler LLC Operating Agreement, *supra* note 188, at Section 3.5. This gives Fiat the right to buy 16 percent of the equity using either a public market price or the valuation formula described in E.2.c. This option can only be exercised once Chrysler has repaid the monies borrowed from the TARP and from the Canadian Government. Funds received by Chrysler for the Incremental Equity Call Option can be used simultaneously to repay the TARP loans. Recent reports from analysts covering Fiat indicate that Fiat may float some of its interest in

significant amount of money because instead of paying Chrysler market price for the new equity, it would be able to purchase the stake (and dilute the other shareholders) at a far lower cost based on a valuation methodology tied to inputs that could artificially lower Chrysler's value as opposed to what the equity might sell for in an IPO.²⁷⁷ According to analysts, exercising the option prior to an IPO would mean up to a \$2 billion savings for Fiat,²⁷⁸ which would translate into a corresponding loss for Chrysler. This in turn would lower the value of the company in a subsequent IPO and result in a loss for the other owners of Chrysler, including Treasury.²⁷⁹ The Fiat CEO's most recent remarks implying that his company may go beyond a 50 percent ownership of Chrysler in 2011 has reinforced analyst opinions that Fiat would try to save money and acquire majority ownership by exercising the Incremental Equity Call Option prior to an IPO.²⁸⁰

The exit options available to Treasury underlie the fact that Treasury's intervention in Chrysler was done in a distinct manner within the TARP by giving Fiat significant rights and benefits at the outset. The Panel notes that this may have saved Chrysler from dissolution, but the conflicting interests inherent in the structure of the intervention going forward may restrict Treasury's ability to maximize return for the taxpayers as it unwinds the government's ownership position.

F. GMAC/Ally Financial

1. Context

a. Brief History of the Company

For most of its history, GMAC Financial Services/Ally Financial was a wholly owned subsidiary of GM. As GM's captive finance arm, GMAC/Ally Financial provided GM dealers

Ferrari and Marelli, a parts supplier, ahead of a Chrysler flotation. A possible explanation for floating these two components of Fiat is to raise the necessary funds to exercise the Incremental Equity Call Option.

²⁷⁷ As described in Section E.2.c, *supra*, the Operating Agreement's formula for the valuation of Chrysler uses a market "multiple" tied to that of Fiat, which is the lowest in the industry, to calculate the value of Chrysler. See footnote 248, *supra*, for a detailed discussion on the calculation of market multiples.

²⁷⁸ Barclays Capital Paper on Fiat, *supra* note 252, at 8. ("We estimate a pre-IPO transaction could save Fiat between \$1.0bn and \$2.7bn compared to a post IPO deal. Adjusted for debt assumed by Fiat, we calculate ROI in a 40-100% range."); UBS Investment Research, *Chrysler: Pre vs Post IPO Take-over*, at 1 (Dec. 15, 2010) (hereinafter "UBS Investment Research Paper on IPO").

²⁷⁹ A similar logic applies to Fiat's rights under the VEBA Call Option Agreement. *VEBA Call Option Agreement* (June 10, 2010). This also has implication for Treasury's return due the Equity Recapture Agreement. Equity Recapture Agreement, *supra* note 212, at 161.

²⁸⁰ Bloomberg Data Service, *supra* note 246 ("It looks cheaper for Fiat to get 51 percent of Chrysler before the IPO," said Philippe Houchois, a London-based analyst at UBS AG, who estimates that Fiat could save \$1 billion to \$2.7 billion if it exercises the option before a Chrysler listing. "It's a positive scenario for Fiat shares."). For analysis, see UBS Investment Research Paper on IPO, *supra* note 278, at 1.

with the financing necessary to acquire and maintain automobile inventories and to provide customers with a means to finance automobile purchases.²⁸¹ Over time, the company's operations expanded and diversified to include insurance, mortgages, commercial finance, and online banking.²⁸² However, the decline in the last decade in GM's credit rating negatively impacted GMAC/Ally Financial's credit ratings and increased the cost of financing GM automobile sales. These circumstances, coupled with GMAC/Ally Financial's branching out into other lending sectors outside the auto industry, called into question GMAC/Ally Financial's ownership and governance structure. As a result, on November 30, 2006, GM sold 51 percent of the equity in GMAC/Ally Financial to an investment consortium led by Cerberus Capital Management, L.P. (Cerberus) for about \$14 billion. GMAC/Ally Financial emerged as an independent global financial services company, but GMAC/Ally Financial's operations continued to have many attributes of a captive finance arm's relationship with an automaker.²⁸³

b. What Precipitated Government Assistance?

A combination of factors led to the government's decision to provide assistance to GMAC/Ally Financial.²⁸⁴ GMAC/Ally Financial reported a net loss of \$2.5 billion for the third quarter of 2008,²⁸⁵ bringing its losses over five consecutive quarters to \$7.9 billion. By late 2008, Residential Capital, LLC (ResCap), GMAC/Ally Financial's global real estate finance business, was incurring debilitating losses due to the downturn in the housing market, especially due to its significant subprime mortgage exposure. Its automotive financing operations were severely weakened by the financial crisis and GM's precarious situation, both of which

²⁸¹ Captive financing organizations can be structured as legally separate subsidiaries or distinct business lines, but they exist primarily as extensions of their corporate parents. Their purpose is to facilitate the parent corporation's sale of goods or services by providing debt and/or lease financing to the parent's customers. See Standard & Poor's, *Captive Finance Operations* (Apr. 17, 2009) (online at www2.standardandpoors.com/spf/pdf/media/Captive_Finance_Operations.pdf).

²⁸² For further discussion concerning GMAC/Ally Financial's diversification efforts, see March 2010 Oversight Report, *supra* note 22, at 11-13.

²⁸³ While GMAC/Ally Financial may no longer be a captive in the legal sense after it became an independent finance company in 2006, it maintains close ties with GM in many ways as a result of the contractual codification of its historical relationship with GM. For example, as part of the 2006 sale, GMAC/Ally Financial and GM entered into several service agreements that codified the mutually beneficial historic relationship between the companies. One of these agreements was the United States Consumer Financing Services Agreement (USCFSA), which, among other things, provided that GM would use GMAC/Ally Financial exclusively whenever it offered vehicle financing and leasing incentives to customers. (As described below, this agreement was modified when GMAC/Ally Financial became a bank holding company in December 2008.) For further discussion of the USCFSA, see Section F.3.b, *infra*. GMAC/Ally Financial also remains the leading floorplan finance franchise for GM dealers.

²⁸⁴ For further discussion concerning the factors that precipitated government assistance, see March 2010 Oversight Report, *supra* note 22, at 11-17, 32-42.

²⁸⁵ GMAC LLC, *GMAC Financial Services Reports Preliminary Third Quarter 2008 Financial Results* (Nov. 5, 2008) (online at media.gmacfs.com/index.php?s=43&item=286).

constricted credit, sharply reduced demand, and moved GMAC/Ally Financial closer toward insolvency.²⁸⁶

As detailed in the Panel's March 2010 report, Treasury presents a two-fold justification for its intervention in GMAC/Ally Financial. First, Treasury states that it acted because of GMAC/Ally Financial's significance to the automotive industry and to GM and Chrysler in particular. As Treasury considered using funds from the TARP to rescue GM and Chrysler in December 2008, it quickly came to the conclusion that GM could not survive without GMAC/Ally Financial's financial underpinning. In particular, GMAC/Ally Financial provided GM dealers with almost all of their "floorplan financing" – that is, loans to purchase their inventory. Without access to this credit, many dealers would have been forced to close their doors. Second, Treasury states that it acted because of GMAC/Ally Financial's inclusion in the stress tests, pursuant to which Treasury committed to provide funds for bank holding companies that could not raise funds privately.²⁸⁷ Over time, Treasury states that it approached the issue of continuing to support GMAC/Ally Financial from the position that it must follow through on its commitments, even if the commitments are not legally enforceable, in order to maintain the credibility of the federal government. These rationales are circular, since GMAC/Ally Financial would not have been included in the stress tests had the government not intervened in December 2008 by expediting the company's application for bank holding company status in order to prevent General Motors from liquidating.

The particular issues associated with GMAC/Ally Financial's near-collapse make this government intervention unique. As the Panel discussed in its March 2010 report, the solvency issue that the company faced in late 2008 owed to poor management decisions related to mortgage market investments that rapidly collapsed once the housing market downturn began. Furthermore, unlike the legacy shareholders and creditors of GM and Chrysler – companies that underwent restructuring via the bankruptcy process – the legacy stakeholders of GMAC/Ally Financial (for example, Cerberus) were rescued along with the company because the government opted not to place GMAC/Ally Financial into bankruptcy.

c. Government Support Efforts

The U.S. government has spent a total of \$17.2 billion to support GMAC/Ally Financial under the TARP. Currently, after Treasury's December 2010 conversion of \$5.5 billion of its \$11.4 billion in mandatory convertible preferred stock in Ally Financial into common stock, Treasury's remaining investment consists of \$2.7 billion in trust preferred securities (TruPS), \$5.9 billion in mandatory convertible preferred stock, and a 73.8 percent common equity

²⁸⁶ For further discussion concerning GMAC/Ally Financial's business and why it was failing, *see* March 2010 Oversight Report, *supra* note 22, at 11-17, 32-42.

²⁸⁷ *See* March 2010 Oversight Report, *supra* note 22, at 57-78.

ownership stake.²⁸⁸ Conversion of Treasury's remaining MCPs would increase the government's equity ownership in the company to approximately 82 percent.

GMAC/Ally Financial received funds on three separate occasions: in December 2008, May 2009, and December 2009.²⁸⁹ The government's support efforts are illustrated in Figure 15 below.

²⁸⁸ U.S. Department of the Treasury, *Treasury Converts Nearly Half of Its Ally Preferred Shares to Common Stock* (Dec. 30, 2010) (online at www.treasury.gov/press-center/press-releases/Pages/tg1014.aspx) (hereinafter "Treasury Converts Ally Preferred Shares to Common Stock").

²⁸⁹ For further discussion concerning the government's "staged" investments in GMAC/Ally Financial, see March 2010 Oversight Report, *supra* note 22, at 42-57.

On December 29, 2008, Treasury purchased \$5 billion in GMAC/Ally Financial Senior Preferred Stock and also received warrants for an additional \$250 million in preferred equity. Second, Treasury made an additional purchase of \$7.5 billion of GMAC/Ally Financial Mandatory Convertible Preferred Stock on May 21, 2009, increasing its investment to \$12.5 billion. Additionally, on May 29, 2009, Treasury accepted Old GM's 35.4 percent equity stake in GMAC/Ally Financial in exchange for the \$884 million loan given to Old GM in December 2008. Finally, Treasury authorized an additional investment of \$3.8 billion in the form of \$2.54 billion of Trust Preferred Securities (TruPs) and \$1.25 billion of MCPs on December 30, 2009. At this time, \$3 billion of the initial December 2008 investment was converted to common stock, bringing Treasury's control of GMAC/Ally Financial to 56.3 percent.

In May 2009, the terms of the MCPs specified that GMAC/Ally Financial could convert the stock at any time, but if the conversion would result in Treasury owning more than 49 percent of the company, then GMAC/Ally Financial would need Treasury's approval or an order from the Federal Reserve. The terms of this MCP were revised in exchange for Treasury's additional investment in December 2009. After the December 2009 investment, GMAC/Ally Financial could only convert the MCPs if it received prior written approval from Treasury or an order from the Federal Reserve. As part of the terms of its December 2009 investment, Treasury also acquired "a 'reset' feature on the entirety of its MCP holdings such that the conversion price under which its MCPs can be converted into common equity will be adjusted in 2011, if beneficial to Treasury, based on the market price of private capital transactions occurring in 2010." U.S. Department of the Treasury, *Treasury Announces Restructuring of Commitment To GMAC* (Jan. 5, 2010) (online at www.financialstability.gov/latest/pr_1052010.html) (hereinafter "Treasury Announces Restructuring of Commitment To GMAC"). See also U.S. Department of the Treasury, *Contract [GMAC]*, at 482 (May 21, 2009) (online at www.financialstability.gov/docs/AIFP/Posted%20to%20AIFP%20Website%20-%20GMAC%202009.pdf) ("The Series F-2 shall be convertible to common stock, in whole or in part, at the applicable Conversion Rate at the option of the holder upon specified corporate events, including any public offering of GMAC's common stock, certain sales, mergers or changes of control at GMAC"). This feature preserves Treasury's ability to assess whether it is advantageous to Treasury to convert considering all the facts and circumstances available at the time.

On December 30, 2010, Treasury announced it is converting \$5.5 billion of its MCP holdings in GMAC/Ally Financial into common stock. See *Treasury Converts Ally Preferred Shares to Common Stock*, *supra* note 288.

Figure 15: TARP Investment in GMAC/Ally Financial (millions of dollars)²⁹⁰

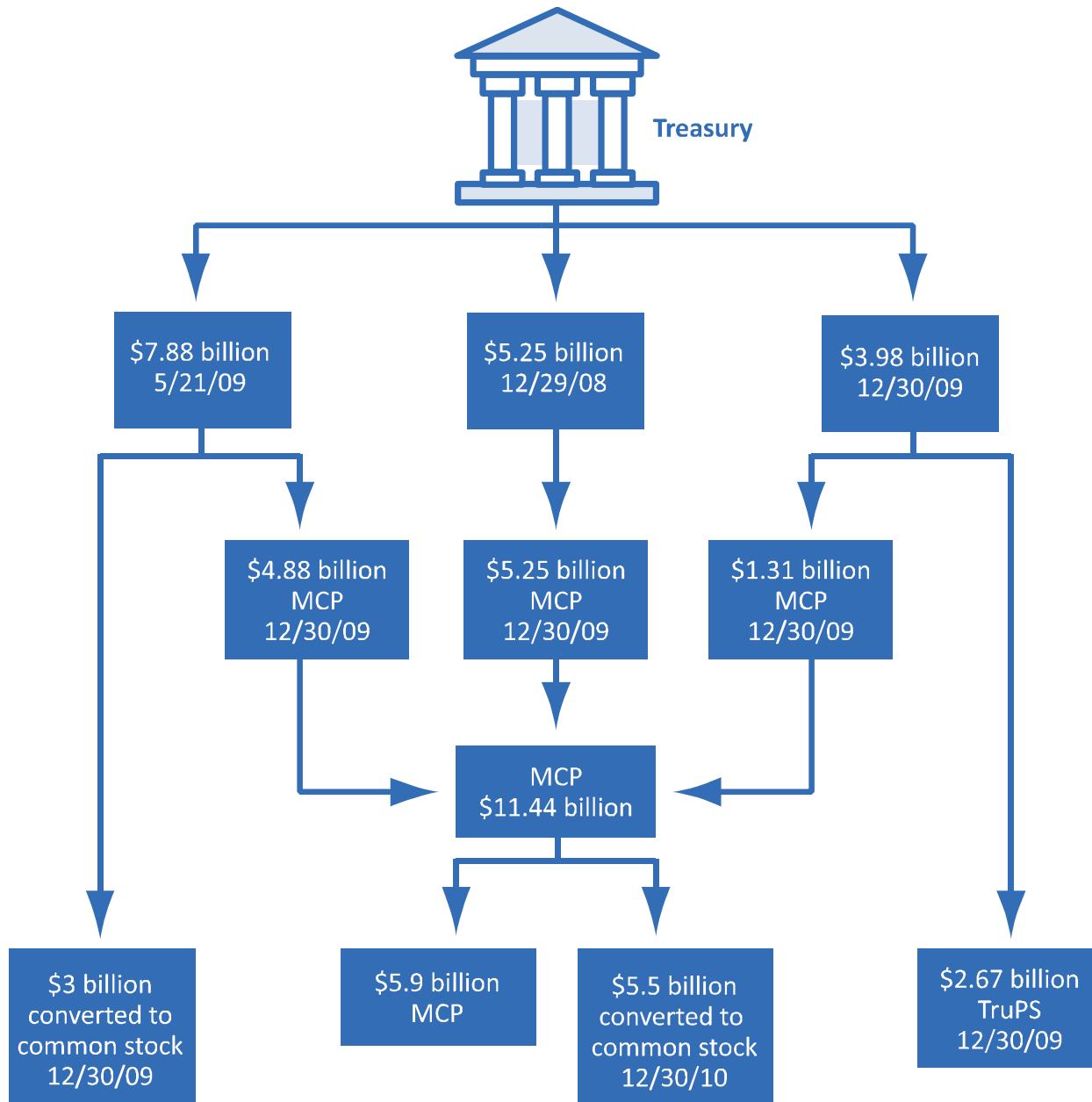
Original Investment Date	Original Assistance Amount	Original Investment Type	Exchange	Current Investment Type	Cumulative Investment Amount	Amount Repaid	Amount Lost
12/29/2008	5,000	Preferred Stock w/ Exercised Warrants	Exchange for convertible preferred stock	Convertible Preferred Stock	²⁹¹ \$5,250		
12/29/2008	884	Loan to General Motors	Extinguished in consideration for 35.4 percent of GMAC/Ally Financial common stock	Common Stock	884		
5/21/2009	7,500	Convertible Preferred Stock w/ Exercised Warrants	\$3 billion exchanged for common stock	Convertible Preferred Stock	²⁹² 7,875		
12/30/2009	2,540	Trust Preferred Securities w/ Exercised Warrants		Trust Preferred Securities w/ Exercised Warrants	2,667		
12/30/2009	1,250	Convertible Preferred Stock w/ Exercised Warrants		Convertible Preferred Stock w/ Exercised Warrants	1,313		
Total	\$17,174				\$17,989		

²⁹⁰ Treasury Transactions Report, *supra* note 24, at 18-19.

²⁹¹ Includes exercised warrants.

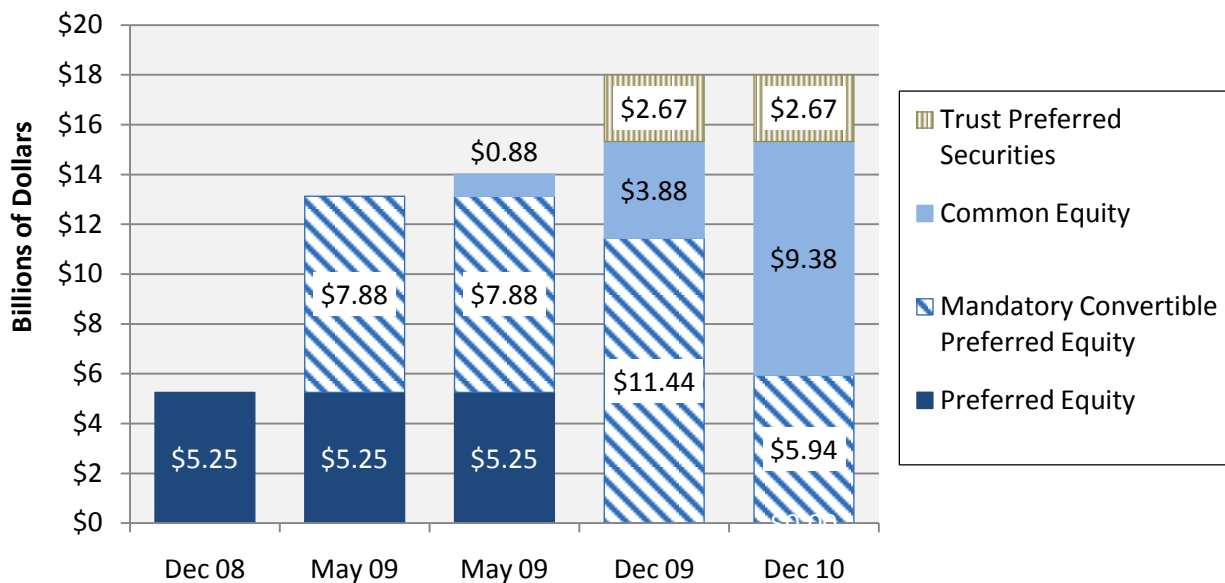
²⁹² Includes exercised warrants.

Figure 16: GMAC/Ally Financial Flowchart of Investments²⁹³



²⁹³ These figures include the exercised warrants associated with each investment. Treasury obtained a 35 percent equity stake on May 29, 2009, when it exercised its option to exchange its \$884 million loan (to GM) for the ownership interest GM had purchased. Including all preferred to common stock conversions, Treasury holds 73.8 percent of the GMAC/Ally Financial's common stock as of December 30, 2010. Treasury Transactions Report, *supra* note 24, at 18.

Figure 17: Treasury’s Investments in GMAC/Ally Financial²⁹⁴

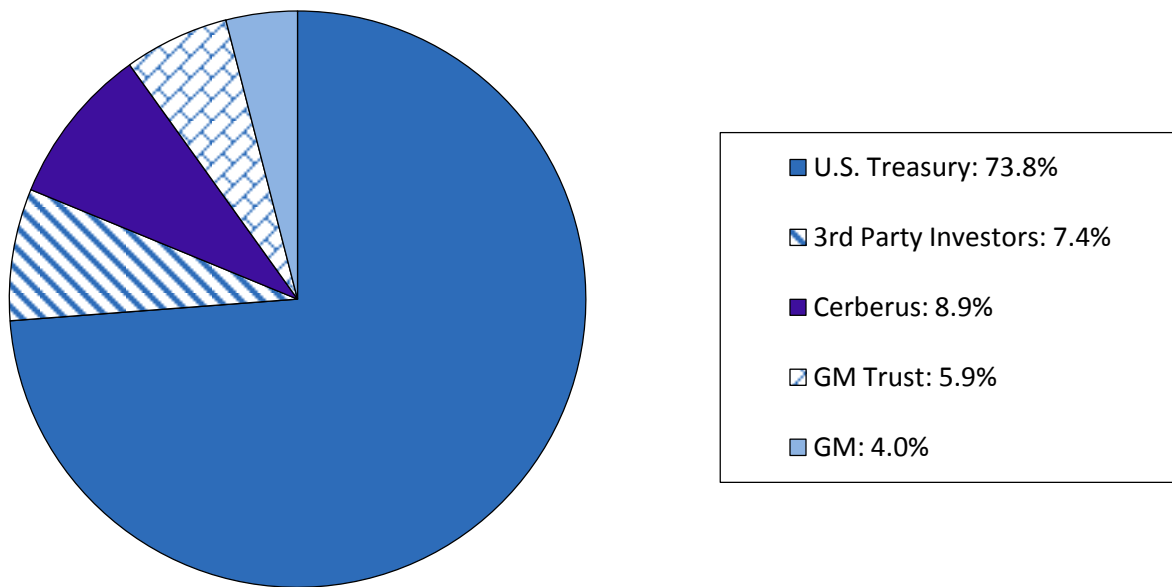


While Treasury holds a controlling interest in GMAC/Ally Financial, lesser interests are held by General Motors, the GM Trust (which was established as part of GM’s bankruptcy and is managed by an independent trustee), the private equity company Cerberus, and third party investors, who purchased a portion of Cerberus’ legacy stake.²⁹⁵ The current ownership composition of GMAC/Ally Financial is illustrated in Figure 18 below.

²⁹⁴ Warrants for MCPs and Preferred Equity were immediately exercised and are included. Treasury Announces Restructuring of Commitment To GMAC, *supra* note 289; Treasury Transactions Report, *supra* note 24, at 18-19.

²⁹⁵ Although the third-party investors received their share in distributions from Cerberus, they are not Cerberus affiliates and will not necessarily act in concert with Cerberus. As part of the conditions to the approval of the BHC application, none of these third-party investors own, hold, or control more than 5 percent of the voting shares or 7.5 percent of the total equity of GMAC/Ally Financial. The Federal Reserve describes them as sophisticated investors who are independent of Cerberus and each other. Board of Governors of the Federal Reserve System, *GMAC LLC; IB Finance Holding Company, LLC: Order Approving Formation of Bank Holding Companies and Notice to Engage in Certain Nonbanking Activities*, Federal Reserve Bulletin, Vol. 95, Legal Developments: Fourth Quarter, 2008 (May 29, 2009) (online at www.federalreserve.gov/pubs/bulletin/2009/legal/q408/order6.htm). As private equity investors, none of these parties are required to disclose their identities publicly under applicable law, and Cerberus generally avoids the spotlight whenever possible. Cerberus Institutional Partners, L.P., *Letter to Investors*, at 6 (Jan. 22, 2008) (online at online.wsj.com/public/resources/documents/WSJ-LB-cerberus080214.pdf).

Figure 18: GMAC/Ally Financial's Current Ownership Structure (as of 12/30/2010)²⁹⁶



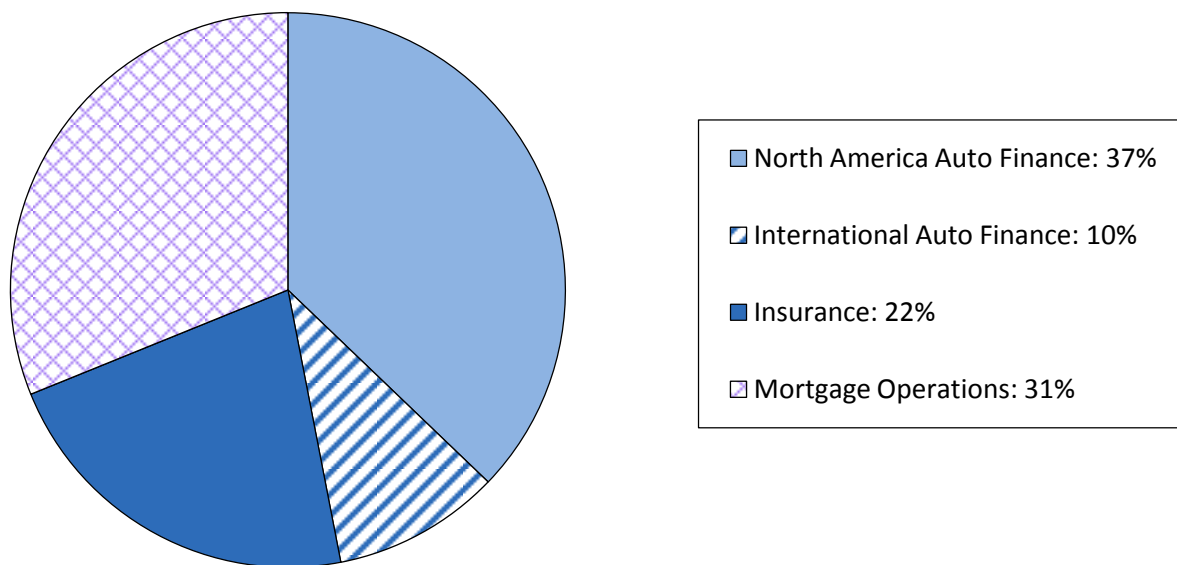
d. Current Company Structure

Since the beginning of 2010, GMAC/Ally Financial's operations have centered on three business segments:

- Dealer and retail automotive financing services (including insurance for consumers, automotive dealerships, and other businesses);
- Mortgage activities focusing primarily on the residential real estate market in the United States, with some international operations; this segment includes the operations of ResCap; and
- Commercial finance activities that provide secured lending products and other financing.

²⁹⁶ Ally Financial Inc., *Ally Financial Announces Conversion of Certain U.S. Treasury Investments into Common Equity* (Dec. 30, 2010) (online at media.ally.com/index.php?s=43&item=438).

Figure 19: Third Quarter 2010 GMAC/Ally Financial Gross Revenue by Segment²⁹⁷



e. Recent Developments

GMAC/Ally Financial is one of the world’s largest financial services companies with approximately \$173.2 billion of assets as of September 30, 2010.²⁹⁸ The third quarter of 2010 marked the third straight profitable quarter for GMAC/Ally Financial (net income of \$278 million), with all segments and entities profitable, including ResCap and Ally Bank, which is GMAC/Ally Financial’s online bank.²⁹⁹

According to its most recent quarterly earnings report, GMAC/Ally Financial has made progress on several important fronts since the Panel last provided an in-depth examination of the company in its March 2010 oversight report.³⁰⁰ These recent developments are discussed in more detail below.

²⁹⁷ Not reflected in this pie chart is the fact that the Corporate Segment recorded a \$535 million loss for the third quarter of 2010. The Corporate segment is composed of the Commercial Finance Group, certain equity investments, other corporate activities, the residual impacts from corporate funds transfer pricing and treasury asset liability management activities, and reclassifications and eliminations between the reportable operating segments. Ally Financial Inc., *Form 10-Q For the Quarterly Period Ended September 30, 2010*, at 80 (Nov. 9, 2010) (online at www.sec.gov/Archives/edgar/data/40729/000119312510252419/d10q.htm) (hereinafter “Ally Financial Form 10-Q”).

²⁹⁸ *Id.* at 79.

²⁹⁹ *Id.* at 82, 94.

³⁰⁰ Ally Financial Inc., *3Q10 Earnings Review*, at 3 (Nov. 3, 2010) (online at phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MzQ2Nzg3NnxDaGlsZEIEPTQwMjMzOHxUeXBIPtI=&t=1) (hereinafter “Ally Financial 3Q10 Earnings Review”).

First, GMAC/Ally Financial's core auto finance business has now seen seven consecutive profitable quarters, primarily due to general improvement in the auto market and GMAC/Ally Financial's increased penetration of both GM and Chrysler consumer auto originations.³⁰¹

As Chrysler is also now increasing its U.S. market share in the wake of the Toyota recalls and a downsized GM, GMAC/Ally Financial has potential for further growth in this market. On April 30, 2009, GMAC/Ally Financial entered into a legally binding term sheet with Chrysler to provide automotive financing products and services to Chrysler dealers and customers, which made GMAC/Ally Financial the "preferred provider of new wholesale financing for Chrysler dealer inventory."³⁰² On August 6, 2010, GMAC/Ally Financial entered into another agreement with Chrysler, which replaced and superseded the April 2009 term sheet. GMAC/Ally Financial is Chrysler's preferred provider of new wholesale financing for dealer inventory in the United States, Canada, Mexico, and other international markets. Chrysler is obligated to provide GMAC/Ally Financial with certain exclusivity privileges, including the use of GMAC/Ally Financial for designated minimum threshold percentages of certain of Chrysler's retail financing subvention programs. (A subvented loan is one where the auto manufacturer provides an incentive to the lender to offer a lower interest rate than it would otherwise offer.) The agreement extends through April 30, 2013, with automatic one-year renewals unless either GMAC/Ally Financial or Chrysler provides sufficient notice of nonrenewal. In addition, GMAC/Ally Financial was named the preferred lender for Fiat in the United States on September 30, 2010 (owing to its existing relationship with Chrysler).³⁰³

While its North American operations have continued to drive results, the performance of GMAC/Ally Financial's international operations has also improved. GMAC/Ally Financial is experiencing strong auto loan originations in China, Brazil, and the United Kingdom.³⁰⁴ With a continued focus on streamlining its auto business, GMAC/Ally Financial's International Automotive Finance segment sold its Argentina auto finance business and signed an agreement to sell its Ecuador auto finance business during the third quarter of 2010.

Second, after recognizing approximately \$18.3 billion in mortgage-related losses during the 2007-2009 period, GMAC/Ally Financial continues to make progress in liquidating legacy mortgage assets at levels above their sharply reduced carrying value. During the third quarter of

³⁰¹ While GMAC/Ally Financial's share of GM-subvented financing has declined from 76 percent in 2006 to 20 percent as of the third quarter of 2010, GMAC/Ally Financial's share of Chrysler-subvented financing has increased since 2009, along with its shares of GM and Chrysler direct-to-consumer loans.

³⁰² GMAC LLC, *GMAC Financial Services Enters Agreement to Provide Financing for Chrysler Dealers and Customers* (Apr. 30, 2009) (online at gmacfs.mediaroom.com/index.php?s=43&item=324). The April 2009 term sheet contemplated a more definitive agreement.

³⁰³ Ally Financial 3Q10 Earnings Review, *supra* note 300, at 3.

³⁰⁴ Ally Financial 3Q10 Earnings Review, *supra* note 300, at 17.

2010, ResCap sold approximately \$11.0 billion worth of European mortgage assets and businesses to affiliates of hedge fund and private equity firm Fortress Investment Group.³⁰⁵ This transaction means that GMAC/Ally Financial has effectively exited the European mortgage market. As of November 3, 2010, GMAC/Ally Financial sold \$1.9 billion of held-for-sale legacy mortgage assets at gains. The company's management believes that it has "effectively de-risked the mortgage business."³⁰⁶ GMAC/Ally Financial has stated that it is considering a number of strategic alternatives with respect to ResCap, including asset sales, spin-offs, or other potential transactions.³⁰⁷

In response to questions concerning irregularities in foreclosure document procedures, which have raised questions about the validity of foreclosures and led to new uncertainties in the mortgage industry, GMAC/Ally Financial states that it continues to monitor closely delinquency and claims trends as well as new repurchase requests, entered into settlements with Freddie Mac and Fannie Mae in 2010 under which it made one-time payments to the GSEs for the release of repurchase obligations, and increased its reserve for mortgage repurchases during the third quarter of 2010.

Finally, GMAC/Ally Financial continues to make progress in accessing the capital markets, improving its funding profile and reducing legacy costs. Ally Bank has taken on a more prominent funding role within the company. The bank's deposits and certificate of deposit (CD) retention rate have increased, and the overall firm's cost of funds has declined by over 100 basis points, or 1 percentage point, since becoming a bank holding company.³⁰⁸

³⁰⁵ Ally Financial Inc., *Ally Financial Completes Sales of European Mortgage Assets and Operations* (Oct. 1, 2010) (online at media.ally.com/index.php?s=43&item=419).

³⁰⁶ Ally Financial Inc., *Transcript: Q3 2010 Earnings Call*, at 5 (Nov. 3, 2010) (hereinafter "Ally Financial Transcript: Q3 2010 Earnings Call").

³⁰⁷ Ally Financial Inc., *Form 10-Q for the Quarterly Period Ended June 30, 2010*, at 10 (Aug. 6, 2010) (online at www.sec.gov/Archives/edgar/data/40729/000119312510181437/d10q.htm); Ally Financial Form 10-Q, *supra* note 297, at 10-11. It does not appear, however, that GMAC/Ally Financial will completely dispose of ResCap, since it plans to shift its mortgage operations to focus on agency servicing and originations.

³⁰⁸ See Ally Financial 3Q10 Earnings Review, *supra* note 300, at 3; Ally Financial Inc., *2Q10 Earnings Review*, at 26 (Aug. 3, 2010) (online at phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MzI0MjM1M3xDaGlsZEIEPTM5MTY3NXxUeXBIPtI=&t=1) (hereinafter "Ally Financial 2Q10 Earnings Review"); GMAC Financial Services, *Preliminary 2010 First Quarter Results* (May 3, 2010) (online at phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NDQxMjF8Q2hpbGRJRDR0tMXxUeXBIPtM=&t=1); GMAC Financial Services, *Preliminary 2009 Fourth Quarter Results* (Feb. 4, 2010) (online at phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MjkzNTh8Q2hpbGRJRDR0tMXxUeXBIPtM=&t=1).

2. Outlook

a. Company Strategy/Business Plan

A greatly improved market backdrop and a longer-term investment mentality on the part of Treasury, GMAC/Ally Financial's principal shareholder, have facilitated a strategy aimed at repaying the government and cultivating a sustainable independent business strategy. At the beginning of 2010 (several months into the tenure of new CEO Michael A. Carpenter), GMAC/Ally Financial announced six objectives for the company, which include becoming the leading global auto finance provider for dealers and consumers, improving its liquidity position and access to the capital markets, reducing the risk in its mortgage operations, improving cost structure, and transitioning fully into a bank holding company.³⁰⁹

At a high level, GMAC/Ally Financial's business plan is focused on achieving these six objectives, which are designed to position the company toward profitability and stability through a combination of higher earnings, reductions in balance sheet risk, the shedding of unproductive businesses, and improved access to the capital markets (at a lower cost of capital). The status of the company's progress on each of these fronts is discussed in more detail below.

Auto Finance. GMAC/Ally Financial has become the number one U.S. new car lender (according to AutoCount, an automotive industry data source), and the company expects to maintain that position.³¹⁰ GMAC/Ally Financial's auto finance franchise also has nearly three times the market share of its five largest competitors.³¹¹

GMAC/Ally Financial's U.S. penetration for the third quarter of 2010 currently stands as follows:³¹²

- 84 percent of GM dealer stock (as compared to 73 percent for the third quarter of 2009);
- 76 percent of Chrysler dealer stock (as compared to 67 percent for the third quarter of 2009);

³⁰⁹ Ally Financial 2Q10 Earnings Review, *supra* note 308, at 28. Ally Financial Transcript: Q3 2010 Earnings Call, *supra* note 306, at 1. During the third quarter 2010 earnings call, Mr. Carpenter stated that the company believes it has "become a fully-fledged bank holding company," so it will no longer report on its progress relating to that objective anymore.

³¹⁰ Ally Financial Transcript: Q3 2010 Earnings Call, *supra* note 306, at 1. This statistic reflects data for the first half of 2010.

³¹¹ Ally Financial 3Q10 Earnings Review, *supra* note 300, at 6.

³¹² Ally Financial 3Q10 Earnings Review, *supra* note 300, at 6.

- 34 percent of GM consumer sales (as compared to 32 percent for the third quarter of 2009); and
- 49 percent of Chrysler consumer sales (as compared to 21 percent for the third quarter of 2009).

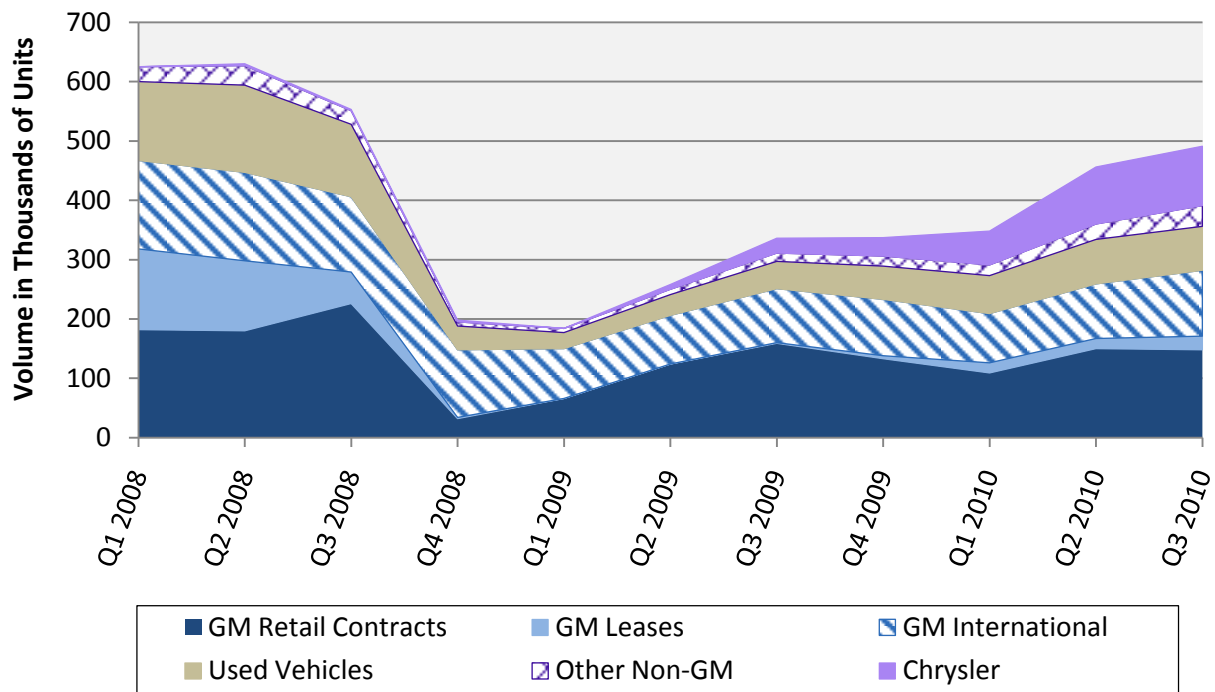
While GMAC/Ally Financial is a leader in floorplan finance (as evidenced by the figures listed above), it states that it is also repositioning its auto finance franchise balance sheet to both reduce the scope of its subvented business with GM and to focus on a more balanced origination and leasing mix. See Figure 20 below.³¹³ GMAC/Ally Financial has also increased its lending to consumers with super-prime and prime credit ratings, while reducing its near-prime and non-prime exposures.³¹⁴ Going forward, one of GMAC/Ally Financial's major focuses will be to expand its presence in the used vehicle market, which is approximately twice the size of the new vehicle market in terms of volume,³¹⁵ but where borrowers generally have weaker credit quality.

³¹³ General Motors may elect to sponsor incentive programs (on both retail contracts and leases) by supporting financing rates below standard rates at which GMAC/Ally Financial purchases retail contracts. Subvention is the manner in which GM pays for exclusive promotions offered through GMAC/Ally Financial. This practice is akin to a marketing expense.

³¹⁴ Ally Financial Transcript: Q3 2010 Earnings Call, *supra* note 306, at 9.

³¹⁵ Ally Financial Transcript: Q3 2010 Earnings Call, *supra* note 306, at 3.

Figure 20: GMAC/Ally Financial Consumer Auto Financing Volume by Sector³¹⁶



Access to Capital Markets. A core component of GMAC/Ally Financial’s viability going forward (and a precursor to an IPO) is its ability to access the capital markets. For calendar year 2010, GMAC/Ally Financial had completed approximately \$36 billion of new secured, unsecured funding and asset-backed securities (ABS) transactions in 2010 (and excluding growth in deposits).³¹⁷

Mortgage Operations. The company has completed a strategic review of its mortgage operations. Since it marked \$2.0 billion in mortgage assets to fair value in the fourth quarter of 2009 (due to the reclassification of certain international mortgage assets and businesses and domestic mortgage assets from held-for-investment (HFI) to held-for-sale (HFS), and management's intent to sell certain mortgage-related assets and thereby reduce volatility in GMAC/Ally Financial’s financial results), GMAC/Ally Financial has made continued progress in reducing its legacy mortgage risk. The remaining mortgage assets are predominantly non-economic exposures and assets supporting its agency origination and servicing business.³¹⁸ As reflected in Figure 21 below, the total assets in GMAC/Ally Financial’s mortgage operations

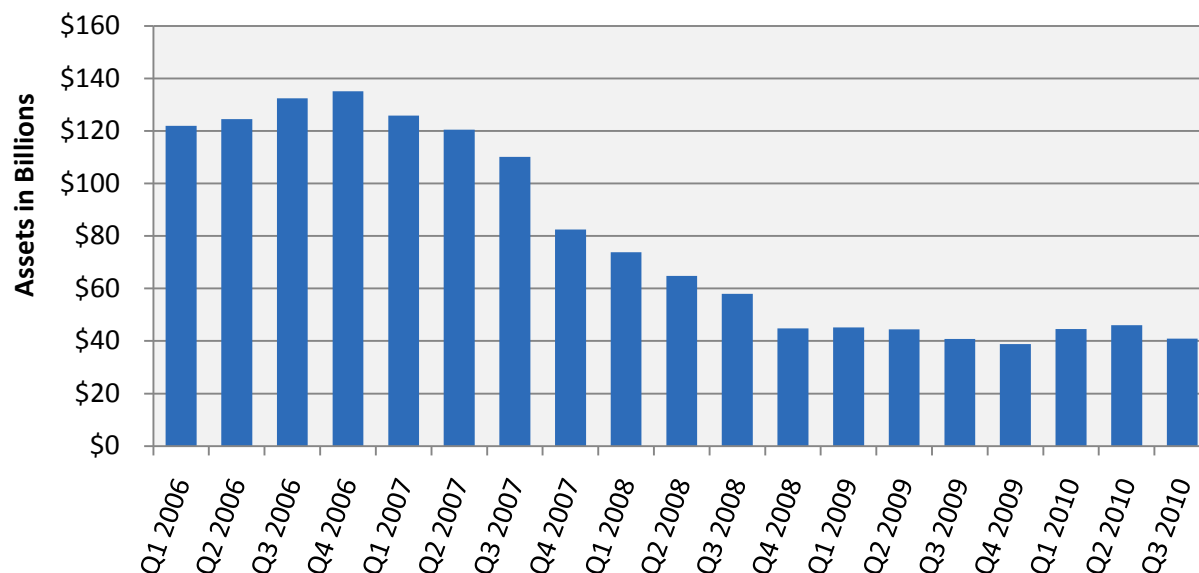
³¹⁶ Ally Financial Form 10-Q, *supra* note 297.

³¹⁷ Ally Financial 3Q10 Earnings Review, *supra* note 300, at 3.

³¹⁸ Ally Financial 3Q10 Earnings Review, *supra* note 300, at 8.

portfolio have declined from \$147 billion to \$41 billion (with \$20.5 billion remaining at ResCap) between 2006 and the end of the third quarter of 2010, while the slight uptick seen in asset values over the course of 2010 reflects the improved market backdrop for mortgage assets.³¹⁹

Figure 21: ResCap and Mortgage Operations Assets³²⁰



Ally Bank. With respect to increasing the importance of Ally Bank within the overall company’s funding structure, Ally Bank increased its deposit base by \$1.8 billion in the third quarter (a 29 percent increase, year-over-year) and achieved an 88 percent CD retention rate. Banking operations now comprise 29 percent of GMAC/Ally Financial’s total funding.³²¹ GMAC/Ally Financial expects that Ally Bank will continue to expand to represent a greater proportion of GMAC/Ally Financial’s funding over time.

Cost Reductions. GMAC/Ally Financial has also made progress with respect to its objective of reducing controllable expenses by approximately \$600 million during 2010. Its quarterly expenses for the third quarter of 2010 were \$146 million less than those of the prior year period.³²²

³¹⁹ Ally Financial 3Q10 Earnings Review, *supra* note 300, at 8.

³²⁰ Ally Financial Form 10-Q, *supra* note 297.

³²¹ Ally Financial Transcript: Q3 2010 Earnings Call, *supra* note 306.

³²² Ally Financial Transcript: Q3 2010 Earnings Call, *supra* note 306.

b. Government Exit Strategy

As discussed above, Treasury's outstanding investment in GMAC/Ally Financial is \$17.2 billion, which includes \$5.9 billion in MCPs, \$2.7 billion in TruPs, and 73.8 percent of the common equity of GMAC/Ally Financial.³²³

Treasury has identified four tasks with which GMAC/Ally Financial must continue to demonstrate progress in order for any government exit strategy to be successful.³²⁴ First, GMAC/Ally Financial must demonstrate consistent access to secured and unsecured funding sources. Second, GMAC/Ally Financial must demonstrate a consistent track record of profitability. Third, GMAC/Ally Financial must mitigate market concerns regarding the risk related to its mortgage operations. Finally, GMAC/Ally Financial must be able to demonstrate to equity investors that its bank franchise will continue to grow at an attractive rate.

As with Chrysler (and until recently with GM) Treasury's stake in GMAC/Ally Financial – common, TruPs, and MCPs³²⁵ – is fundamentally illiquid. Accordingly, Treasury's large common stock position in GMAC/Ally Financial, a non-public company, can be sold only in private sales unless and until GMAC/Ally Financial launches an IPO. Hence, the U.S. government's exit strategy for GMAC/Ally Financial relies primarily upon an IPO tentatively scheduled, per GMAC/Ally Financial management, for 2011. Treasury intends to sell its interests in a timely and orderly manner that “minimizes financial market and economic impact,” under what it determines to be appropriate market conditions.³²⁶ Consistent with its approach overall, Treasury's goal is to “dispose of the government's interests as soon as practicable

³²³ If Treasury were to convert its remaining \$5.9 billion of MCPs prior to an IPO at the same conversion terms used in the December 2010 conversion (i.e., same conversion price and conversion ratio), its common equity ownership percentage would increase to 81.7 percent.

³²⁴ Treasury conversations with Panel staff (Nov. 18, 2010).

³²⁵ TruPs have elements of both common equity and debt, are senior to all other common equity of GMAC/Ally Financial, and have no contractual restrictions on transfer (other than requirements that certificates bear certain legends and other similar restrictions set forth in the Declaration of Trust for the Trust), while MCPs, which are convertible at the Federal Reserve's option, would require conversion before they can be marketed. See Treasury Announces Restructuring of Commitment To GMAC, *supra* note 289; U.S. Department of the Treasury, *Decoder* (online at www.financialstability.gov/roadtostability/decoder.htm) (accessed Jan. 11, 2011); U.S. Department of the Treasury, *The Treasury Capital Assistance Program and the Supervisory Capital Assessment Program*, Joint Statement by Secretary of the Treasury Timothy F. Geithner, Chairman of the Board of Governors of the Federal Reserve System Ben S. Bernanke, Chairman of the Federal Deposit Insurance Corporation Sheila Bair, and Comptroller of the Currency John C. Dugan (May 6, 2009) (online at www.financialstability.gov/latest/tg91.html); GMAC, Inc., *Summary of Trust Preferred Securities and Warrant Terms* (May 21, 2009) (online at financialstability.gov/docs/AIFP/Posted%20to%20AIFP%20Website%20-%20GMAC%202009.pdf).

³²⁶ U.S. Department of the Treasury, *Office of Financial Stability Agency Financial Report: Fiscal Year 2009* at 40 (Dec. 10, 2009) (online at www.treasury.gov/about/organizational-structure/offices/Mgt/Documents/OFS%20AFR%2009_24.pdf) (hereinafter “OFS FY2009 Agency Financial Report”); Treasury conversations with Panel staff (Nov. 18, 2010).

consistent with EESA goals.”³²⁷ When asked at the Panel’s recent hearing about the timetable for a GMAC/Ally Financial IPO, Secretary Geithner stated that it would happen “[a]s quickly as we can do it,” emphasizing that Treasury is “going to move as quickly as we can to replace the government’s investments with private capital, take those firms public, and figure out a way to exit as quickly as we can. And we’re working very hard with the management and board of Ally to achieve that outcome.”³²⁸ While noting that he does not know how soon the IPO will happen, Secretary Geithner stated that “it’s going to be much sooner than we thought six months ago.”³²⁹

As it has done with its stake in Citigroup, and as it plans to do for its stake in AIG, Treasury recently converted \$5.5 billion of its MCP interest (nearly half of its preferred shares) into common stock.³³⁰ In addition to providing more clarity on the government’s equity stake (and potential shareholder dilution), Treasury’s conversion also helps GMAC/Ally Financial in two significant ways.³³¹ First, as a result of the conversion and the consequent dilution of the equity interest in GMAC/Ally Financial held by or on behalf of GM, the Federal Reserve has determined that Ally Bank and GM will no longer be treated as “affiliates” for purposes of Sections 23(a) and 23(b) of the Federal Reserve Act, which, among other things, impose limitations on transactions between banks and their affiliates.³³² Since Ally Bank is a source of

³²⁷ OFS FY2009 Agency Financial Report, *supra* note 326, at 44. Given that Treasury currently holds 73.8 percent of GMAC/Ally Financial’s common equity, it is likely to take one to two years following the IPO for Treasury to dispose completely of its ownership stake. Treasury conversations with Panel staff (Jan. 5, 2011).

³²⁸ Congressional Oversight Panel, Testimony of Timothy F. Geithner, secretary, U.S. Department of the Treasury, *Transcript: COP Hearing with Treasury Secretary Timothy Geithner* (Dec. 16, 2010) (online at cop.senate.gov/hearings/library/hearing-121610-geithner.cfm) (publication forthcoming).

³²⁹ *Id.*

³³⁰ Treasury Converts Ally Preferred Shares to Common Stock, *supra* note 288.

³³¹ Treasury conversations with Panel staff (Jan. 5, 2011).

³³² Transactions between Ally Bank and GM will, however, continue to be subject to regulation and examination by the bank’s primary federal regulator, the Federal Deposit Insurance Corporation. Ally Financial Inc., *Form 8-K* (Dec. 30, 2010) (online at www.sec.gov/Archives/edgar/data/40729/000119312510291571/d8k.htm).

After it became a bank holding company, GMAC/Ally Financial requested on two occasions that the Federal Reserve Board grant Ally Bank an exemption from Section 23(a) of the Federal Reserve Act. Section 23(a) restricts the amount of “covered transactions” between a bank and its affiliates. According to the Federal Reserve Board, the “twin purposes of section 23(a) are (i) to protect against a depository institution suffering losses in transactions with affiliates and (ii) to limit the ability of an institution to transfer to its affiliates the subsidy arising from the institution’s access to the federal safety net.” Board of Governors of the Federal Reserve System, *Transactions Between Member Banks and Their Affiliates*, 67 Fed. Reg. 76560, 76560 (Dec. 12, 2002) (final rule). The safety net consists of deposit insurance, the Federal Reserve’s discount window, and other banking regulatory tools designed to protect financial markets and participants.

Section 23(a), however, authorizes the Board to grant an exemption if it finds that doing so is in the public interest and consistent with the statute’s purposes. 12 U.S.C. § 371c(f)(2); 12 CFR § 223.43(a). On December 24, 2008, the Board granted GMAC/Ally Financial’s request for an exemption for retail loans, and on May 21, 2009, it granted GMAC/Ally Financial’s extended request for an exemption for both retail and dealer loans.

cheap financing in part because it is the beneficiary of federal deposit insurance, it is cheaper and more cost-effective for GMAC/Ally Financial to use its bank as the core piece of its auto finance operations. This Federal Reserve decision will allow GMAC/Ally Financial to use Ally Bank to fund an increasing amount of GM retail and dealer loans.³³³ Second (and, according to Treasury, the more important ramification), the conversion was intended to strengthen GMAC/Ally Financial's capital structure by increasing the proportion of equity in the form of common stock (and, therefore, conforming GMAC/Ally Financial's equity account to that more typical of a bank holding company and improving its leverage ratios). This factor largely determined the timing of Treasury's conversion, as Treasury determined it would be beneficial to allow the company to conform its capital structure to that of a more typical bank holding company before it starts to market itself to investors ahead of an upcoming IPO.³³⁴

The conversion helps GMAC/Ally Financial raise equity in the capital markets in the future, and improves GMAC/Ally Financial's ability to raise debt financing as loss-absorbing common equity increases.³³⁵ GMAC/Ally Financial's management is pleased with the timing and terms of Treasury's conversion and believes that there are no other steps the government would need to take before the company pursues an IPO. It remains too early, however, to speculate on the impact of this transaction on an IPO and Treasury's exit strategy because Treasury still retains \$5.9 billion in MCPs and \$2.7 billion in TruPS.³³⁶ At this time, Treasury's strategy for the disposition of those interests remains unclear.

For further details and discussion concerning Section 23(a) of the Federal Reserve Act and GMAC/Ally Financial's receipt of Section 23(a) waivers, see March 2010 Oversight Report, *supra* note 22, at 23-25.

³³³ In the company's view, the Section 23(a) limitations were impacting their business with GM. GMAC/Ally Financial conversations with Panel staff (Jan. 5, 2011).

³³⁴ In addition to seeking an improved capital structure prior to the company's efforts to market itself to investors, Treasury also stated that were other factors that influenced the timing of its December 2010 conversion. First, by year-end 2010, GMAC/Ally Financial had demonstrated a track record of overall profitability for three consecutive quarters. Second, GMAC/Ally Financial made headway in reducing the risk in its mortgage portfolio during 2010. By year-end 2010, GMAC/Ally Financial had entered into settlements with Fannie Mae and Freddie Mac to resolve potential repurchase exposure related to mortgage loans sold to the GSEs. In addition, the company sold its European mortgage operations, representing approximately \$11.0 billion of assets. Treasury conversations with Panel staff (Jan. 5, 2011).

³³⁵ According to JPMorgan Chase, if Treasury converts its GMAC/Ally Financial preferred stake into common equity, GMAC/Ally Financial should be able to lower its leverage as preferred dividends could decline by \$1 billion. A conversion of some or all of Treasury's preferred stake into common equity should likely "further improve Ally's leverage ratios in the event of an IPO." J.P. Morgan, North America Credit Research, *Ally Financial Inc.: 3Q10 Preview* (Nov. 1, 2010) (hereinafter "Ally Financial 3Q10 Preview").

³³⁶ While investor confidence and interest in an IPO has presumably been increased because the recent conversion provides some reassurance to the markets that Treasury does not intend to retain its ownership stake in GMAC/Ally Financial over the long term, some investors might be hesitant to buy shares that could later be substantially diluted through a conversion by the government.

Alternatively, Treasury has noted that it would be impossible to rule out a sale of GMAC/Ally Financial.³³⁷ The company would entertain any bids that might come in, and Treasury, as the majority shareholder, would have a significant influence on any discussions and the decision on whether to accept such a bid.³³⁸ Treasury has stated, however, that only a small number of institutions could digest an acquisition of this magnitude, so this course of action appears less feasible than an IPO exit strategy.³³⁹

As part of its exit strategy, Treasury should ensure that legacy private sector stakeholders in GMAC/Ally Financial do not see any return until U.S. taxpayers recoup their entire investment.

c. Valuing GMAC/Ally Financial's Equity

Since GMAC/Ally Financial is a private company, and its business platform is unique, it is difficult to conduct a clear analysis of its current value. As comparables, Treasury currently uses for the GMAC/Ally Financial valuation 35 publicly traded companies across the bank, thrift, and specialty lender sectors.³⁴⁰ Through an analysis of the market performance of these comparables, by using the average price-to-book value for this imperfect peer group, it is possible to estimate a market capitalization for GMAC/Ally Financial.³⁴¹ During 2010, the 35 comparable firms traded between 102 and 132 percent of their book value. Applying this range of multiples to GMAC/Ally Financial – with a reported book value of \$21 billion as of the third quarter of 2010 – values the equity of the entire firm between \$21.4 billion and \$27.7 billion.³⁴² Hence, this methodology values the Treasury's 73.8 percent equity stake between \$15.8 billion

As part of the terms of Treasury's December 2010 conversion, GMAC/Ally Financial also agreed to assist Treasury in the sale of a portion of its holdings of TruPs on terms acceptable to Treasury and GMAC/Ally Financial as soon as practical, subject to certain conditions.

GMAC/Ally Financial's working assumption is that the company will redeem Treasury's remaining MCPs as part of the IPO, meaning that GMAC/Ally Financial will need to raise additional equity to pay back Treasury. GMAC/Ally Financial conversations with Panel staff (Jan. 5, 2011).

³³⁷ Treasury conversations with Panel staff (Nov. 18, 2010).

³³⁸ Treasury conversations with Panel staff (Nov. 18, 2010).

³³⁹ Treasury conversations with Panel staff (Nov. 18, 2010).

³⁴⁰ Treasury conversations with Panel staff (Jan. 10, 2011). Treasury requested that the identity of the 35 companies be withheld.

³⁴¹ The book value of a company, in this instance, is the difference between a company's assets and its liabilities. The market capitalization is broadly defined as the dollar value of a company.

³⁴² Bloomberg Data Service; SNL Financial. This analysis is based on GMAC/Ally Financial's third quarter 2010 total asset figure of \$173.2 billion, its total liabilities of \$152.2 billion and its implied book value, the difference between assets and liabilities, of \$21.0 billion. The analysis uses the price-to-book ratios of the 35 comparables and averages the results for each trading day for the full-year 2010. The implied trading ranges for the comparables are as follows: low estimate (102 percent), median estimate (113 percent), average estimate (114 percent), and high estimate (132 percent).

and \$20.4 billion.³⁴³ However, as noted, this is a crude yardstick given that GMAC/Ally Financial has a differentiated business model focused on the auto finance sector. Further, the company's book value calculation is likely to change before an IPO.

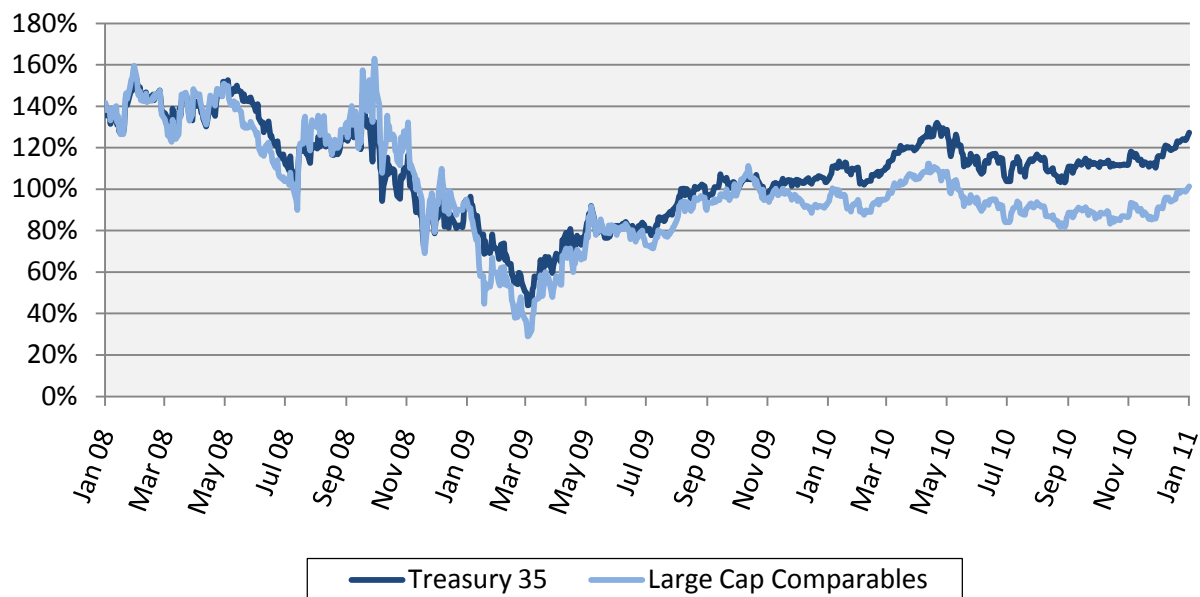
In conversations with Panel staff, Mr. Carpenter and other senior officers from GMAC/Ally Financial's management stated that its public offering, if priced at or near book value, could help facilitate the conversion of the Treasury's remaining MCPs, which would help the company ultimately repay the government in full.³⁴⁴ As Figure 22 below illustrates, the average price-to-book of Treasury's 35 comparables has recovered dramatically from its 2009 trough and has remained above 100 percent for the entirety of 2010. The performance of these comparables, which are used by Treasury's Office of Financial Supervision (OFS) to monitor the value of its investments,³⁴⁵ appears to be positive for GMAC/Ally Financial, signaling a market perception at this time that comparable companies are valued at a multiple high enough to provide for full Treasury repayment. While the comparables show a positive trend in the market valuation of their businesses, there is a clear disparity between the performance of the broader universe of Treasury comparables and that of a more specifically tailored peer group, which may provide a closer – but still imperfect – representation of the value of GMAC/Ally Financial. As demonstrated in Figure 22 below, the average price-to-book ratios of the nation's four largest banks (Bank of America, JPMorgan, Citigroup, and Wells Fargo), as well as CIT Group, a large specialty lender, have traded within a relatively narrow band over the past 12 months, underperforming a larger universe of financial firms. As of December 31, 2010, the price-to-book ratio of those five larger financial sector companies was 25 percent lower than that of the universe of smaller companies.

³⁴³ As discussed in Section B.1.d, Treasury has converted or exchanged \$9.4 billion (both a loan and preferred stock) of its investment in GMAC/Ally Financial for the 73.8 percent equity stake it currently holds, therefore valuing Treasury's common interests in the company above the amount it invested to receive those interests. This does not, however, account for the remaining debt instruments Treasury holds in the company, or the difficulty in liquidating such a large equity position.

³⁴⁴ GMAC/Ally Financial conversations with Panel staff (Dec. 6, 2010).

³⁴⁵ Treasury conversations with Panel staff (Nov. 18, 2010).

Figure 22: Price-to-Book Ratio of GMAC/Ally Financial Comparables³⁴⁶



3. Analysis of Intended Exit Strategy

a. The Timetable for Treasury's Exit Strategy

As discussed above, GMAC/Ally Financial has taken steps to mitigate some of the poor management decisions made in the past (most notably with respect to the company's substantial mortgage market exposure). As economic conditions have improved, the potential for Treasury to recoup its investment increased as market prices for capital transactions improved throughout 2010. In recent conversations with Panel staff, Treasury representatives have expressed confidence about the progress the company has made over the course of 2010 and the prospects for the taxpayers to be repaid pending the completion of an IPO.

Treasury pointed to three key developments that underscore their optimism.³⁴⁷

- First, they noted the improvements in the company's liquidity profile, with approximately \$30 billion of new secured and unsecured funding transactions and an increase in the number of deposits at Ally Bank.

³⁴⁶ Bloomberg Data Service. Note that Large Cap Comparables refers to Bank of America, Citigroup, Wells Fargo, JPMorgan Chase, and CIT Group.

³⁴⁷ Treasury conversations with Panel staff (Nov. 18, 2010).

- Second, they noted that the outlook for GMAC/Ally Financial has become more favorable as the valuations for financial companies have increased since the early part of 2010.³⁴⁸
- Finally, Treasury discussed how the company's core business has remained profitable for three consecutive quarters.

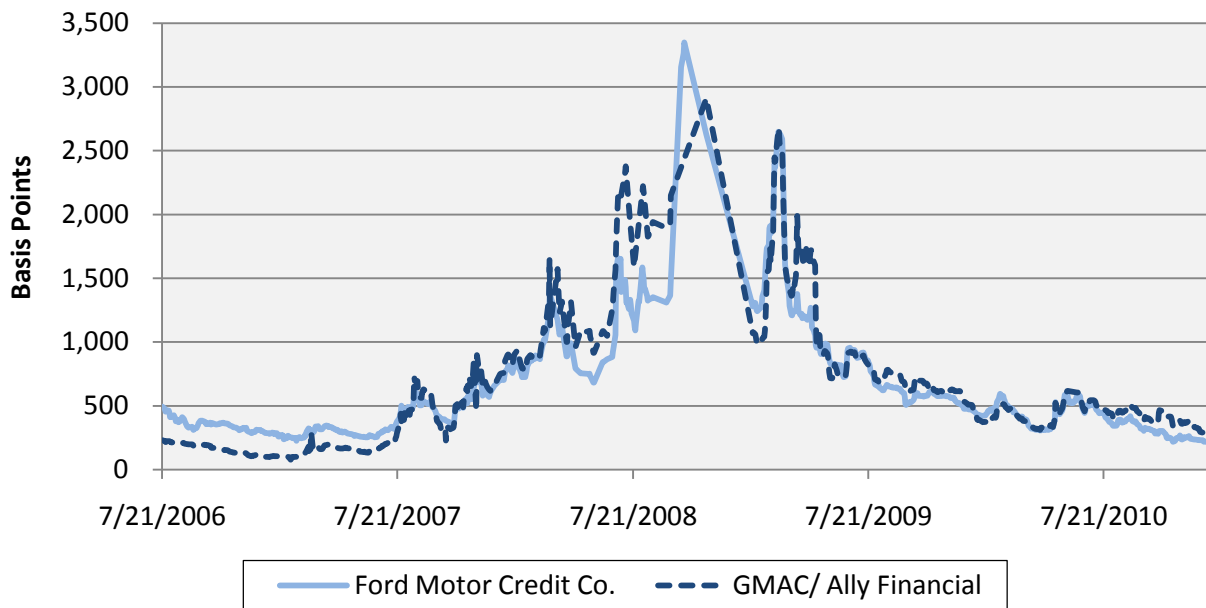
Treasury's cause for optimism on both the company's progress and an upcoming IPO, however, might be premature. As discussed above, the Panel notes that the valuations for financial companies have not improved as much as Treasury stated. It is likely that mortgage market valuations have had the biggest impact on GMAC/Ally Financial (largely as a result of the company's efforts to stem the bleeding at ResCap). While GMAC/Ally Financial has now had three consecutive quarters of overall profitability, this likely owes more to the improvements in the ResCap mortgage portfolio than to anything else.

Moreover, with respect to GMAC/Ally Financial's improved liquidity, an analysis of GMAC/Ally Financial's five-year credit default swap (CDS) spreads, a market indicator of perceived risk of a company's default, provides insight into the market's perception of the company's health. Using Ford Motor Credit (FMCC), a better capitalized company without the same degree of mortgage exposure, as a comparable provides a basis of comparison. The movement in GMAC/Ally Financial's CDS spread illustrates the dramatic improvement in market sentiment towards the company following the announcement that the Treasury would provide assistance to the company on December 29, 2008. The 14.8 percent decline in GMAC/Ally Financial's CDS spread between December 30, 2010 and January 5, 2011, as compared to the 2.0 percent decline in Ford Motor Credit's CDS spread during the same period, further demonstrates the improvement in market opinion following Treasury's conversion of \$5.5 billion of preferred interests in GMAC/Ally Financial into common stock.³⁴⁹ However, the current low spreads on its CDS, and its position relative to Ford Motor Credit – a company with a stronger balance sheet – show that GMAC/Ally Financial is apparently still benefitting from the support provided by Treasury as well as a market belief that the support will remain intact for the foreseeable future (which helps it secure funding at a lower cost).

³⁴⁸ Noting that although there is no company that is a perfect match against which to measure GMAC/Ally Financial's prospects, Treasury is nonetheless pleased with the general improvements in valuation of companies that are at least somewhat comparable to GMAC/Ally Financial. Treasury conversations with Panel staff (Nov. 18, 2010).

³⁴⁹ On the day prior to the announcement – December 29, 2010 – GMAC/Ally Financial's 5-year CDS spread was 270.9 basis points and Ford Motor Credit's was 218.5 basis points. On January 5, 2011, these metrics were 230.8 and 214.1 basis point, respectively. Bloomberg Data Service.

Figure 23: Credit Default Spreads on GMAC/Ally Financial and Ford Motor Credit³⁵⁰



b. Key Variables/Risks Going Forward that Might Impact the Exit Strategy and Government Returns

As with its ownership stakes in GM and Chrysler, there are certain variables and risks associated with Treasury's ability to divest its ownership stake in GMAC/Ally Financial successfully. As detailed below, the exit strategy timetable for GMAC/Ally Financial is somewhat complicated because the company's outlook is tied substantially to two key sectors – the auto industry and mortgage market – and the outlook for both remains uncertain. A successful exit strategy will, however, continue to depend upon positive – and improving – earnings as well as greater clarity about the company's medium-term strategy to grow Ally Bank, manage the GM relationship, maintain a mortgage portfolio with a more conservative risk/reward calculus, and seize other growth opportunities. Since a public offering is the most likely method for recovery of taxpayers' money, if GMAC/Ally Financial experiences delays or obstacles in accessing the equity capital markets, this will prolong Treasury's involvement as a shareholder and could potentially impact GMAC/Ally Financial's ability to repay its government assistance.

³⁵⁰ Bloomberg Data Service.

i. Performance of U.S. Auto Retail Market

Given how the largest percentage of GMAC/Ally Financial's net revenue during the third quarter of 2010 was related to North American auto finance, GMAC/Ally Financial faces the classic monoline concentration risk – it is a company that focuses primarily on operating in one specific financial area. The company's viability and future profitability are, therefore, intimately tied to the performance of the U.S. retail auto market.³⁵¹

On one hand, GMAC/Ally Financial's efforts to increase lending to consumers with super-prime and prime credit ratings (while reducing its near-prime and non-prime exposures), as discussed above, have resulted in higher quality originations that will likely minimize the risk of delinquencies and necessitate lower loss provisions (at least in the short term). Additionally, it might be at least somewhat prudent for a company to have such a disproportionate exposure to the auto finance business, since this asset class category is very attractive from a risk point of view, and has been one of the most resilient asset classes in the banking business.

On the other hand, however, the global auto industry is highly cyclical and sensitive to changes in consumer sentiment, employment, gasoline prices, interest rates, and general economic activity.³⁵² GMAC/Ally Financial's focus on this sector – and its continued close relationships with GM and Chrysler – concentrates the risk to GMAC/Ally Financial of any decline in the automotive industry. The success of GMAC/Ally Financial's auto finance franchise (and, in large part, that of GMAC/Ally Financial as a company), therefore, in large part depends upon credit quality and the pace of auto sales growth, which is tied to the rate of economic recovery, consumer sentiment, and the outlook for housing and employment in the United States. Further, GMAC/Ally Financial's prior major effort at diversification (albeit under an earlier management team) beyond the automotive industry, ResCap, was clearly not successful. While GMAC/Ally Financial has started to focus on building a presence in the used-car sector, where prices are currently at an all-time high,³⁵³ it is unclear what level of revenue this sector will generate for GMAC/Ally Financial going forward, but it will become less valuable if prices decline.

ii. Relationship with GM

GM recently acquired AmeriCredit, an auto finance company with total assets of \$10 billion, to meet customer demand for leasing and non-prime financing for GM vehicles.

³⁵¹ Treasury conversations with Panel staff (Nov. 18, 2010). *See also* Ally Financial Form 10-Q, *supra* note 297, at 80.

³⁵² *See* Section C.5, *supra*.

³⁵³ Decreased consumer confidence in the economy is driving more people to purchase used cars, putting increased pricing pressure on a limited supply of vehicles. Inventory is low due to the current shortage of lease returns and trade-ins for vehicles of this type.

GMAC/Ally Financial's auto finance franchise focuses on prime retail and dealer financing, while AmeriCredit focuses on subprime retail financing exclusively.³⁵⁴ If GM changes AmeriCredit's business model and expands its financing operations, however, GMAC/Ally Financial would lose some of its GM market share to AmeriCredit. While GMAC/Ally Financial continues to emphasize how it maintains an "important, mutually beneficial relationship" with GM,³⁵⁵ GM's acquisition of AmeriCredit raises the question as to whether GMAC/Ally Financial will continue to be uniquely positioned to serve GM dealers and customers.

GMAC/Ally Financial's current relationship with GM is shaped by the shared historical relationship between the two entities since 1919. Until 2006, GMAC/Ally Financial was a wholly owned subsidiary of GM, functioning as GM's captive financing arm with the interests of both entities very closely aligned. As part of the 2006 sale, GMAC/Ally Financial and GM entered into several service agreements that "codified the mutually beneficial historic relationship between the companies."³⁵⁶ One of these agreements was the United States Consumer Financing Services Agreement (USCFSA), which provided that GM would use GMAC/Ally Financial exclusively whenever it offered vehicle financing and leasing incentives to customers.³⁵⁷ The parties agreed to maintain this relationship for 10 years. As consideration for this arrangement, GMAC/Ally Financial pays GM an annual exclusivity fee and agrees to meet specified targets with respect to consumer retail and lease financings of new GM vehicles. On December 29, 2008, after the Federal Reserve approved GMAC/Ally Financial's application to become a bank holding company, GM and GMAC/Ally Financial agreed to modify certain terms and conditions of the USCFSA.³⁵⁸ The modified USCFSA is in effect until December 24, 2013, but certain provisions terminate in January 2011.³⁵⁹ In addition, the subvention

³⁵⁴ Ally Financial 2Q10 Earnings Review, *supra* note 308, at 7. However, there is room for competition between the two in the leasing market, as the economy recovers, and some lease programs may be more suitable to a captive financier.

³⁵⁵ Ally Financial 2Q10 Earnings Review, *supra* note 308, at 7.

³⁵⁶ GMAC LLC, *Form 10-K for the Fiscal Year Ended December 31, 2008*, at 40 (Feb. 27, 2009) (online at www.sec.gov/Archives/edgar/data/40729/000119312509039567/d10k.htm) (hereinafter "GMAC Form 10-K").

³⁵⁷ *Id.* at 40.

³⁵⁸ *Id.* at 40.

³⁵⁹ *Id.* at 40. These amendments include the following:

- (1) The parties agreed that for a two-year period (until 2011), GM could offer retail financing incentive programs through an alternative financing source under certain conditions. Following that two-year period, GM would be able to offer any incentive programs on a graduated basis through alternative financing sources, along with GMAC/Ally Financial, provided that the pricing satisfies certain requirements.
- (2) The parties agreed to eliminate the requirement that GMAC/Ally Financial satisfy certain lending and underwriting targets in order to remain the exclusive underwriter of special promotional loan programs

agreements between GM and GMAC/Ally Financial have been continued through these contractual agreements.³⁶⁰

These contractual modifications mean that GMAC/Ally Financial will be engaging in a sizeable renegotiation with its biggest operating partner in the near future. While the USCFSFA relates mainly to subvented GM financing, GMAC/Ally Financial's share of which is proportionately less important now than what it once was, it is likely that before GMAC/Ally Financial can pursue an IPO, potential investors would like further clarification on GMAC/Ally Financial's relationship with GM going forward, especially given how critical GMAC/Ally Financial's relationships with GM dealers and customers are to its balance sheet.³⁶¹ This may include a renegotiated operating agreement between GM and GMAC/Ally Financial that would explicitly prevent AmeriCredit from overtaking GMAC/Ally Financial's floorplan and consumer financing, at least for the indefinite future.³⁶²

While GM's AmeriCredit acquisition does not pose a near-term threat to GMAC/Ally Financial's business, it could represent a longer-term strategy by GM to grow its own captive financing arm organically.³⁶³ GM currently benefits from its relationship with GMAC/Ally Financial because Ally Bank (as a federally insured depository institution) has a lower cost of capital than captive finance companies such as Ford Motor Credit, leading some industry analysts to conclude that this remains an excellent arrangement for GM.³⁶⁴ As the Panel stated in its March 2010 report, however, "it would not be unreasonable for a potential equity investor to question whether [GMAC/Ally Financial]'s relationship with GM is designed to serve GM's

offered by GM. GM offered GMAC/Ally Financial the right to finance these special programs for retail consumers for a five-year period.

- (3) The parties eliminated the exclusivity arrangement with respect to promotional programs for GM dealers, and this change will be phased out over time.
- (4) The parties agreed that GMAC/Ally Financial would no longer have an obligation to lend to a particular wholesale or retail customer, provide operating lease financing products, or be required to pay a penalty or receive lower payments or incentives for refusing to lend to a customer or for failing to satisfy individual or aggregate lending targets. GMAC/Ally Financial can also make loans to any third party and will use its own underwriting standards in making loans, including GM-related loans.

³⁶⁰ See, e.g., GMAC Form 10-K, *supra* note 356, at 162; GMAC, Inc., *Form 10-K for the Fiscal Year Ended December 31, 2009*, at 43-44 (Mar. 1, 2010) (online at www.sec.gov/Archives/edgar/data/40729/000119312510043252/d10k.htm) (hereinafter "GMAC Form 10-K").

³⁶¹ Industry analyst conversations with Panel staff (Nov. 16, 2010).

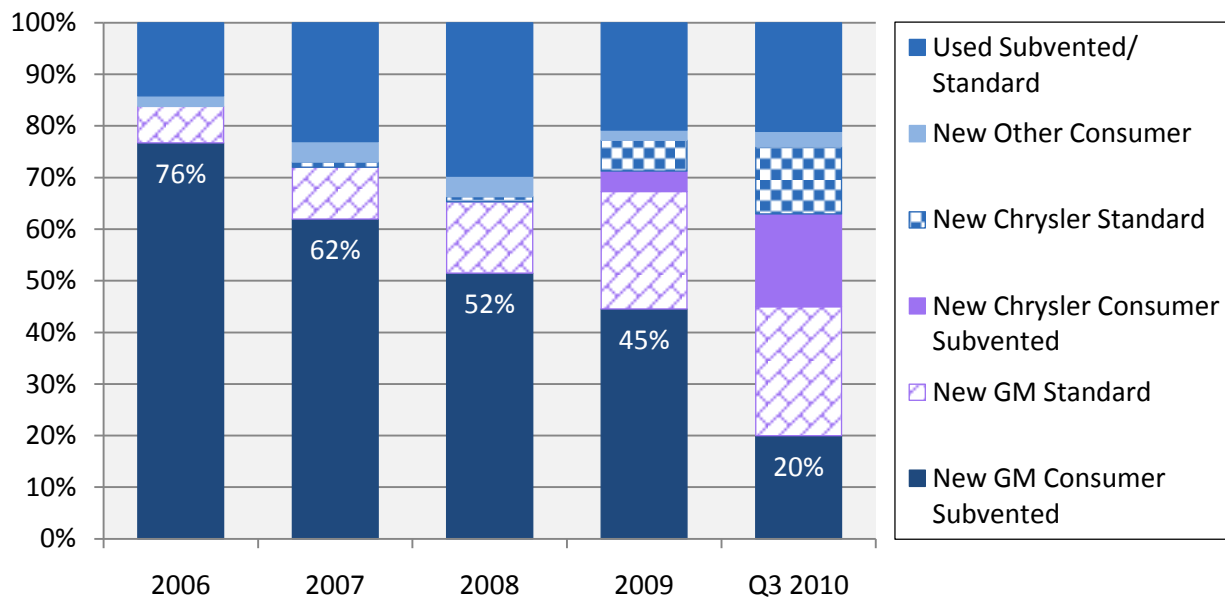
³⁶² Industry analyst conversations with Panel staff (Nov. 16, 2010).

³⁶³ Although a substantial loss in GM business would have a meaningful impact on GMAC/Ally Financial's ongoing viability because the company's auto finance platform has not yet undergone sufficient diversification, it is likely that an unwinding of GM's relationship with GMAC/Ally Financial would happen over the long term, which would allow for the impact of the loss to be spread over a period of time.

³⁶⁴ Industry analyst conversations with Panel staff (Dec. 3, 2010).

rather than [GMAC/Ally Financial]’s shareholders’ interests.”³⁶⁵ In that context, GMAC/Ally Financial’s non-captive status subjects it to greater risk from GM: the relationship could sour, and GMAC/Ally Financial could lose its preferred provider role, and/or GM could, in fact, form its own, new captive finance company.³⁶⁶ If any of this were to happen, investor enthusiasm for a potential GMAC/Ally Financial IPO might be dampened, absent any evidence of other tangible growth opportunities. GMAC/Ally Financial has become the preferred finance company in the United States for Saab, Suzuki, Thor Industries (the world’s largest manufacturer of recreational vehicles), and Fiat over the course of 2010, but it is unclear how much business these relationships will generate for GMAC/Ally Financial going forward, and it appears that current revenue projections are fairly small. An IPO requires a prospective investor to believe either that GMAC/Ally Financial’s relationship with GM is sufficiently stable to sustain it as a separate company, or that GMAC/Ally Financial can expand adequately (through growth strategies for Ally Bank, Chrysler, other automotive companies, the used car market, or otherwise) to handle the risk of a reduced relationship with GM. The public equity markets have never had an opportunity to evaluate this question, and their assessment remains unknown.

Figure 24: GMAC/Ally Financial’s Auto Finance Loan Originations through December 20, 2010 (Percent of Units Originated)³⁶⁷



³⁶⁵ March 2010 Oversight Report, *supra* note 22, at 108-109.

³⁶⁶ The Panel also notes that GM might be further incentivized to form its own new captive finance company (or build AmeriCredit’s platform) because it is beneficial to have a finance arm particularly during very tough markets, as it provides some protection if other lenders walk away. Industry analyst conversations with Panel staff (Nov. 10, 2010).

³⁶⁷ Data from GMAC/Ally Financial.

iii. Turmoil in the Mortgage Market

GMAC Mortgage, a subsidiary of GMAC/Ally Financial, is the fifth largest U.S. mortgage servicer.³⁶⁸ As the Panel discussed in its November 2010 report, in the fall of 2010, reports began to surface of problems with foreclosure documentation.³⁶⁹ GMAC Mortgage announced on September 24, 2010 that it had identified irregularities in its foreclosure document procedures, which have raised questions about the validity of some of its foreclosures. GMAC/Ally Financial temporarily suspended evictions and foreclosure sales by GMAC Mortgage in 23 states during September after an employee testified that he signed foreclosure documents without ensuring their accuracy.

These developments raise two important issues: (1) the validity of some of GMAC Mortgage's foreclosures given the irregularities in its documentation procedures; and (2) the amount of exposure GMAC/Ally Financial could face from mortgage repurchases.

With respect to the first issue, as of November 3, 2010, GMAC Mortgage has reviewed 9,523 foreclosure affidavits and, where necessary, has re-executed some.³⁷⁰ Fewer than 15,500 additional affidavits are being reviewed and, when necessary, will be remediated.³⁷¹ According to GMAC/Ally Financial, the review has shown "no evidence of inappropriate foreclosure to date," and GMAC Mortgage "is confident that the decisions behind foreclosure proceedings were sound."³⁷² Corrective actions will be taken as necessary, according to the company, and company management expects that the vast majority of cases will be remediated over the next few months.

With respect to the second issue, GMAC Mortgage, like other underwriters/issuers, is required to make representations and warranties about the mortgage loans to the purchaser or securitization trust when selling mortgage loans through whole-loan sales or securitizations. This may require it to repurchase mortgage loans as a result of borrower fraud or if a payment default occurs on a mortgage loan shortly after its origination. Over the course of 2010,

³⁶⁸ House Financial Services, Subcommittee on Housing and Community Opportunity, Written Testimony of Thomas Marano, chief executive officer, Mortgage Operations, Ally Financial Inc., *Robo-Signing, Chain of Title, Loss Mitigation, and Other Issues in Mortgage Servicing*, at 1 (Nov. 18, 2010) (online at financialservices.house.gov/Media/file/hearings/111/Marano111810.pdf) (hereinafter "Thomas Marano Testimony") (stating that GMAC Mortgage "is currently the fifth largest residential mortgage servicer in the United States ...").

³⁶⁹ See Congressional Oversight Panel, *November Oversight Report: Examining the Consequences of Mortgages Irregularities for Financial Stability and Foreclosure Mitigation*, at 7-8 (Nov. 16, 2010) (online at cop.senate.gov/documents/cop-111610-report.pdf) (hereinafter "November 2010 Oversight Report").

³⁷⁰ Ally Financial 3Q10 Earnings Review, *supra* note 300, at 10.

³⁷¹ Ally Financial 3Q10 Earnings Review, *supra* note 300, at 10.

³⁷² Ally Financial 3Q10 Earnings Review, *supra* note 300, at 10. See also Thomas Marano Testimony, *supra* note 368, at 1.

GMAC/Ally Financial entered into settlements with Fannie Mae and Freddie Mac, under which it made one-time payments to Fannie Mae and Freddie Mac for the release of repurchase obligations relating to mortgage loans sold to the GSEs.³⁷³ This means that its remaining exposure is to potential repurchase obligations related to mortgage loans sold to private institutions to be securitized. Estimates of potential repurchase claims are subject to change as GMAC Mortgage provides more clarity on its exposure. Some analysts see GMAC/Ally Financial as a “well capitalized company with considerable liquidity and earnings power,” despite the risk of negative publicity surrounding mortgage uncertainties.³⁷⁴ Furthermore, while the company’s current repurchase reserve might not be sufficient to resolve all future claims, these issues will likely take years to settle, which would thereby spread the impact of the liability over a period of time and mitigate capital outflows.³⁷⁵ The repurchase exposure is the primary concern of both GMAC/Ally Financial’s management and investors, rather than the foreclosure irregularities issue.³⁷⁶ Because the 2009 stress tests considered the ability of financial institutions to remain well-capitalized only until the end of 2010, however, the stress tests offer limited reassurance that major bank holding companies like GMAC/Ally Financial will remain

³⁷³ In March 2010, GMAC/Ally Financial’s subsidiaries, GMAC Mortgage and Residential Funding Company, LLC, made a one-time payment to Freddie Mac for the release of repurchase obligations relating to mortgage loans sold to Freddie Mac prior to January 1, 2009. The release does not cover any of GMAC/Ally Financial’s potential repurchase obligations related to mortgage loans sold to Freddie Mac after January 1, 2009 or GMAC/Ally Financial’s potential repurchase obligations related to “private-label” mortgage securities (mortgage loans sold to private institutions to be securitized). This agreement also does not cover any of GMAC/Ally Financial’s obligations with respect to loans where its subsidiary Ally Bank is the owner of the servicing. Ally Financial Form 10-Q, *supra* note 297, at 77.

On December 27, 2010, GMAC/Ally Financial announced that ResCap and certain ResCap subsidiaries reached a settlement with Fannie Mae for the release of repurchase obligations relating to mortgage loans sold to Freddie Mac. The agreement covers loans serviced by GMAC Mortgage on behalf of Fannie Mae prior to June 30, 2010, and all mortgage-backed securities that Fannie Mae purchased prior to the settlement, including private-label securities. “The settlement was for approximately \$462 million and releases ResCap and its subsidiaries from liability related to approximately \$292 billion of original unpaid principal balance (and \$84 billion of current UPB) on these loans.” ResCap and Fannie Mae also reached an arrangement with respect to “ResCap’s payment of mortgage insurance proceeds where mortgage insurance coverage is rescinded or canceled.” This agreement does not cover other contractual obligations that ResCap has with Fannie Mae (e.g., those that may arise in connection with mortgage servicing), and excludes Ally Bank. Ally Financial Inc., *Ally Financial’s Mortgage Subsidiaries Reach Agreement With Fannie Mae on Repurchase Exposure* (Dec. 27, 2010) (online at media.ally.com/index.php?s=43&item=437).

³⁷⁴ Ally Financial 3Q10 Preview, *supra* note 335. Based upon assumptions of delinquency rates, put-back rates, put-back acceptance, and loss severity on the \$310.6 billion of loans originated by GMAC/Ally Financial during 2006-2008, JPMorgan Chase estimated in November 2010 that mortgage put-backs will cost the company \$1.4 billion of incremental capital. While this potential magnitude is significant, JPMorgan Chase believes GMAC/Ally Financial can “easily fund potential liabilities” with its existing liquidity or estimated 2010 net income and notes that the firm increased its mortgage repurchase reserve by \$1 billion in 2009 to end the year with a \$1.2 billion reserve.

³⁷⁵ Ally Financial 3Q10 Preview, *supra* note 335, at 2.

³⁷⁶ GMAC/Ally Financial conversations with Panel staff (Dec. 6, 2010); Industry analyst conversations with Panel staff (Dec. 1, 2010).

well-capitalized in the months and years to come, especially if the economic recovery remains sluggish. Even the prospect of such losses could damage GMAC/Ally Financial's reputation, its ability to raise capital, and its ability to pursue an IPO.³⁷⁷ If the company is unable to assuage investor concerns on this front, the timing of a potential IPO could be impacted.

In conversations with Panel staff, Treasury representatives noted that they believe GMAC/Ally Financial's exposure is manageable, and asserted that the risk profile of GMAC Mortgage is no worse or better than that of its peers.³⁷⁸ In addition, they stated that they have not dictated GMAC/Ally Financial's response to the foreclosure irregularities issue, but have handled the issue in a "routine" manner, consistent with its core principles as a "reluctant shareholder."³⁷⁹ According to GMAC/Ally Financial, however, Mr. Carpenter has met with Treasury Acting Assistant Secretary for Financial Stability Tim Massad regularly on this topic.³⁸⁰ While GMAC/Ally Financial management concurs that Treasury has not told the company how to respond to this issue, they note that Treasury remains a "very concerned shareholder" on this topic.³⁸¹

iv. Has GMAC/Ally Financial Sufficiently Reduced the Risk in its Mortgage Portfolio?

As discussed above, one of GMAC/Ally Financial's core goals has been to review the mortgage strategy and reduce the risk in its mortgage operations business. During the earnings call for the third quarter of 2010 (and in conversations with Panel staff), Mr. Carpenter stated that the company has "effectively de-risked the mortgage business."³⁸² While ResCap was again profitable in the third quarter of 2010 (with net income of \$38 million) and has required no additional capital or liquidity support, there continues to be a risk that ResCap will not be able to meet its debt service obligations.³⁸³ Although GMAC/Ally Financial's mortgage operations proved to be a poor strategy in the past, its plans to retain and expand its mortgage

³⁷⁷ Moody's Investors Service, *Issuer Comment: Problems at GMAC Servicing and Ally Financial Are Credit Negative* (extracted from *Moody's Weekly Credit Outlook*) (Sept. 27, 2010) (noting that GMAC/Ally Financial may need to increase its marketing expense to help offset or overcome the reputational damage associated with these developments).

³⁷⁸ Treasury conversations with Panel staff (Nov. 18, 2010).

³⁷⁹ Treasury conversations with Panel staff (Dec. 21, 2010).

³⁸⁰ These meetings have been requested by both GMAC/Ally Financial and Treasury. GMAC/Ally Financial conversations with Panel staff (Dec. 14, 2010).

The Panel also notes the company's recent testimony on this topic. *See, e.g.*, Thomas Marano Testimony, *supra* note 368.

³⁸¹ GMAC/Ally Financial conversations with Panel staff (Dec. 13, 2010).

³⁸² Ally Financial Transcript: Q3 2010 Earnings Call, *supra* note 306; Ally Financial 3Q10 Earnings Review, *supra* note 300, at 40.

³⁸³ Ally Financial Form 10-Q, *supra* note 297, at 10.

servicing/origination business (rather than selling off the entire ResCap business) are much less balance sheet intensive and lower risk than mortgage originations. It remains unclear whether GMAC/Ally Financial has reduced the risk in its mortgage portfolio completely, in large part because the company's outstanding contingent liabilities (including repurchase claims) and any remaining legal exposure could present risks going forward.³⁸⁴

v. Maintaining a Robust Liquidity Profile

As noted above, GMAC/Ally Financial faces multiple impediments to profitability, especially amid a fragile economic and market recovery. At the parent company level, GMAC/Ally Financial must maintain sufficient liquidity to support its non-bank asset originations, debt maturities, interest and dividends, and investments/loans to operating subsidiaries. GMAC/Ally Financial must continue to demonstrate unfettered and non-government-sponsored access to the third-party credit markets, including wholesale financing markets, and must continue to make headway in reducing its cost of capital.

A key challenge facing GMAC/Ally Financial will be maintaining robust liquidity. GMAC/Ally Financial suffers from significant amounts of maturing debt, as reflected below in Figure 25. GMAC/Ally Financial has \$21.5 billion coming due in 2011 and \$19.8 billion in 2012. In the second quarter of 2009, the company received approval to issue debt up to \$7.4 billion under the FDIC's Temporary Liquidity Guarantee Program (TLGP).³⁸⁵ Pursuant to the program, it issued \$4.5 billion of unsecured long-term debt, which included \$3.5 billion of senior fixed-rate notes and \$1.0 billion of senior floating rate notes. Both types of notes are due in December 2012.³⁸⁶ On October 30, 2009, GMAC/Ally Financial issued an additional \$2.9 billion of unsecured debt in the form of senior fixed-rate notes. These notes are due in October 2012.³⁸⁷ If GMAC/Ally Financial is unable to refinance at affordable rates or has insufficient cash to cover its maturing obligations, it may face even higher borrowing costs, possibly resulting in renewed liquidity problems.

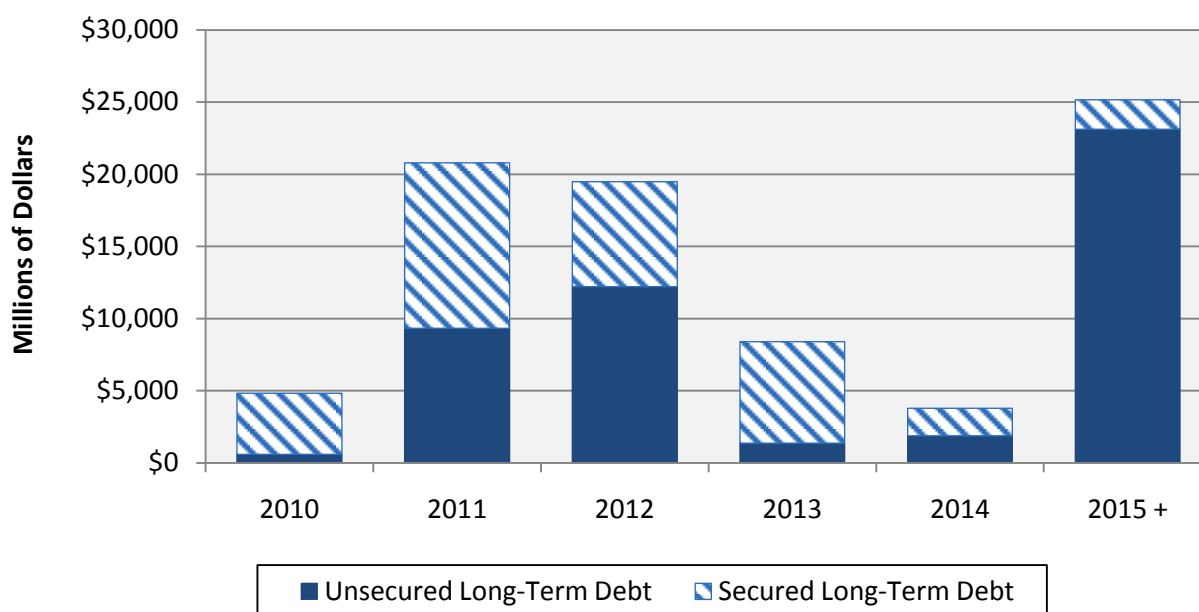
³⁸⁴ Industry analyst conversations with Panel staff (Dec. 1, 2010).

³⁸⁵ GMAC Form 10-K, *supra* note 360, at 83.

³⁸⁶ GMAC Form 10-K, *supra* note 360, at 83.

³⁸⁷ GMAC Form 10-K, *supra* note 360, at 83.

Figure 25: Long-Term Debt Maturities as of September 30, 2010 – Ally Financial (excluding ResCap)³⁸⁸



vi. Ally Bank’s Strategy is a Work in Progress

As discussed above, Ally Bank provides GMAC/Ally Financial with a source of liquidity in both the retail and wholesale markets. Ally Bank also provides diversified funding (including deposits) for the automotive financing unit. This strategy has several components. GMAC/Ally Financial is simultaneously integrating Ally Bank with the auto lending business while expanding its retail banking offerings. GMAC/Ally Financial is aware that its combination of retail online banking and wholesale automotive financial services is untested but believes that it offers good value to Ally Bank’s customers while simultaneously involving Ally Bank effectively in the automotive lending side of the business.

GMAC/Ally Financial has been engaged in an aggressive marketing campaign for Ally Bank. Among other things, Ally Bank has been attempting to interest depositors by offering CD rates that have been and remain among the highest available nationally.³⁸⁹ Some analysts also

³⁸⁸ Regarding ResCap long-term debt, \$716 million is set to mature in 2011, \$358 million is set to mature in 2012, \$1,236 million is set to mature in 2013, \$809 million is set to mature in 2014, and \$1,011 million is set to mature during and after 2015. There was no ResCap long-term debt scheduled to mature in 2010. These amounts exclude ResCap debt held by GMAC/Ally Financial and collateralized borrowings in securitized trusts. Ally Financial Form 10-Q, *supra* note 297, at 31.

³⁸⁹ Bankrate.com, *CD Investment Rates* (online at www.bankrate.com/cd.aspx) (accessed Jan. 11, 2011). This strategy has been politically contentious as regulators view unusually high rates as an indication of instability. For example, in the summer of 2009, Ally Bank’s rates were more than double the national average. This prompted

believe that there is long-term uncertainty with Ally Bank's funding strategy due to both the risks associated with changing its operational and funding model to one focused on banking and those risks associated with whether an internet banking platform can meet the funding requirements of a large-scale company such as GMAC/Ally Financial.³⁹⁰ In addition, since Ally Bank's current deposit mix is rate sensitive, GMAC/Ally Financial could be subject to some amount of volatility due to the potential for loss of customers and deposit amounts due to rate shifts.³⁹¹ In order to support Ally Bank's expansion and sustain its capital strength, the GMAC/Ally Financial parent company will "probably need to inject significant cash capital over the next few years."³⁹² The extent to which GMAC/Ally Financial will need to provide Ally Bank with cash infusions remains unclear.

Ultimately, Ally Bank appears to be both critical to GMAC/Ally Financial and is very much a work in progress. The Panel notes that Ally Bank may ultimately need to move toward a more traditional banking model (with a branch network) and broaden its footprint via other

the American Bankers Association (ABA) to write a letter of complaint to the FDIC and the FDIC to issue new regulations setting a variety of standards for the interest rates permissible for insured depository institutions that are not well capitalized. For further discussion concerning the controversy surrounding Ally Bank's interest rates and the viability of Ally Bank's strategy going forward, see March 2010 Oversight Report, *supra* note 22, at 105-107. See also Bankrate.com, *CD Investment Rates* (online at www.bankrate.com/funnel/cd-investments/cd-investment-results.aspx?local=false&tab=CD&prods=15&ic_id=CR_searchCDNational_cd_1yrCD_V1) (accessed Jan. 11, 2011).

³⁹⁰ Moody's Investors Service, Global Credit Research, *Liquidity Risk Assessment: Ally Financial Inc.*, at 1 (Oct. 15, 2010) (hereinafter "Moody's Liquidity Risk Assessment").

³⁹¹ *Id.* at 1. While Ally Bank has demonstrated strong CD retention rates, Moody's believes that "these deposits are rate sensitive and therefore less sticky than demand deposits offered through traditional branch networks."

Given the very limited product suite at Ally Bank, some analysts believe that Ally Bank's deposits function more like brokered deposits (or "hot money") than core deposits at more conventional banks. Industry analyst conversations with Panel staff (Dec. 1, 2010). Brokered deposits are large deposits that deposit brokers shop among depository institutions looking for high rates and are usually viewed as risky for the depository institution. They are short-term investments, which have been associated with high rates of bank failures. See Mindy West and Chris Newbury, *Brokered and High-Cost Deposits*, FDIC Interagency Minority Depository Institutions National Conference Presentation, at 33, 40 (July 2009) (online at www.fdic.gov/regulations/resources/minority/events/interagency2009/Presentations/Brokered.pdf). See also L.J. Davis, *Chronicle of a Debacle Foretold*, Harper's Magazine, at 53-54 (Sept. 1990).

One analyst considers Ally Bank's proportion of brokered deposits and lack of restrictions on deposit withdrawals to be a warning sign of bank instability. See Congressional Oversight Panel, Written Testimony of Christopher Whalen, senior vice president and managing director, Institutional Risk Analytics, *COP Hearing on GMAC Financial Services*, at 18 (Feb. 25, 2010) (online at cop.senate.gov/documents/testimony-022510-whelen.pdf); Congressional Oversight Panel, Testimony of Christopher Whalen, senior vice president and managing director, Institutional Risk Analytics, *Transcript: COP Hearing on GMAC Financial Services*, at 91-98 (Feb. 25, 2010) (online at frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_senate_hearings&docid=f:56723.pdf).

³⁹² Moody's Liquidity Risk Assessment, *supra* note 390, at 1.

offerings. These possibilities, however, are not on the immediate horizon and would be impractical for the company to accomplish before the government's exit.³⁹³

G. Auto Supplier Support Program

1. Background

Generally, automotive suppliers ship parts to auto manufacturers and receive payment 45-60 days later. Under normal market conditions, suppliers can either sell or borrow against the payment commitments, known as receivables. In early 2009, the downturn in the economy and uncertainty regarding the future of GM and Chrysler resulted in tightening credit for auto suppliers. Banks stopped providing credit against supplier receivables. On March 19, 2009, in order to address this situation and to provide overall structural support for the auto industry, Treasury announced the creation of the Auto Supplier Support Program (ASSP).³⁹⁴

2. TARP Intervention

When the ASSP was created, up to \$5 billion in financing was made available through the TARP. Participating suppliers could access a government-backed guarantee of eligible receivables or sell receivables into the program. A fee was charged for participation in the ASSP, and receivables were sold into the program at a discount.³⁹⁵ While all domestic automotive manufacturers were eligible for the program, only Chrysler and GM participated.

Two special-purpose vehicles (SPVs), GM Supplier Receivables LLC and Chrysler Receivables SPV LLC, were created to administer the program for GM and Chrysler, respectively. Originally, \$3.5 billion was committed to the GM SPV, and \$1.5 billion was dedicated to the Chrysler counterpart. On July 1, 2009, Treasury reduced the total amount available under the ASSP to \$3.5 billion, with \$2.5 billion being reserved for GM's SPV and \$1 billion for the Chrysler SPV. As Figure 26 details, through the life of the program, only \$413.1 million of the \$3.5 billion in available funding was drawn down. Treasury's commitment to lend to the SPVs terminated in April 2010.³⁹⁶ All funds outstanding under the ASSP were repaid, and

³⁹³ GMAC/Ally Financial conversations with Panel staff (Dec. 6, 2010).

³⁹⁴ U.S. Department of the Treasury, *Auto Supplier Support Program: Stabilizing the Auto Industry at a Time of Crisis* (Mar. 19, 2009) (online at www.treasury.gov/press-center/press-releases/Documents/supplier_support_program_3_18.pdf).

³⁹⁵ The credit insurance cost participants 2 percent, while selling receivables into the program carried a 3 percent cost. U.S. Department of Commerce, Office of Transportation and Machinery, *On the Road: U.S. Automotive Parts Industry Annual Assessment*, at 19 (2010) (online at trade.gov/wcm/groups/internet/documents/article/auto_reports_parts2010.pdf).

³⁹⁶ The GM SPV closed on April 5, 2010, and the Chrysler SPV closed on April 7, 2010. Treasury Transactions Report, *supra* note 24, at 19.

Treasury earned a total of \$14.9 million in interest as well as \$101.1 million in proceeds from additional notes.³⁹⁷

Figure 26: Auto Supplier Support Program Metrics (*millions of dollars*)

	Original Commitment	Adjusted Commitment	Amount Drawn Down	Interest Paid	Proceeds from Additional Notes
GM Receivables LLC	\$3,500	\$2,500	\$290.0	\$9.1	\$56.5
Chrysler Receivables SPV LLC	1,500	1,000	123.1	5.8	44.5
Total	\$5,000	\$3,500	\$413.1	\$14.9	\$101.1

3. Current Status of Auto Supplier Industry

Standard indicators appear to show a stabilization in the automotive supplier industry as industry-wide consolidation increases. While there were 62 automotive supplier bankruptcies in 2009, there were only 5 failures in 2010.³⁹⁸ Furthermore, the auto supplier industry’s capacity utilization rate, an indicator of the degree to which an enterprise uses its ability to produce, is currently 60.5 percent. While this figure is significantly higher than it was at its trough of 45.9 percent during the crisis, it remains notably lower than the pre-crisis level, when it was typically above 70 percent.³⁹⁹ This has led to ongoing consolidation of the supplier industry. Ford, GM, and Chrysler have announced reductions of 53, 30, and 50 percent, respectively, in their direct supply bases.⁴⁰⁰

³⁹⁷ The additional notes were financial instruments that Treasury took from the Chrysler and GM SPVs as part of their agreement to participate in the program; the notes provided Treasury the opportunity to recognize upside gains on its investments. As dictated in the legislation that created the TARP, the Emergency Economic Stabilization Act, financial instruments such as warrants were to be provided to Treasury in consideration for its investment in participating institutions. As the law states, instruments such as warrants, or additional debentures in the case of the ASSP, were created “to provide for reasonable participation by the Secretary, for the benefit of taxpayers, in equity appreciation in the case of a warrant or other equity security, or a reasonable interest rate premium, in the case of a debt instrument.” 12 U.S.C. § 5223(d)(2)(A)(i).

³⁹⁸ Data provided by the Original Equipment Suppliers Association in response to a Panel request (Nov. 30, 2010).

³⁹⁹ Data provided by the Original Equipment Suppliers Association in response to a Panel request (Jan. 7, 2011).

⁴⁰⁰ The State of the Supplier Industry, *supra* note 52, at 17. This measure is based on number of direct suppliers each manufacturer states it will use going forward. For example, Ford has stated that it will have 750 direct suppliers in the future as compared to the 1,600 it currently relies upon.

H. Analysis of Treasury’s Interaction with all Three Companies in Light of Government’s Objectives

1. Summary of Principles upon which Government Says it Will Conduct its Involvement in Private Companies

In numerous hearings, reports, and statements to the press, Treasury has articulated four guiding principles for its involvement in private industry in the wake of the financial crisis, and specifically for its involvement with the automotive industry.

First, the government has cast itself as a “reluctant shareholder.” It has stated that: “[t]he government has no desire to own equity stakes in companies any longer than necessary, and will seek to dispose of its ownership interests as soon as practicable. Our goal is to promote strong and viable companies that can quickly be profitable and contribute to economic growth and jobs without government involvement.”

Second, Treasury has said that it will “reserve the right to set upfront conditions to protect taxpayers, promote financial stability, and encourage growth. When necessary, these conditions may include restructurings similar to that now underway at GM as well as changes to ensure a strong board of directors that selects management with a sound long-term vision to restore their companies to profitability and to end the need for government support as quickly as is practically feasible.”

Third, Treasury has stated its commitment to “managing its ownership stake in a hands-off, commercial manner.” This includes a commitment not to “interfere with or exert control over day-to-day company operations.” To the extent that Treasury appoints any board members, it has stated that “[n]o government employees will serve on the boards or be employed by these companies.”

Finally, Treasury has stated that it will vote its shares only “on core governance issues, including the selection of a company’s board of directors and major corporate events or transactions.”⁴⁰¹

Put together, these principles illustrate an approach to government intervention that seeks to minimize the government’s role, dampen any leverage the government has simply by virtue of its unique authority as sovereign, and present itself as a shareholder that behaves in most cases as a private shareholder would, while still protecting the assets of the people of the United States.⁴⁰²

⁴⁰¹ White House Fact Sheet on General Motors Restructuring, *supra* note 36.

⁴⁰² Whether the use of the TARP for the support of the automotive industry is a legitimate use of TARP funds is an issue that the Panel has addressed at length. September 2009 Oversight Report, *supra* note 2, at 70-79.

Given the principles Treasury has laid out for its own involvement with the American automobile industry, three questions arise: (1) has Treasury abided by its own principles; (2) has Treasury used its limited powers effectively; and (3) was Treasury correct in establishing these guidelines as an act of prudent government restraint, or did the guidelines unnecessarily tie Treasury's hands at a time when greater government action, or at least shareholder activism, was necessary.

2. Has Treasury Abided by its own Principles?

As to the first question, the answer seems to be a qualified yes. According to the information the Panel has received from Treasury and the companies, it seems that Treasury has kept to the guidelines it established for itself. It is unclear, however, whether given its status, the government can actually be a passive investor. On the whole, Treasury's involvement in the companies has been restricted to participation in periodic calls with management to obtain information, appointing directors as permitted by the shares Treasury holds, and voting on a limited number of issues. At present, Treasury staff speaks with management at GM and Chrysler at least monthly and with management at GMAC/Ally Financial on a regular basis. In most cases, it is the companies that contact Treasury to convey new information such as earnings reports, or other relevant data. During these calls, company management provides Treasury with updated information on current operations and financial information, including updates on revenue, market share, domestic and international sales, and any corporate highlights as well as a review and analysis of the companies' balance sheets.⁴⁰³ Treasury maintains that these calls are one-way; Treasury's role is to listen to the information provided by management, and does not respond with any directives or requests of management.⁴⁰⁴ In the wake of allegations of irregularities in GMAC/Ally Financial's mortgage foreclosures, however, Treasury did take the initiative to contact the company for additional information regarding the irregularities.

Treasury has described these calls as the type that any large shareholder might have with company management, although it is unlikely that a large private shareholder would actually be as passive as Treasury describes. For the most part, the companies also describe their interactions with Treasury as being similar to interactions with other major shareholders. For example, Chrysler has stated that it provides all of its owners, including Treasury, with the same information about its operations and financial results each month. GM has stated that Treasury expressed a desire to be kept apprised of progress but had no intention to influence the company's progress, and that Treasury has stayed true to that intent. Moreover, GM has confirmed that Treasury's role in determining the timing of its IPO was extremely limited and

⁴⁰³ Data provided by Treasury (Dec. 9, 2010).

⁴⁰⁴ Treasury conversations with Panel staff (Nov. 18 and 22, 2010).

that Treasury left the decision in the hands of GM management. Chrysler has similarly stated that Treasury has not provided input on the proposed timing for that company's IPO.

Treasury has said that, in the period preceding the GM IPO, its interactions with GM were much more frequent than they had been previously.⁴⁰⁵ This increased activity, however, Treasury has attributed solely to its need to perform due diligence as a large shareholder. GM has affirmed this view, and has also confirmed Treasury's position that the decision about when to have the IPO was made primarily by the company. Treasury and the Canadian government both had demand rights that would have enabled them to force an IPO by a certain date if the company had not begun the process, but the need to exercise those rights did not arise. Treasury has acknowledged that waiting a year or 18 months may have given GM time to improve its value even further, but noted that the company had determined that it was ready for an IPO.⁴⁰⁶

In general, GMAC/Ally Financial has described its interactions with Treasury in the same way. Preparations for GMAC/Ally Financial's potential IPO, however, have presented some challenges that have led to a different dynamic in the interactions between GMAC/Ally Financial and Treasury with regard to this issue. As the Panel discussed in its March 2010 report, Treasury's treatment of GMAC/Ally Financial has not adhered as firmly to the principles on which Treasury has claimed to base all of its TARP investment decisions.⁴⁰⁷ For Treasury to suggest otherwise in conversations with Panel staff may reveal a bias to present a consistent narrative regarding its shareholder principles, rather than acknowledging the unique circumstances that its stake in GMAC/Ally Financial may present.

This is illustrated by the rigidity with which Treasury articulates these principles in explaining its interactions with the company – descriptions that often lack the transparency that would illustrate the unique factors that understandably impact Treasury's GMAC/Ally Financial exit strategy.

Treasury initially informed the Panel on November 22, 2010 that the timing of a potential IPO was entirely up to GMAC/Ally Financial. However, this assertion neglected to acknowledge the practical impact of the continued uncertainty regarding the potential conversion status of the Treasury's MCPs, and the obvious hurdle this would present in terms of proceeding with an IPO. Although Treasury later acknowledged that the timing of the conversion would impact the timing of the IPO, Treasury still maintained that the conversion of its MCP holdings

⁴⁰⁵ Treasury conversations with Panel staff (Nov. 22, 2010).

⁴⁰⁶ The exact timing of the IPO was impacted by the holiday season. Treasury has stated that there was a consensus that if the IPO did not happen by mid-November 2010, it would have to wait until after the holidays and possibly until the spring for a receptive market. Treasury conversations with Panel staff (Nov. 22, 2010). As discussed in Sections C and D, *supra*, the company has taken several steps in the course of restructuring that have made it a more attractive investment, including streamlining its operations and improving its efficiency.

⁴⁰⁷ March 2010 Oversight Report, *supra* note 22.

was not a prerequisite for the company to proceed with an IPO. After a portion of the MCPs were converted, however, Treasury finally cited this move as a necessary step towards the IPO during a conversation with oversight bodies on January 5, 2011, and now appears somewhat more hesitant to reassert its prior claims of GMAC/Ally Financial's independence to pursue its IPO on its own timetable.⁴⁰⁸ Treasury's stated rationale for timing the conversion tacitly confirms the fact that a GMAC/Ally Financial IPO would be impeded by a delay on Treasury's part in converting its MCPs into common shares, and seems to contradict Treasury's earlier statement that GMAC/Ally Financial could hold its IPO without waiting for Treasury to convert the MCPs.⁴⁰⁹ In any case, the Panel recognizes that this may be a prudent (but belated) acknowledgement of the unique factors that understandably complicate the IPO process for GMAC/Ally Financial.

Treasury, in its role as shareholder, has also appointed a number of new members to the board of each company. At GM, Treasury has appointed 10 of the current 12 board members, including Dan Akerson, who was later named CEO by the company's directors. Treasury has appointed four members to the Chrysler board, and three to GMAC/Ally Financial's board, with an additional member currently undergoing the vetting process for appointment. As a result of converting a portion of its GMAC/Ally Financial MCPs into common shares, Treasury has also acquired the right to appoint two more members to the company's board. In seeking candidates for these positions, Treasury used private search companies, such as might be used by a private shareholder seeking to appoint directors to a large corporation.

As a common stockholder, Treasury has the right to vote its shares on various issues. In accordance with its commitment to vote only on "core governance issues," Treasury has exercised its right three times, all at GM: the appointment of board members; a stock split that immediately preceded the IPO; and a charter amendment for the preservation of tax assets. These actions fall squarely within the category of "core governance issues" and are the type on which a large private shareholder would usually vote. Treasury has never voted its shares in Chrysler or GMAC/Ally Financial.

⁴⁰⁸ In something of a departure from its involvement in GM, Treasury would not state unequivocally that the timing of a GMAC/Ally Financial IPO is solely in company management's hands. Treasury conversations with Panel staff (Jan. 5, 2011).

⁴⁰⁹ Treasury also cited the need to bolster GMAC/Ally Financial's capital structure and its recent settlement with Fannie Mae on mortgage repurchase claims as affecting the timing of the conversion. During the same meeting, Treasury articulated, for the first time, the need to conduct the conversion in order to remove GMAC/Ally Financial from the strictures of section 23(a) of the Federal Reserve Act, which limits the transactions between a bank and its non-bank affiliates (in this instance, GM). Treasury conversations with Panel staff (Jan. 5, 2011). GMAC/Ally Financial was granted an exemption from this rule in 2008 and in 2009. See March 2010 Oversight Report, *supra* note 22, at 23-25.

Based on the information that Treasury has provided to the Panel, it appears that Treasury has been following its guidelines and has taken no action that a private shareholder could not take. This does not mean, however, that Treasury's position as a majority shareholder, or even as a shareholder at any level, has had no impact on the companies. It may be impossible for a government agency to hold a stake in a private company without having a greater impact than a private shareholder. First, Treasury's stake is more visible than that of any other shareholder. Because the American people have a direct interest in the companies, the companies' every movement is of potential interest to the press. Second, Treasury makes larger waves with each of its movements than a private investor does. The fact that Treasury intends to have a "hands-off" approach does not mean that its voice does not seem louder to the companies than those of other shareholders.

Treasury's ownership stake may have both a positive and negative impact on the companies' share prices. For example, there may be a perception in the market – particularly among debt investors – that the government stands behind the companies, regardless of whether the government has that intention, thereby making credit available to the companies on more favorable terms than they would have otherwise received. As discussed in Section F.3.a, the current spreads on GMAC/Ally Financial credit default swaps support this assumption. On the negative side, potential investors may fear that Treasury would wield influence disproportionate to its holdings, and that Treasury's presence is not a positive backstop, but an ongoing sign of the companies' inherent weaknesses.⁴¹⁰

3. Has Treasury Used its Limited Authority Effectively?

To analyze the success of Treasury's intervention in the automotive industry, there must first be a definition of "success." Treasury has provided its own views on what would constitute a success. In testimony before the Panel, senior Treasury advisor Ronald Bloom defined success as primarily a question of return on investment: "the greater percentage of the money that we invested that we get back, the greater success."⁴¹¹ The investment was not, however, made purely for the purpose of seeing a return on those funds. Mr. Bloom also testified to the importance of job preservation and listed a number of other measures for determining whether the program was successful, including the question of "whether these companies have addressed

⁴¹⁰ See September 2009 Oversight Report, *supra* note 2, at 80-102 (discussing the tensions inherent in government ownership of private enterprise). Moreover, GM has indicated that it believes that some potential consumers may be disinclined to buy automobiles from the companies due to dissatisfaction with the government's policies. The company was unwilling to provide documentation to support this claim, as it views this analysis as confidential and proprietary.

⁴¹¹ Congressional Oversight Panel, Testimony of Ron Bloom, senior advisor, U.S. Department of the Treasury, *Transcript: COP Field Hearing on the Auto Industry*, at 38 (July 27, 2009) (online at cop.senate.gov/documents/transcript-072709-detroithearing.pdf) (hereinafter "Transcript: Testimony of Ron Bloom").

the long-term problems that we identified,” such as “a declining market share, a poor profitability profile” and failing to increase their ability to provide “good, stable jobs.”⁴¹² Austan Goolsbee, Chairman of the Council of Economic Advisers, appeared in a recent video released by the White House to explain the “Rebirth of the American Auto Industry.” According to Mr. Goolsbee, although taxpayers may soon see a return of the funds invested, the investment “was never really about the stock market. It was about saving American jobs.”⁴¹³

If the success of the overall automotive rescue, and of the government’s means of implementing that program in accordance with the principles listed in Section H.1, above, is measured by Treasury’s ability to meet its own definition of success, the program must: (1) provide a return on investment; (2) create or at least preserve jobs that would have otherwise been lost; and (3) set the companies on a path toward ongoing stability. Treasury’s challenge, given its goals, lies not only in the difficulty of the goals themselves, but also in the fact that they may be mutually exclusive at times. For example, the best way to improve the return on investment and shore up the companies for the future may be to cut jobs. Also, to the extent that these companies have conflicting interests, Treasury may be placed in an untenable position. Historically, GMAC/Ally Financial has had close to a monopoly position in providing financing for GM dealers as well as a large share of the GM consumer financing market. This position is beneficial to GMAC/Ally Financial but not to GM and may have led to borrowers receiving more expensive loans than they might have obtained in a more competitive market. Treasury, as a stakeholder in both GM and GMAC/Ally Financial, can support neither GMAC/Ally Financial’s dominant market position nor the entrance of greater competition without potentially undermining its investment in one company or the other. Moreover, judging Treasury solely by its ability to meet goals it set for itself may lead to a result that is overly favorable to Treasury. The goals articulated by Treasury may include certain assumptions about the proper role of government and the needs of the American economy that are not shared by all.

As described in detail elsewhere in this report,⁴¹⁴ the likelihood that taxpayers will receive a full return of their money depends on a variety of market factors that are impossible to predict with perfect accuracy. A certain portion of the funds have already been repaid, however, and the current prospect for a significant return is more favorable than it was as of the Panel’s September 2009 report on the automotive industry. Using Mr. Bloom’s yardstick, therefore, the program has been more successful than many had predicted.

⁴¹² *Id.* at 38-39.

⁴¹³ The White House, *The White House Whiteboard: The Rebirth of the American Auto Industry*, at 3:15 (Nov. 18, 2010) (online at www.whitehouse.gov/photos-and-video/video/2010/11/18/white-house-white-board-rebirth-american-auto-industry) (hereinafter “The White House Whiteboard: The Rebirth of the American Auto Industry”).

⁴¹⁴ See Sections D, E, and F.

Additional repayment at this point, however, turns in large part on Treasury's ability to sell off its entire stake in each company, including its sizeable remaining stake in GM. As discussed in Sections D, E, and F, above, Treasury faces challenges in each case. In the case of GM, Treasury still holds a substantial share of the common stock, which it must sell at a price approximately 64 percent above the IPO price to realize a profit on the government's overall investment. Investor interest in GM must therefore remain high enough to absorb such a large number of shares. GMAC/Ally Financial faces various uncertainties before investors are likely to welcome an IPO. And, in the case of Chrysler, the earliest an IPO is likely to occur is 2012, making it difficult to predict both Treasury's ability to sell its entire stake and the amount Treasury is likely to receive in such a sale. In any case, \$3.5 billion of Treasury's investment in Chrysler has already been written off, so even a very successful IPO is unlikely to recoup all of the money invested in that company. Moreover, as discussed in Section E above, Treasury holds only an 8 percent equity stake in Chrysler and is unlikely to be able to exercise its call option to obtain more. This leaves Treasury with a stake that is too small either to command a control premium or to exercise any control over the timing of the IPO. Finally, it is not clear whether the market will have an appetite for shares of another large American auto company soon after the GM IPO.

The case of Chrysler Financial may provide an example of the government forgoing potential upside in order to exit an investment as quickly as possible. The issue is not that the implied value of Chrysler Financial increased by 33 percent in the seven months following the sale of Treasury's stake to Cerberus in May 2010. The Panel acknowledges that there is no exact science to determining the most opportune time to exit an investment. Rather, the government's exercise of due diligence in response to the overture from Cerberus to buy out its stake appears to have been surprisingly limited and did not envision other valuation scenarios for Chrysler Financial that would involve a strategic buyer for the asset. Clearly, both Cerberus and Chrysler Financial, on the other hand, recognized the value in the platform and subsequently sought to maximize the value of the business following the government's exit in preparation for a sale to a strategic buyer.

As the Panel has discussed in earlier reports, the cost of any program initiated under EESA cannot be measured solely by the amount of money returned to the public coffers.⁴¹⁵ The cost must also include a calculation of the risk that the American people assumed while the loans or investments were outstanding.⁴¹⁶ And it must include some accounting of the potential future effects on the industry and the wider economy, such as the heightened risk of moral hazard

⁴¹⁵ See, e.g., Congressional Oversight Panel, *September Oversight Report: Assessing the TARP on the Eve of Its Expiration*, at 95-104 (Sept. 16, 2010) (online at cop.senate.gov/documents/cop-091610-report.pdf).

⁴¹⁶ In addition, Treasury has already written off \$3.5 billion in funds invested in the domestic automotive industry. See Figure 1.

among American automobile companies, or among any large corporations, leading these companies and the market to assume that they have an implicit guarantee from the government (i.e., that they are “too big to fail,” or at least will receive generous government support to ease the bankruptcy process). Even if such effects cannot be determined until years into the future, their potential must be taken into account when measuring the success of the automobile programs.

It is also difficult to determine how many jobs were saved through the government’s intervention. In the aforementioned White House video presentation, Mr. Goolsbee states that hundreds of thousands of American workers are currently employed at GM plants, dealerships, and auto suppliers instead of “going out and looking for new work.”⁴¹⁷ But, as discussed in Sections C and D, above, GM has also shed thousands of jobs as part of its bid to return to profitability. It is likely true that, had the company faced a prolonged disruption in operations as part of the bankruptcy process, either because the company was liquidated or because there was a significant delay in finding DIP financing, a much larger number of GM employees, if not all, may have been laid off.⁴¹⁸ The exact number of jobs ultimately saved is difficult to determine. For example, some of the workers included in Mr. Goolsbee’s calculation, such as those working for suppliers, may have served customers in addition to GM and may not have been laid off in the event of a GM liquidation. In addition, if the rescue of the automotive industry ultimately proves unsuccessful, then these jobs were not truly saved; instead, unemployment for these workers was delayed at a cost to the American taxpayers.⁴¹⁹ It is likely, however, that, had GM’s bankruptcy been a more prolonged process, a larger number of workers would likely have lost their jobs.⁴²⁰

The final issue with respect to the effectiveness of the government’s intervention is whether these companies are now on the path to long-term stability. Because the issues that determine long-term stability are often the same issues that determine a company’s valuation, these factors overlap substantially with the question of whether and to what extent Treasury may recover its investment and exit its positions in these companies. As discussed in prior sections of this report, GMAC/Ally Financial has been profitable for the last three quarters, GM’s earnings

⁴¹⁷ The White House Whiteboard: The Rebirth of the American Auto Industry, *supra* note 413, at 3:36. An earlier White House estimate placed the figure at 1.1 million jobs saved by the entire automobile industry rescue. George W. Bush White House Archives Fact Sheet, *supra* note 12.

⁴¹⁸ For a full discussion of the bankruptcy options available to GM and Chrysler, *see* September 2009 Oversight Report, *supra* note 2.

⁴¹⁹ To the extent that the rescue of the automotive industry is viewed as a job preservation program, it is not clear that such a program aimed solely at a single industry was the best use of funds for this purpose. The Panel takes no position on this issue, however.

⁴²⁰ On the other hand, it should be noted that employment in the motor vehicle and parts industry declined by 40 percent between November 2006 and November 2010, from 1.1 million to 650,000.

have increased in each of the last four quarters, and Chrysler has been consistently repaying its debts. GM and Chrysler nonetheless face a number of challenges. Both are seeking additional market share in the small-car sector, which is extremely competitive. Both must also convince consumers that they are creating reliable, quality cars, since their reputation in this area has been declining in recent years.⁴²¹ GMAC/Ally Financial must overcome its current trouble with foreclosure irregularities, and must establish a stable business model for automotive financing and leasing, one that is not overly dependent on GM in light of GM's acquisition of AmeriCredit. GMAC/Ally Financial also faces uncertainty related to its heavy concentration in the automotive industry. Even if the three companies' financials are relatively sound now, the domestic automotive sector as a whole must make a strong comeback in order for them to thrive.

4. Was Treasury Right in Establishing These Guidelines for Itself?

Treasury's determination to set and abide by its own guidelines may be an exemplary exercise in government restraint, or it may be an unnecessary and harmful restriction on government in a time when government intervention was necessary. The guidelines, to the extent that they were followed, provided some reassurance to the markets that Treasury's actions would be circumscribed and no more unpredictable than those of the average private investor. Moreover, given the public's preference for free-market commerce instead of government-owned enterprise, the guidelines may have assuaged some objections to Treasury's actions. They also may have provided a check on Treasury at times when the temptation to take more aggressive action arose and ensured that rules established with a cooler head prevailed.

On the other hand, Treasury created certain risk for the American people by imposing restrictions on its actions. The American people had a large amount of money at stake in private companies. Treasury arguably had a duty to protect those resources to the best of its ability, and voluntarily refraining from action could have been a way of doing less than that. Treasury staff has said that even if one of the companies had taken a step that, even to an industry outsider, would appear foolhardy, Treasury would not have stepped in to prevent the company from pursuing its plan. It does not appear that any of the companies involved with the TARP has had any intention of taking highly risky or questionable marketing or investment decisions, let alone actually having done so. Hence, Treasury's self-restraint does not seem to have ultimately had any harmful effects in practice.

There are, however, other opportunities that may have been lost. As discussed in the Panel's March 2010 report on GMAC/Ally Financial, it appears that the option to merge the company back into GM, making GMAC/Ally Financial again a captive finance arm, was not considered, despite certain potential advantages. The Panel has no opinion on whether merging the companies would actually have been the correct course, but it is disconcerting that the option

⁴²¹ As discussed in Sections D and E above, though, both have made definite strides in this area.

was not thoroughly examined. This lack of consideration raises questions about whether other options that may have maximized benefits to the taxpayer were also left unexplored due to Treasury's avowed hands-off stance.

I. Conclusions and Recommendations

The financial crisis laid bare the challenges facing the domestic U.S. auto industry. The cumulative impact of a series of strategic and competitive missteps over the preceding decade came to the fore in the fall of 2008. While the Panel has previously questioned the government's perception of its policy choices during various stages of the crisis, there is little doubt that in the absence of massive government assistance, GM, Chrysler, and GMAC/Ally Financial faced the prospect of bankruptcies and potential liquidation, given the apparent dearth of available financing from the private sector. In the context of a fragile economy and the financial crisis (which severely restricted both corporate and consumer credit), the failure of these companies could have had significant near-term consequences in terms of job losses and the performance of the broader U.S. economy. Although the assets of GM and Chrysler (plants and equipment, employees, brand recognition) would have had value to other firms over the longer term, it was in the context of these adverse near-term consequences that both the Bush and Obama Administrations provided assistance to the auto sector.

The Panel takes no position on the decision to support the auto industry, a topic addressed in our September 2009 report. All told, the Bush and Obama Administrations provided \$81.4 billion in assistance to these three companies (as well as \$3.5 billion for auto suppliers). Unlike assistance to the banks, much of the government's investment still hangs in the balance, with 66 percent of overall assistance still outstanding. Treasury is now on course to recover the majority of its automotive investments within the next few years, but the impact of its actions will reverberate for much longer. Treasury's rescue suggested that any sufficiently large American corporation may be considered "too big to fail," broadening moral hazard risk from its TARP rescue actions beyond the financial sector. Further, the fact that the government helped absorb the consequences of GM's and Chrysler's failures has put more competently managed automotive companies at a disadvantage. Still, while the government perhaps set a dangerous precedent of expanding the notion of "too-big-to-fail" to the non-financial sector, the terms on which this support was provided offered considerably less comfort to legacy shareholders and creditors, at least to those of Chrysler and GM, than it did to the equity and debt holders of rescued financial firms.

While the outlook for the return on taxpayer funds has improved considerably over the past 12 months, there is still a long road ahead, particularly for GMAC/Ally Financial and Chrysler. Improving industry fundamentals – signified by GM's recent IPO – highlight a more hospitable backdrop since the Panel's last report on the auto sector in September 2009. This

backdrop corresponds with improved operating fundamentals, as GM and Chrysler have shed costs and positioned themselves to produce profits at much lower levels of output. Market shares have generally stabilized, as has vehicle pricing since manufacturers no longer need to offer generous incentives to reduce overlaid inventories. GMAC/Ally Financial has benefited from an improving backdrop for mortgage assets, allowing the firm to reduce the crushing overhang of its mortgage exposure, as well as reverse at least a portion of prior asset write-downs.

Against this improving backdrop, GM has reported improving earnings in each of the past four quarters. GMAC/Ally Financial is now in the black after reporting losses throughout 2009, and Chrysler's performance has improved materially with the help of its alliance with Fiat. (While operationally profitable, interest payments on TARP loans have prevented a bottom-line return to profitability at Chrysler.)

Treasury's calculations of potential taxpayer losses of \$14.7 billion on total assistance of \$81.3 billion to these three firms could ultimately prove conservative, but significant risks remain, given that the amount recovered will depend heavily on public market valuations of each firm's shares into 2011 and beyond.⁴²² Below is a brief summary of the status of Treasury's investments in GM, Chrysler, and GMAC/Ally Financial.

- GM: Of the \$49.9 billion in total assistance, the government has thus far recouped \$22.7 billion.⁴²³ As of December 31, 2010, the government's unsold stake is valued at \$18.4 billion, which would represent a total taxpayer loss of \$7.9 billion.
- Chrysler: Only \$2.2 billion in total assistance has been recouped,⁴²⁴ and \$3.5 billion in loans are considered a loss. However, the improved financial performance of the company indicates that Treasury's remaining loans to Chrysler may in fact be ultimately recovered. As discussed in Section E, for the government to recoup losses already incurred to Old Chrysler, the equity value of a potential IPO would have to exceed \$14.5 billion.⁴²⁵
- GMAC/Ally Financial: Significant equity investments in GMAC/Ally Financial imply greater risk and more uncertainty in the lead-up to a potential IPO in 2011, although the improved operating performance – similar to that of GM and Chrysler – bodes well for a meaningful return on the \$17.2 billion in total assistance to

⁴²² OFS Agency Financial Report, *supra* note 172, at 11; Treasury Transactions Report, *supra* note 24, at 18-19.

⁴²³ Total funds recovered to date excludes dividends and interest of \$766 million paid to Treasury through December 31, 2010.

⁴²⁴ Total funds recovered to-date excludes interest of \$580 million paid to Treasury through December 31, 2010.

⁴²⁵ Certain assumptions apply to this estimate. See Section E.3 for a fuller discussion.

GMAC/Ally Financial. This being said, GMAC/Ally Financial is now the last TARP recipient standing – after the accelerated Citigroup exit and recent announcements about exiting AIG – for which the government has control of its exit and not articulated a clear exit strategy.

These rescue efforts by the government employed differentiated strategies with varying levels of risk to the taxpayer. While GM and Chrysler were put through bankruptcy, GMAC/Ally Financial was not, to the relative benefit of its legacy shareholders and creditors. Whereas the government shouldered the entire rescue of GM, it enlisted Fiat as a partner for Chrysler, which is a smaller and less economically significant automobile manufacturer than GM.

While the Panel has outlined various scenarios that could see taxpayers recover a meaningful amount of this assistance over the next two years, the financial returns on these investments do not tell the entire story and should not overshadow the Administration’s broader objectives in providing assistance to the auto industry.

Unlike the intervention in the financial sector, the government in this case sought a broad restructuring of the underlying industry, and it was able to pursue this objective given its controlling stake in some of the impacted companies. Given the broader restructuring aims – as well as countering the threat of imminent and massive job losses – it is perhaps not surprising that the government has offered various benchmarks beyond a strict tally of the full return of the taxpayer’s assistance to measure its success in this endeavor. While senior Treasury advisor Ronald Bloom once defined success solely in monetary terms – “the greater percentage of the money that we invested that we get back, the greater success”⁴²⁶ – on other occasions Mr. Bloom and others in the Administration have cited the dual mandates of jobs preservation and effecting lasting fundamental reform of the auto sector.

As outlined in this report, there are examples of conflict – some inevitable, others not – between Treasury’s core principles. In particular, the government has sought to present a consistent narrative of its role as a reluctant shareholder. In the case of GMAC/Ally Financial, transparency that would illustrate the unique circumstances of specific investments and explain certain actions by Treasury has sometimes been sacrificed in favor of retaining the appearance of a consistent narrative. This unnecessarily undermines the spirit of transparency critical to the effectiveness of the TARP.

Another recent example of this conflict between Treasury’s principles involves Chrysler Financial, where meaningful incremental taxpayer returns appear to have been sacrificed in favor of an unnecessarily accelerated exit, further compounded by apparently questionable due

⁴²⁶ Transcript: Testimony of Ron Bloom, *supra* note 411, at 38.

diligence. The Panel notes that questions stemming from this transaction are not motivated by the fact that seven months following Treasury's exit, Chrysler Financial sold at a price that was 33 percent higher than the value of the company implied by Treasury's settlement price. Rather, the government's due diligence on the sale of its stake to Cerberus was surprisingly limited in scope. Treasury focused on the merits of the offer at hand and apparently neglected to contemplate more favorable valuation scenarios that may have resulted from a competitive bidding process of eager strategic buyers looking to acquire and invest in the Chrysler Financial platform. Given the apparent success of the longer-term investment mindset that has characterized the government's management of its AIG and GMAC/Ally Financial investments, Treasury's haste to exit Chrysler Financial is perplexing.

A final tally on the return of taxpayer assistance and a report card on longer-term reform efforts remain premature. Early returns indicate that the government's intervention in the auto sector – leaving aside any assessment of the relative merits of providing that assistance in the first place – has been surprisingly successful, both in terms of financial returns from assistance and the rebound in the companies' performance. The Panel notes that GM and Chrysler are now *adding* jobs after their initial downsizings. However, as noted, a more robust scorecard, one that weighs the positives from government intervention, such as the near-term preservation of jobs and prevention of a deeper contraction in the economy, versus the negatives, including the investment of substantial taxpayer dollars and the precedent set by government intervention into the private sector, is required to evaluate fully the government's actions. Nonetheless, this longer-term assessment should not obscure the near-term focus on recovering as much value as possible for the taxpayer. At the same time, the Panel recognizes that absent sustainable reform that produces a smaller auto industry subject to the discipline of the private capital markets, improved returns on taxpayer assistance could mask longer-term risks.

Likewise, the relatively improved outlook should not overshadow serious questions that prevent a more transparent assessment of the government's efforts. These questions arise from the fact that, having intervened on a massive scale and outlined sweeping mandates for the reform of the industry, the government – by its own account – then chose largely to retreat to the sidelines, performing run-of-the-mill oversight of its investments and leaving the heavy lifting to the government's designees on the companies' boards of directors.

Treasury has consistently (and often vociferously) asserted that it will not interfere or otherwise seek to influence the strategic management of the companies in which it holds a stake. The Panel recognizes the importance of a hands-off approach to day-to-day business operations and recognizes that crossing this line in certain instances can raise troubling questions regarding the government's role in the private sector. However, many would argue that this line had long since been crossed, given the government's initial decision to provide assistance to the auto industry, and to pretend otherwise today begs credulity.

In the case of GMAC/Ally Financial, the Panel recommended previously that Treasury explore the possibility of value-enhancing strategic arrangements that would seek to maximize the government's aggregate stake in both GM and GMAC/Ally Financial. Subsequently, rather than seeking a closer relationship with GMAC/Ally Financial, GM has chosen to build its own auto financing subsidiary via the acquisition of AmeriCredit. While such a move may seemingly make strategic sense for GM, it is not clear if the value to the government, as a shareholder in GM, outstrips the potential negative impact of this acquisition to the government's stake in GMAC/Ally Financial. Treasury's deliberate refusal to take a portfolio investment approach to managing its holdings across the auto sector appears to be inconsistent with the rationale for its decision to rescue GMAC/Ally Financial, which was to help GM continue to finance car sales, particularly to its dealership network.⁴²⁷

The Panel recognizes two potential positive developments from Treasury's hands-off approach. Namely, GM's efforts to establish its own captive auto finance subsidiary will likely improve the competitive dynamics in this market by reducing the company's reliance on GMAC/Ally Financial. Further, any residual moral hazard in the marketplace related to the perception that GMAC/Ally Financial is too interconnected with GM to be allowed to fail would likely be mitigated by GM's development of its own captive financing subsidiary.

The Panel makes the following recommendations:

- The Administration should enhance disclosure in the budget and financial statements for the TARP by reporting on the valuation assumptions ("credit reform" subsidy rates) for the individual companies included in the overall subsidy rate for the AIFP.
- The Panel recognizes that it is in the private sector's and the government's interest for Treasury to exit its investments as soon as practicable. However, Treasury should be cognizant that this may not in all instances be in the taxpayer's best interest. The Panel urges Treasury to consult independent third parties to assess these determinations in the future to identify instances where a longer investment horizon may meaningfully improve the outlook for the taxpayer's return on its investment.
- Treasury sought to assure the Panel during its February 2010 hearing on GMAC/Ally Financial that legacy private sector stakeholders in the company would not see any return until and if the U.S. taxpayer recoups its entire investment. The Panel recommends that Treasury expand on this assertion, clarifying its approach to the treatment of legacy shareholders in GMAC/Ally Financial as the government's exit plan moves forward. Aside from the consequences to the taxpayer's interest,

⁴²⁷ A similar portfolio analysis might have been undertaken at the time of the initial decision to rescue Chrysler, exploring the alternative of letting Chrysler fail in order to bolster the prospects of the remaining domestic auto manufacturers, particularly GM.

clarifying the treatment of legacy shareholders will help preserve market discipline going forward.

- Given the scale of government intervention and the desire not to repeat this episode, it may be in the taxpayer's interest that Congress commission independent researchers to periodically assess the long-term fallout from the collapse of the auto industry and the subsequent government intervention, including the risk to taxpayers stemming from future disruptions to the auto market from economic, credit market or other potential threats. Related to these efforts, Congress should also follow up by contracting with independent researchers and market analysts to develop more credible estimates of the impact of the bailout of GM, GMAC/Ally Financial, and Chrysler on economic performance and employment.

Section Two: Additional Views

A. J. Mark McWatters and Professor Kenneth R. Troske

We concur with the issuance of the January report and offer the additional observations below. We appreciate the efforts the Panel and staff made incorporating our suggestions offered during the drafting of the report.

We wish to make the following points.

- In the closing days of 2008 when GM, Chrysler, and GMAC/Ally Financial faltered, the American taxpayers – not the Department of Treasury – stood as the last safe-haven for these distressed institutions. In return for their generosity the CBO estimates that the taxpayers stand to lose approximately \$19 billion on their investments.⁴²⁸ This is real money, enough to finance the construction of over four Nimitz-class aircraft carriers (at \$4.5 billion each) or fund approximately 25 years of NIH-sponsored breast cancer research (at \$765 million per year).⁴²⁹
- Treasury’s primary role in the restructuring of GM, Chrysler, and GMAC/Ally Financial was to act as a funding conduit for the taxpayer sourced capital infusions. These institutions have, not surprisingly, performed reasonably well over the past several months due to the strength of their foreign markets, the recovery of their domestic markets, the replacement of their directors and senior management, the de-leveraging of their balance sheets, the renegotiation of their collective bargaining agreements, the recovery of the capital markets, the tepid recovery of the general economy, and, of course, the “gift” of \$19 billion or so of taxpayer funds. It remains to be seen, however, if these companies can remain on the path to financial recovery and independence from taxpayer-sourced subsidies.
- The Panel concludes in the report: “there is little doubt that in the absence of massive government assistance, GM, Chrysler, and GMAC/Ally Financial faced the prospect of bankruptcies and potential liquidation.”⁴³⁰

⁴²⁸ See Congressional Budget Office, *Report on the Troubled Asset Relief Program – November 2010*, at 5 (Nov. 18, 2010) (online at www.cbo.gov/ftpdocs/119xx/doc11980/11-29-TARP.pdf).

⁴²⁹ See U.S. Navy, *Fact File: Aircraft Carriers* (online at www.navy.mil/navydata/fact_display.asp?cid=4200&tid=200&ct=4) (accessed Jan. 12, 2011); U.S. Department of Health and Human Services, *National Institutes of Health, Estimates of Funding for Various Research, Condition and Disease Categories (RCDC)* (Feb. 1, 2010) (online at report.nih.gov/rcdc/categories/).

⁴³⁰ See Section I, *supra*.

While bankruptcy did follow for GM and Chrysler and probably should have followed for GMAC/Ally Financial, we remain skeptical that the companies would have been liquidated and sold off for scrap value absent direct intervention by the government. The brisk turn-around of the three institutions over the past two years indicates that even in the last quarter of 2008 substantial inherent value existed within each company. Despite claims to the contrary, we still have trouble concluding that Chevrolet, Cadillac, Buick, GMC trucks, and Jeep, as well as GMAC/Ally Financial's auto finance business, among others, were worth next to nothing in the closing days of 2008 and, but for the taxpayer-funded bailouts, would have failed and left hundreds of thousands temporarily unemployed. It would have been preferable for these institutions to have been reorganized by private sector participants, with, perhaps, debtor-in-possession financing guaranteed to a limited extent by the government. It is difficult to accept that private sector strategic buyers, private equity firms, hedge funds, and sovereign wealth funds were not willing and able to orchestrate the successful reorganizations or restructurings of the three distressed companies. Once the government entered the picture and signaled its intent to bail out the institutions with its unlimited taxpayer-financed checkbook, it is hardly surprising that private sector participants demurred. Under such circumstances, it is not possible for even the most sophisticated, motivated, and financially secure of private sector firms to prevail.

- The Panel states in the report:

Treasury is now on course to recover the majority of its automotive investments within the next few years, but the impact of its actions will reverberate for much longer. Treasury's rescue suggested that any sufficiently large American corporation – even if it is not a bank – may be considered “too big to fail,” creating a risk that moral hazard will infect areas of the economy far beyond the financial system. Further, the fact that the government helped absorb the consequences of GM's and Chrysler's failures has put more competently managed automotive companies at a disadvantage. For these reasons, the effects of Treasury's intervention will linger long after taxpayers have sold their last share of stock in the automotive industry.⁴³¹

The Panel states in the report:

These favorable events, however, must be thoughtfully balanced against the moral hazard risks created by the taxpayer's bailout of the three institutions and the ongoing implicit guarantee of the government. By bailing out GM,

⁴³¹ See Section I, *supra*.

Chrysler, and GMAC/Ally Financial, the government sent a powerful message to the marketplace – some institutions will be protected at all cost, while others must prosper or fail based upon their own business judgment and acumen. We regret that Treasury has focused solely on the apparent success of the GM IPO in assessing the rescues of the three institutions to the distinct exclusion of the moral hazard risks arising from the bailouts.⁴³²

The Panel also states in the report:

As the Panel has discussed in earlier reports, the cost of any program initiated under EESA cannot be measured solely by the amount of money returned to the public coffers. The cost must also include a calculation of the risk that the American people assumed while the loans or investments were outstanding. And it must include some accounting of the potential future effects on the industry and the wider economy, such as the heightened risk of moral hazard among American automobile companies, or among any large corporations, leading these companies and the market to assume that they have an implicit guarantee from the government (i.e., that they are “too big to fail,” or at least will receive generous government support to ease the bankruptcy process). Even if such effects cannot be determined until years into the future, their potential must be taken into account when measuring the success of the automobile programs.⁴³³

In our view, the above passages represent the most significant analysis provided in the report. The TARP has all but created an expectation, if not an emerging sense of entitlement, that certain financial and non-financial institutions are simply “too-big-or-too-interconnected-to-fail” and that the government will promptly honor the implicit guarantee issued for the benefit of any such institution that suffers a reversal of fortune. This is the enduring legacy of the TARP. Unfortunately, by offering a strong safety net funded with unlimited taxpayer resources, the government has encouraged potential recipients of such largess to undertake inappropriately risky behavior secure in the conviction that all profits from their endeavors will inure to their benefit and that large losses will fall to the taxpayers. The placement of a government sanctioned thumb-on-the-scales corrupts the fundamental tenets of a market economy – the ability to prosper *and the ability to fail*.

Following the bailouts of GM, Chrysler, and GMAC/Ally Financial and the potential loss of \$19 billion or more of taxpayer-sourced funds, is it realistic to expect that the

⁴³² See Section A, *supra*.

⁴³³ See Section H.3, *supra*.

government will permit these companies to fail the next time around? We have our doubts. More significantly, the directors, managers, and employees of these institutions most likely appreciate the benefits afforded by the government's implicit guarantee, but it remains to be seen whether they also appreciate the attendant moral hazard risks.

- Although not the subject of this report, we would be remiss if we did not note that commentators have questioned the treatment of certain classes of creditors in the GM and Chrysler bankruptcies as well as certain procedures adopted by and rulings of the bankruptcy courts.⁴³⁴

Regarding this matter, Barry E. Adler, the Petrie Professor of Law and Business, New York University, offered the following testimony to the Panel:

The rapid disposition of Chrysler in Chapter 11 was formally structured as a sale under §363 of the Bankruptcy Code. While that provision does, under some conditions, permit the sale of a debtor's assets, free and clear of any interest in them, the sale in Chrysler was irregular and inconsistent with the principles that undergird the Code.

The most notable irregularity of the Chrysler sale was that the assets were not sold free and clear ... That is, money that might have been available to repay these secured creditors was withheld by the purchaser to satisfy unsecured obligations owed the UAW. Thus, the sale of Chrysler's assets was not merely a sale, but also a distribution – one might call it a diversion – of the sale proceeds seemingly inconsistent with contractual priority among the creditors.

Given the constraint on bids, it is conceivable that the liquidation value of Chrysler's assets exceeded the company's going-concern value but that no liquidation bidder came forward because the assumed liabilities – combined with the government's determination to have the company stay in business – made a challenge to the favored sale unprofitable, particularly in the short time frame afforded. It is also possible that, but for the restrictions, there might have been a higher bid for the company as a going concern, perhaps in anticipation of striking a better deal with workers. Thus, the approved sale may not have fetched the best price for the Chrysler assets. That is, the diversion of sales proceeds to the assumed liabilities may have been greater than the government's subsidy of the transaction, if any, in which case the secured creditors would

⁴³⁴ See September 2009 Oversight Report, *supra* note 2, at 148 (from the Additional Views of former Panel member Congressman Jeb Hensarling).

have suffered a loss of priority for their claims. There is nothing in the Bankruptcy Code that allows a sale for less than fair value simply because the circumstances benefit a favored group of creditors.⁴³⁵

In addition, with respect to the bailout of GMAC/Ally Financial, the Panel offered the following observations in its March 2010 report:

Although the Panel takes no position on whether Treasury should have rescued GMAC, it finds that Treasury missed opportunities to increase accountability and better protect taxpayers' money. Treasury did not, for example, condition access to TARP money on the same sweeping changes that it required from GM and Chrysler: it did not wipe out GMAC's equity holders; nor did it require GMAC to create a viable plan for returning to profitability; nor did it require a detailed, public explanation of how the company would use taxpayer funds to increase consumer lending.

Moreover, the Panel remains unconvinced that bankruptcy was not a viable option in 2008. In connection with the Chrysler and GM bankruptcies, Treasury might have been able to orchestrate a strategic bankruptcy for GMAC. This bankruptcy could have preserved GMAC's automotive lending functions while winding down its other, less significant operations, dealing with the ongoing liabilities of the mortgage lending operations, and putting the company on sounder economic footing. The Panel is also concerned that Treasury has not given due consideration to the possibility of merging GMAC back into GM, a step which would restore GM's financing operations to the model generally shared by other automotive manufacturers, thus strengthening GM and eliminating other money-losing operations.⁴³⁶

⁴³⁵ Congressional Oversight Panel, Written Testimony of Barry E. Adler, Charles Seligson Professor of Law, New York University School of Law, *COP Field Hearing on the Auto Industry*, at 2-3 (July 27, 2009) (online at cop.senate.gov/documents/testimony-072709-adler.pdf).

⁴³⁶ March 2010 Oversight Report, *supra* note 22, at 4. *See also id.* at 122 (from the Additional Views of Panel member J. Mark McWatters and former Panel member Paul S. Atkins).

Section Three: TARP Updates Since Last Report

A. Ally Financial Mandatory Convertible Preferred Exchange to Common Stock

On December 30, 2010, Treasury converted \$5.5 billion of its total convertible preferred stock in GMAC/Ally Financial into 531,850 shares of common stock of the company, following the terms of conversion. Treasury currently holds \$5.9 billion of GMAC/Ally Financial's convertible preferred stock, \$2.7 billion in Trust Preferred securities, and 73.8 percent of the common stock.

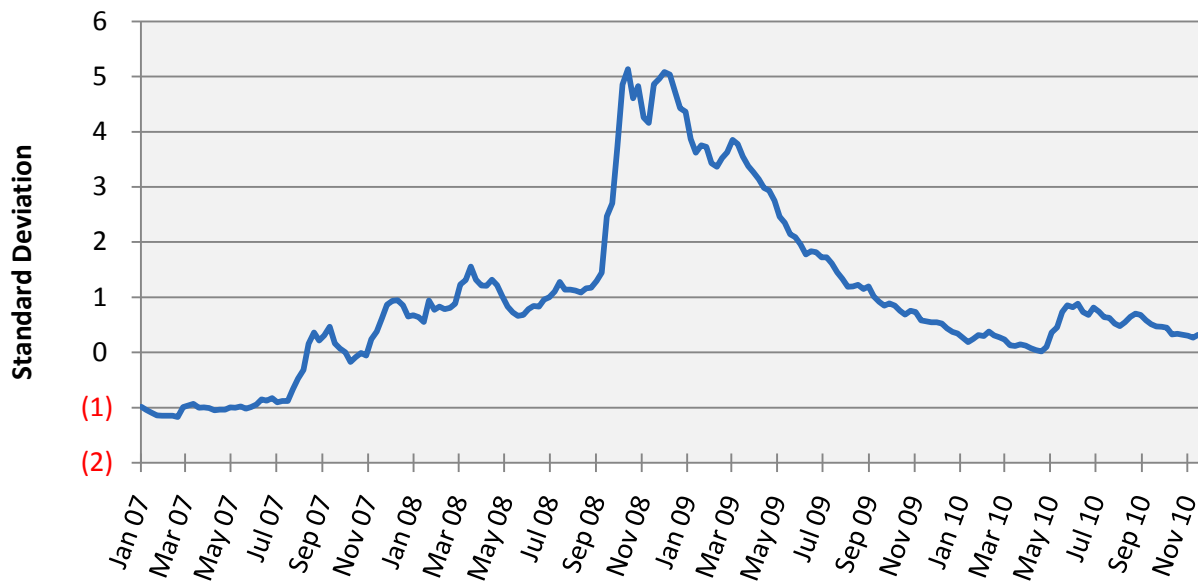
B. Metrics

Each month, the Panel's report highlights a number of metrics that the Panel and others, including Treasury, the Government Accountability Office (GAO), the Special Inspector General for the Troubled Asset Relief Program (SIGTARP), and the Financial Stability Oversight Board, consider useful in assessing the effectiveness of the Administration's efforts to restore financial stability and accomplish the goals of EESA. This section discusses changes that have occurred in several indicators since the release of the Panel's December 2010 report.

1. Financial Indices

Financial Stress. The St. Louis Financial Stress Index, a proxy for financial stress in the U.S. economy, has decreased by more than half since the Panel's December 2010 report. The index has decreased more than 80 percent since its post-crisis peak in June 2010. Furthermore, the recent trend in the index suggests that financial stress continues moving toward its long-run norm. The index has decreased by more than four standard deviations since EESA was enacted in October 2008.

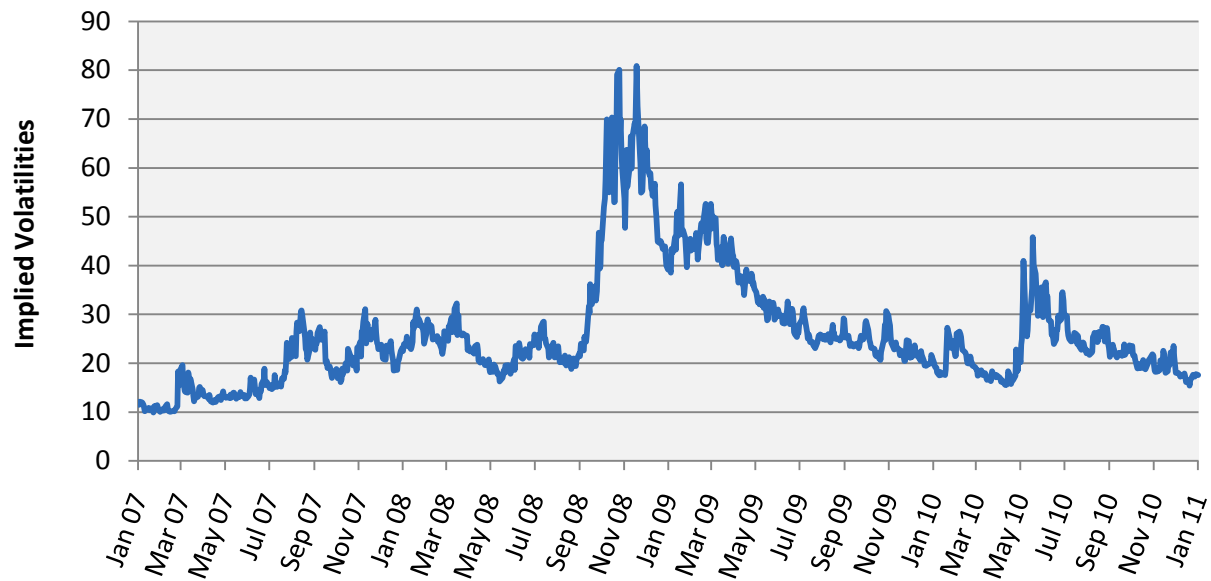
Figure 27: St. Louis Federal Reserve Financial Stress Index⁴³⁷



Stock Market Volatility. Stock market volatility, as measured by the Chicago Board Options Exchange Volatility Index (VIX), continues to decrease. The VIX has fallen by more than half since its post-crisis peak in May 2010 and has declined 18 percent since the Panel’s December 2010 report. As of January 3, 2011, volatility was 13 percent higher than its post-crisis low on April 12, 2010.

⁴³⁷ Federal Reserve Bank of St. Louis, *Series STLFSI: Business/Fiscal: Other Economic Indicators* (Instrument: St. Louis Financial Stress Index, Frequency: Weekly) (online at research.stlouisfed.org/fred2/series/STLFSI) (accessed Jan. 3, 2011). The index includes 18 weekly data series, beginning in December 1993 to the present. The series are: effective federal funds rate, 2-year Treasury, 10-year Treasury, 30-year Treasury, Baa-rated corporate, Merrill Lynch High Yield Corporate Master II Index, Merrill Lynch Asset-Backed Master BBB-rated, 10-year Treasury minus 3-month Treasury, Corporate Baa-rated bond minus 10-year Treasury, Merrill Lynch High Yield Corporate Master II Index minus 10-year Treasury, 3-month LIBOR-OIS spread, 3-month TED spread, 3-month commercial paper minus 3-month Treasury, the J.P. Morgan Emerging Markets Bond Index Plus, Chicago Board Options Exchange Market Volatility Index, Merrill Lynch Bond Market Volatility Index (1-month), 10-year nominal Treasury yield minus 10-year Treasury Inflation Protected Security yield, and Vanguard Financials Exchange-Traded Fund (equities). The index is constructed using principal components analysis after the data series are de-meaned and divided by their respective standard deviations to make them comparable units. The standard deviation of the index is set to 1. For more details on the construction of this index, see Federal Reserve Bank of St. Louis, *National Economic Trends Appendix: The St. Louis Fed’s Financial Stress Index* (Jan. 2010) (online at research.stlouisfed.org/publications/net/NETJan2010Appendix.pdf).

Figure 28: Chicago Board Options Exchange Volatility Index⁴³⁸



Interest Rates. As of January 3, 2011, the 3-month and 1-month London Interbank Offer Rates (LIBOR), the prices at which banks lend and borrow from each other, were 0.30 and 0.26, respectively.⁴³⁹ Both rates have decreased slightly since the Panel’s December 2010 report. The 3-month and 1-month LIBOR remain below their post-crisis highs in June 2010. Over the longer term, interest rates remain extremely low relative to pre-crisis levels, reflecting the impact of the actions of central banks and institutions’ perceptions of reduced risk in lending to other banks.

Figure 29: 3-Month and 1-Month LIBOR Rates (as of January 3, 2011)

Indicator	Current Rates	Percent Change from Data Available at Time of Last Report (12/1/2010)
3-Month LIBOR ⁴⁴⁰	0.30	(0.2)%
1-Month LIBOR ⁴⁴¹	0.26	(1.8)%

⁴³⁸ Data accessed through Bloomberg Data Service (Jan. 3, 2011). The CBOE VIX is a key measure of market expectations of near-term volatility. Chicago Board Options Exchange, *The CBOE Volatility Index – VIX*, 2009 (online at www.cboe.com/micro/vix/vixwhite.pdf) (accessed Jan. 3, 2011).

⁴³⁹ Data accessed through Bloomberg Data Service (Jan. 3, 2011).

⁴⁴⁰ Data accessed through Bloomberg Data Service (Jan. 3, 2011).

⁴⁴¹ Data accessed through Bloomberg Data Service (Jan. 3, 2011).

Interest Rate Spreads. As of January 3, 2011, the conventional mortgage rate spread, which measures the difference between 30-year mortgage rates and 10-year Treasury bond yields, decreased by 8 percent since the Panel’s December 2010 report.⁴⁴² The TED spread, which captures the difference between the 3-month LIBOR and the 3-month Treasury bill rates, serves as an indicator for perceived risk in the financial markets.⁴⁴³ As of January 3, 2011, the spread was 18.3 basis points, increasing almost 30 percent in December.

The LIBOR-OIS (Overnight Index Swap) spread serves as a metric for the health of the banking system, reflecting what banks believe to be the risk of default associated with interbank lending.⁴⁴⁴ The spread increased over threefold from early April to July 2010, before falling in mid-July.⁴⁴⁵ The LIBOR-OIS spread grew approximately 13 percent since the Panel’s December 2010 report. The decrease in both the LIBOR-OIS spread and the TED spread from the middle of 2010 suggests that hesitation among banks to lend to counterparties has receded. As shown in Figures 30 and 31 below, these spreads remain below pre-crisis levels.

⁴⁴² Board of Governors of the Federal Reserve System, *Federal Reserve Statistical Release H.15: Selected Interest Rates: Historical Data* (Instrument: Conventional Mortgages, Frequency: Weekly) (online at www.federalreserve.gov/releases/h15/data/Weekly_Thursday_/H15_MORTG_NA.txt) (accessed Jan. 3, 2011) (hereinafter “Federal Reserve Statistical Release H.15”); Federal Reserve Bank of St. Louis, *Series DGS10: Interest Rates: Treasury Constant Maturity* (Instrument: 10-Year Treasury Constant Maturity Rate, Frequency: Daily) (online at research.stlouisfed.org/fred2/series/DGS10) (accessed Jan. 3, 2011).

⁴⁴³ Federal Reserve Bank of Minneapolis, *Measuring Perceived Risk – The TED Spread* (Dec. 2008) (online at www.minneapolisfed.org/publications_papers/pub_display.cfm?id=4120).

⁴⁴⁴ Federal Reserve Bank of St. Louis, *What the LIBOR-OIS Spread Says* (May 11, 2009) ([online at research.stlouisfed.org/publications/es/09/ES0924.pdf](http://research.stlouisfed.org/publications/es/09/ES0924.pdf)).

⁴⁴⁵ Data accessed through Bloomberg Data Service (Jan. 3, 2011).

Figure 30: TED Spread⁴⁴⁶

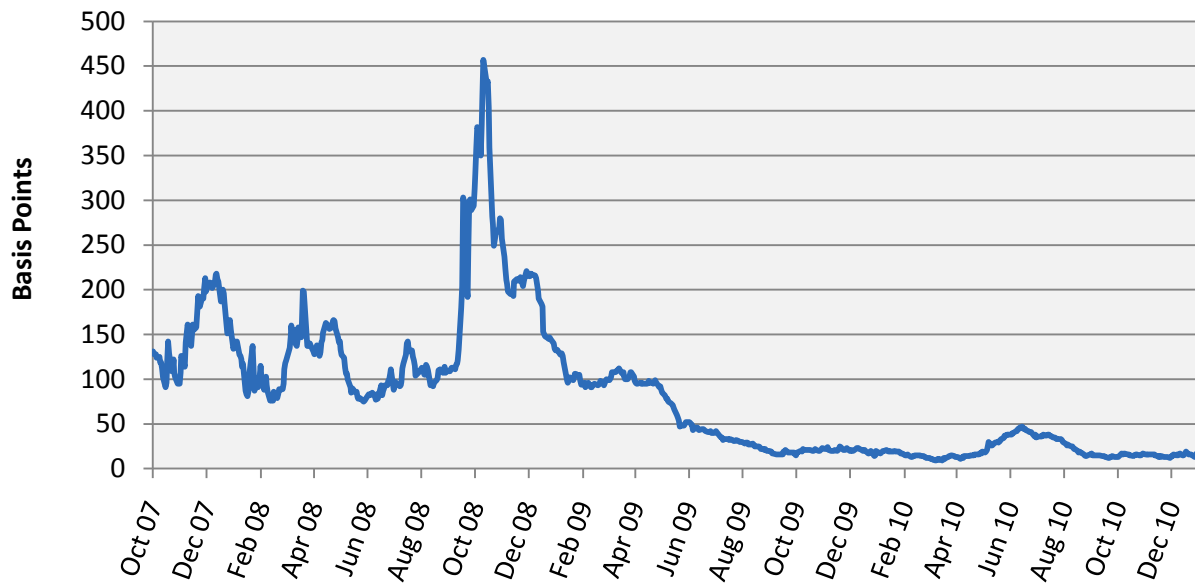
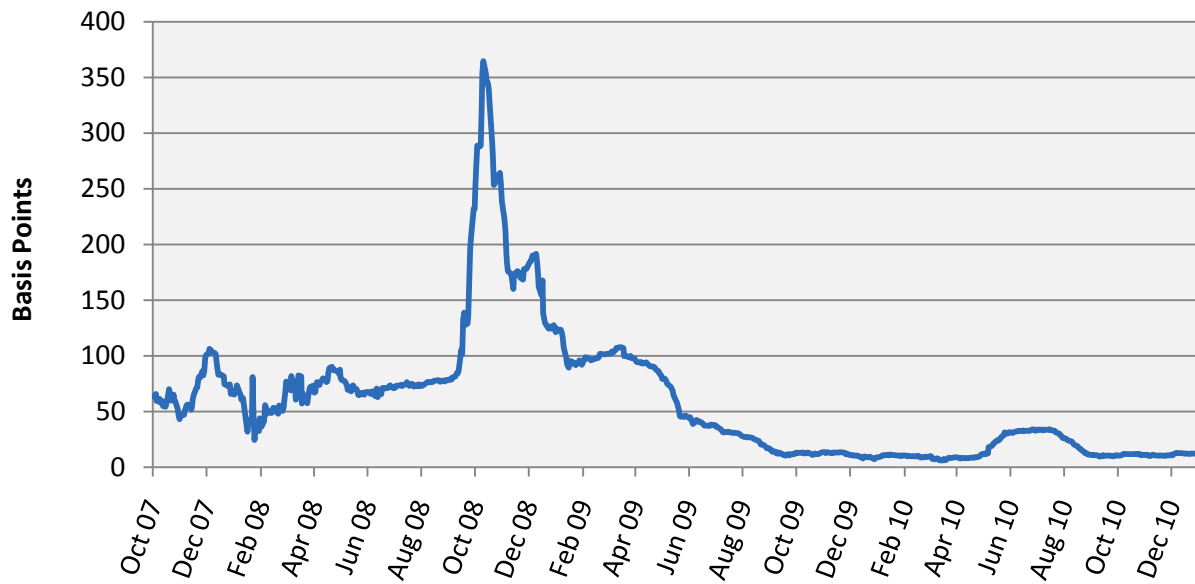


Figure 31: LIBOR-OIS Spread⁴⁴⁷



⁴⁴⁶ Data accessed through Bloomberg Data Service (Jan. 3, 2011).

⁴⁴⁷ Data accessed through Bloomberg Data Service (Jan. 3, 2011).

The interest rate spread on AA asset-backed commercial paper, which is considered mid-investment grade, decreased by almost 20 percent since the Panel’s December 2010 report. The interest rate spread on A2/P2 commercial paper, a lower grade investment than AA asset-backed commercial paper, increased by approximately 10 percent. Both interest rate spreads remain below pre-crisis levels.

Figure 32: Interest Rate Spreads (as of January 3, 2011)

Indicator	Current Spread	Percent Change Since Last Report (12/1/2010)
Conventional mortgage rate spread ⁴⁴⁸	1.44	(7.7)%
TED Spread (basis points)	18.28	27.5%
Overnight AA asset-backed commercial paper interest rate spread ⁴⁴⁹	0.06	(19.4)%
Overnight A2/P2 nonfinancial commercial paper interest rate spread ⁴⁵⁰	0.14	9.7%

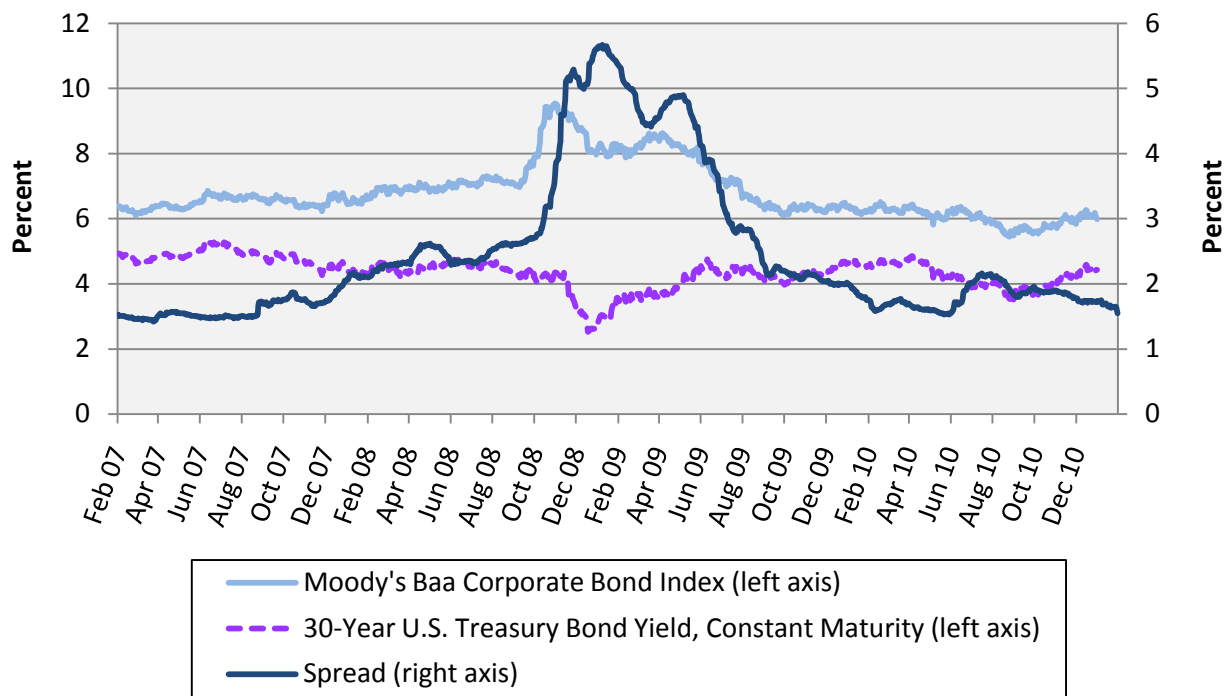
Corporate Bonds. The spread between Moody’s Baa Corporate Bond Yield Index and 30-year constant maturity U.S. Treasury Bond, which indicates the difference in perceived risk between corporate and government bonds, doubled from late April to mid-June 2010. During December, the spread declined approximately 10 percent, and has fallen almost 30 percent since its post-crisis peak in mid-June. The declining spread could indicate waning concerns about the riskiness of corporate bonds.

⁴⁴⁸ Federal Reserve Statistical Release H.15, *supra* note 442; Board of Governors of the Federal Reserve System, *Federal Reserve Statistical Release H.15: Selected Interest Rates: Historical Data* (Instrument: U.S. Government Securities/Treasury Constant Maturities/Nominal 10-Year, Frequency: Weekly) (online at www.federalreserve.gov/releases/h15/data/Weekly_Friday_H15_TCMNOM_Y10.txt) (accessed Jan. 3, 2011).

⁴⁴⁹ The overnight AA asset-backed commercial paper interest rate spread reflects the difference between the AA asset-backed commercial paper discount rate and the AA nonfinancial commercial paper discount rate. Board of Governors of the Federal Reserve System, *Federal Reserve Statistical Release: Commercial Paper Rates and Outstandings: Data Download Program* (Instrument: AA Asset-Backed Discount Rate, Frequency: Daily) (online at www.federalreserve.gov/DataDownload/Choose.aspx?rel=CP) (accessed Jan. 3, 2011); Board of Governors of the Federal Reserve System, *Federal Reserve Statistical Release: Commercial Paper Rates and Outstandings: Data Download Program* (Instrument: AA Nonfinancial Discount Rate, Frequency: Daily) (online at www.federalreserve.gov/DataDownload/Choose.aspx?rel=CP) (accessed Jan. 3, 2011). In order to provide a more complete comparison, this metric utilizes the average of the interest rate spread for the last five days of December.

⁴⁵⁰ The overnight A2/P2 nonfinancial commercial paper interest rate spread reflects the difference between the A2/P2 nonfinancial commercial paper discount rate and the AA nonfinancial commercial paper discount rate. Board of Governors of the Federal Reserve System, *Federal Reserve Statistical Release: Commercial Paper Rates and Outstandings: Data Download Program* (Instrument: A2/P2 Nonfinancial Discount Rate, Frequency: Daily) (online at www.federalreserve.gov/DataDownload/Choose.aspx?rel=CP) (accessed Jan. 3, 2011); Board of Governors of the Federal Reserve System, *Federal Reserve Statistical Release: Commercial Paper Rates and Outstandings: Data Download Program* (Instrument: AA Nonfinancial Discount Rate, Frequency: Daily) (online at www.federalreserve.gov/DataDownload/Choose.aspx?rel=CP) (accessed Jan. 3, 2011). In order to provide a more complete comparison, this metric utilizes the average of the interest rate spread for the last five days of December.

Figure 33: Moody's Baa Corporate Bond Index and 30-Year U.S. Treasury Yield⁴⁵¹



2. Bank Conditions

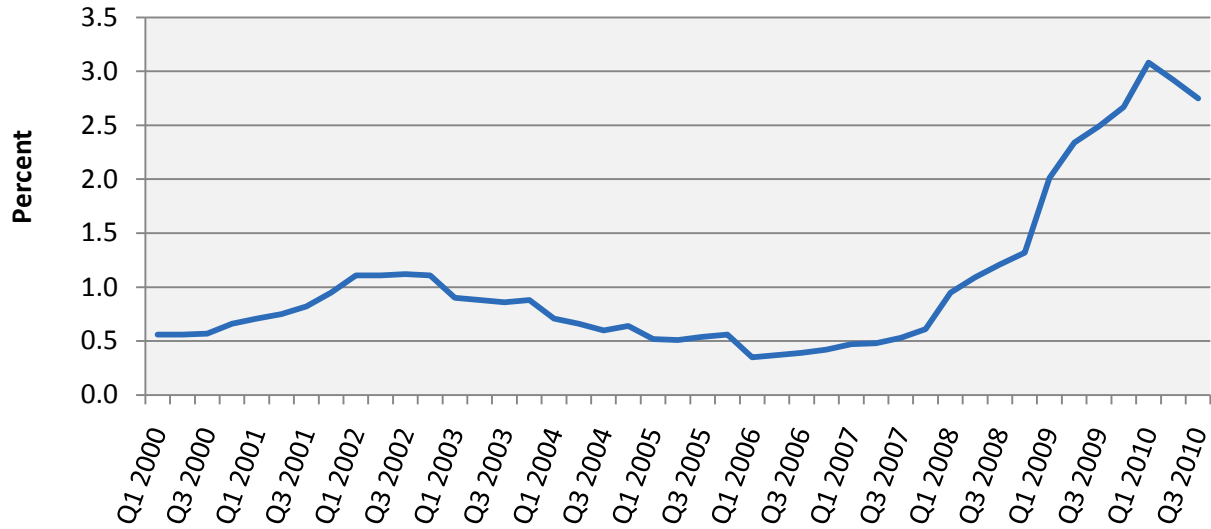
Net Charge-Offs and Nonperforming Loan Rates. Data on net charge-offs and nonperforming loans are beginning to reflect stabilizing loan quality in domestic banks. Net loan charge-offs represented 2.8 percent of all loans at the end of the third quarter of 2010, falling 10 percent from the first quarter of 2010. Nonperforming loans as a percentage of all commercial bank loans have also declined. Nonperforming loans include loans that are in default for 90 or more days and nonaccrual loans.⁴⁵² Since the beginning of 2010, this percentage has fallen from 5.6 percent to 5.2 percent at the end of the third quarter of 2010.

⁴⁵¹ Federal Reserve Bank of St. Louis, *Series DGS30: Selected Interest Rates* (Instrument: 30-Year Treasury Constant Maturity Rate, Frequency: Daily) (online at research.stlouisfed.org/fred2/release?rid=18) (accessed Jan. 3, 2011). Corporate Baa rate data accessed through Bloomberg data service (Jan. 3, 2011).

⁴⁵² Loans in nonaccrual status include those that are: (a) maintained on a cash basis because of deterioration in the financial condition of the borrower; (b) full payment of principal or interest is not expected; or (c) principal or interest has been in default for 90 or more days. Federal Deposit Insurance Corporation, *Schedule RC-N – Past Due and Nonaccrual Loans, Leases, and Other Assets*, at 2 (online at www.fdic.gov/regulations/resources/call/crinstant/2008-03/308RC-N032808.pdf).

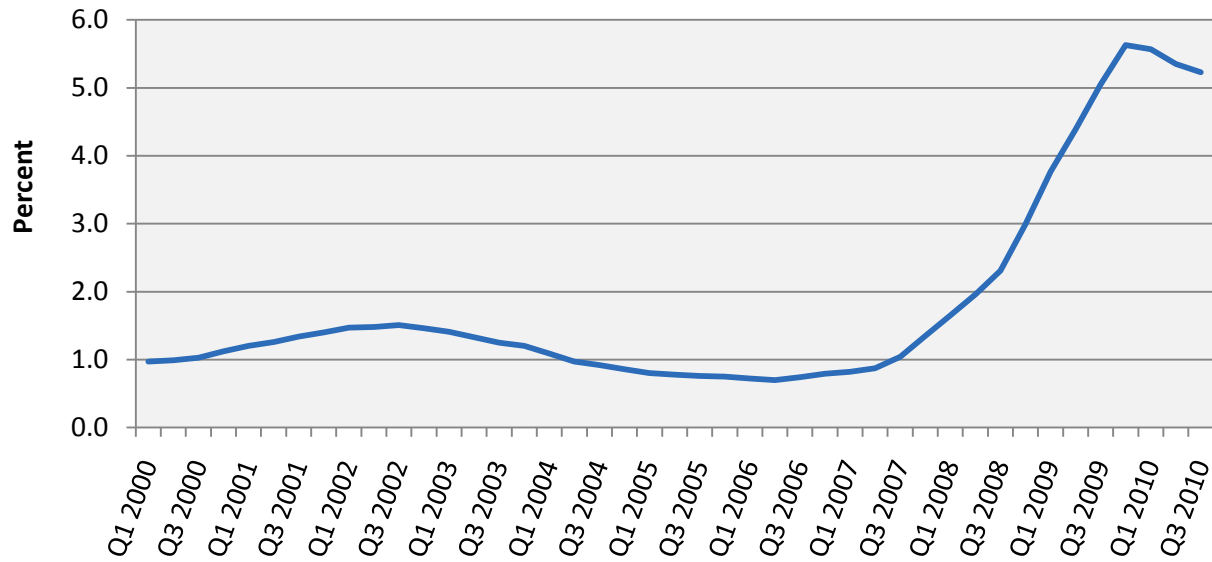
Despite the recent decline, these two percentages remain well above their respective levels in October 2008. At the time, total net loan charge-offs accounted for only 1.2 percent of all loans, and nonperforming loans represented 2.3 percent of all loans.

Figure 34: Net Loan Charge-Offs as a Percentage of Total Loans (as of Q3 2010)⁴⁵³



⁴⁵³ Federal Reserve Bank of St. Louis, *Condition of Banking: Total Net Loan Charge-offs* (online at research.stlouisfed.org/fred2/series/NCOTOT/downloaddata?cid=93) (accessed Jan. 3, 2011).

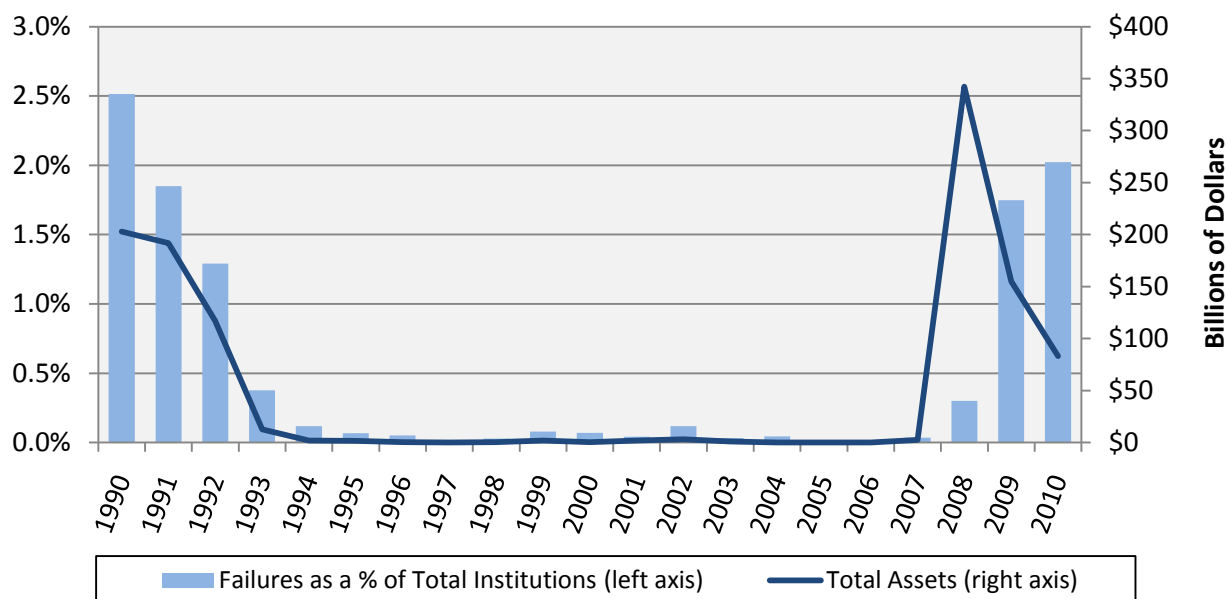
Figure 35: Nonperforming Loans as a Percentage of Total Loans (as of Q3 2010)⁴⁵⁴



⁴⁵⁴ Federal Reserve Bank of St. Louis, *Condition of Banking: Nonperforming Loans (Past Due 90+ Days Plus Nonaccrual)/Total Loans for All U.S. Banks* (online at research.stlouisfed.org/fred2/series/USNPTL?cid=93) (accessed Jan. 3, 2011).

Bank Failures. In 2010, a total of 157 banks failed and were placed into receivership, with eight institutions failing in December. Despite exceeding the total number of bank failures for 2009, banks that failed in 2010 had \$92.1 billion in total assets, which represents approximately half of the total assets of failed institutions in 2009.⁴⁵⁵ Most failures in 2010 involved institutions that held less than \$10 billion in assets.

Figure 36: Bank Failures as a Percentage of Total Banks and Bank Failures by Total Assets (1990-2010)⁴⁵⁶



3. Housing Indices

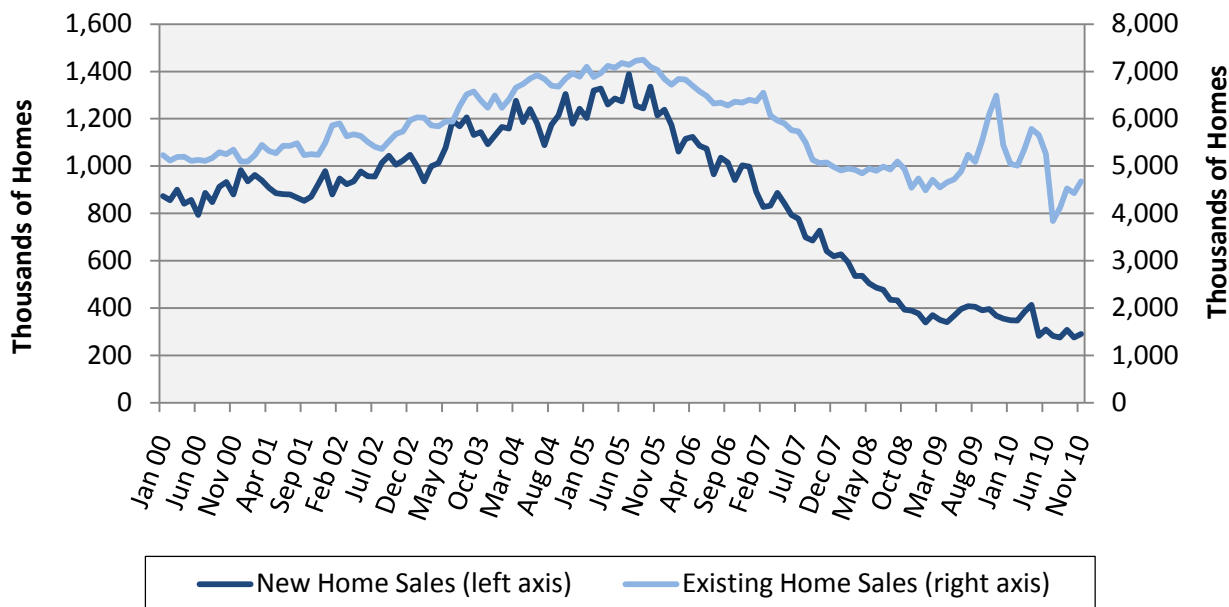
Home Sales. Both new and existing home sales saw a month-over-month increase in November 2010, increasing 2 percent during the month. New home sales, as measured by the

⁴⁵⁵ Federal Deposit Insurance Corporation, *Failures & Assistance Transactions* (online at www2.fdic.gov/hsob/SelectRpt.asp?EntryTyp=30) (accessed Jan. 3, 2011) (hereinafter “FDIC Failures & Assistance Transactions”).

⁴⁵⁶ The disparity between the number of and total assets of failed banks in 2008 is driven primarily by the failure of Washington Mutual Bank, which held \$307 billion in assets. The 2010 year-to-date percentage of bank failures includes failures through December. The total number of FDIC-insured institutions as of September 30, 2010 is 7,760 commercial banks and savings institutions, which represents a quarter-over-quarter decline of 70 institutions and a decrease of 624 institutions since the end of the third quarter of 2008. Furthermore, there are currently 860 institutions on the FDIC’s “Problem List.” FDIC Failures & Assistance Transactions, *supra* note 455; Federal Deposit Insurance Corporation, *Quarterly Banking Profile, Third Quarter 2010: Statistics At A Glance*, at 5 (online at www.fdic.gov/bank/statistical/stats/2010sep/industry.pdf) (accessed Jan. 3, 2011). Asset totals have been converted into 2005 dollars using the GDP implicit price deflator. The quarterly values were averaged into a yearly value. FDIC Failures & Assistance Transactions, *supra* note 455.

U.S. Census Bureau, increased 2 percent to 290,000 during the month. With respect to existing home sales, the National Association of Realtors estimates a 6 percent month-over-month increase in November, to an annual rate of 4.4 million homes sold. Although existing home sales in November remain below the ten-year historical average, current levels are above the July 2010 level, when existing home sales reached their lowest point in more than a decade.

Figure 37: New and Existing Home Sales (2000-2010)⁴⁵⁷



Foreclosures. Foreclosure actions, which consist of default notices, scheduled auctions, and bank repossessions, decreased 21 percent in November 2010 to 262,339, marking the first month since February 2009 that foreclosure filings have been below 300,000.⁴⁵⁸ However, it is important to note that much of the decline could be attributed to a number of loan servicers suspending foreclosures in the fall of 2010 as they conducted internal reviews of their

⁴⁵⁷ Data accessed through Bloomberg Data Service (Jan. 3, 2011). Spikes in both new and existing home sales in January 2009 and November 2009 correlate with the tax credits extended to first-time and repeat home buyers during these periods. After both tax credits were extinguished on April 30, 2010, existing home sales dropped to 3.8 million homes in July, their lowest level in a decade. National Association of Realtors, *July Existing-Home Sales Fall as Expected but Prices Rise* (Aug. 24, 2010) (online at www.realtor.org/press_room/news_releases/2010/08/ehs_fall).

⁴⁵⁸ RealtyTrac, *Foreclosure Activity Decreases 21 Percent in November* (Dec. 16, 2010) (online at www.realtytrac.com/content/press-releases/foreclosure-activity-decreases-21-percent-in-november-6251) (hereinafter “RealtyTrac – Foreclosure Activity Decreases”).

foreclosure procedures.⁴⁵⁹ Since the enactment of EESA, there have been approximately 8.4 million foreclosure filings.⁴⁶⁰

Home Prices. With respect to housing price indices, the Case-Shiller Composite 20-City Composite Home Price Index decreased by less than 1 percent, while the FHFA Housing Price Index increased by less than 1 percent in October 2010. The Case-Shiller and FHFA indices are approximately 8 percent and 5 percent below their respective October 2008 levels.⁴⁶¹

Case-Shiller futures prices indicate a market expectation that home-price values for the major Metropolitan Statistical Areas (MSAs) will decrease through 2011.⁴⁶² These futures are cash-settled to a weighted composite index of U.S. housing prices in the top ten MSAs, as well as to those specific markets. They are used to hedge by businesses whose profits and losses are related to a specific area of the housing industry, and to balance portfolios by businesses seeking exposure to an uncorrelated asset class. As such, futures prices are a composite indicator of market information known to date and can be used to indicate market expectations for home prices.

⁴⁵⁹ For more information on foreclosure irregularities, see November 2010 Oversight Report, *supra* note 369.

⁴⁶⁰ Data accessed through Bloomberg Data Service (Jan. 3, 2011).

⁴⁶¹ The most recent data available are for September 2010. See Standard and Poor's, *S&P/Case-Shiller Home Price Indices* (Instrument: Case-Shiller 20-City Composite Seasonally Adjusted, Frequency: Monthly) (online at www.standardandpoors.com/indices/sp-case-shiller-home-price-indices/en/us/?indexId=spusa-cashpidff--p-us---) (accessed Jan. 3, 2011) (hereinafter "S&P/Case-Shiller Home Price Indices"); Federal Housing Finance Agency, *U.S. and Census Division Monthly Purchase Only Index* (Instrument: USA, Seasonally Adjusted) (online at www.fhfa.gov/Default.aspx?Page=87) (accessed Jan. 3, 2011) (hereinafter "FHFA Monthly Purchase Only Index"). S&P has cautioned that the seasonal adjustment is probably being distorted by irregular factors. These factors could include distressed sales and the various government programs. See Standard and Poor's, *S&P/Case-Shiller Home Price Indices and Seasonal Adjustment* (Apr. 2010) (online at www.standardandpoors.com/servlet/BlobServer?blobheadername3=MDT-Type&blobcol=urldata&blobtable=MungoBlobs&blobheadervalue2=inline;+filename%3DCaseShiller_SeasonalAdjustment2,0.pdf&blobheadername2=Content-Disposition&blobheadervalue1=application/pdf&blobkey=id&blobheadername1=content-type&blobwhere=1243679046081&blobheadervalue3=UTF-8). For a discussion of the differences between the Case-Shiller Index and the FHFA Index, see Congressional Oversight Panel, *April Oversight Report: Evaluating Progress on TARP Foreclosure Mitigation Programs*, at 98 (Apr. 14, 2010) (online at cop.senate.gov/documents/cop-041410-report.pdf).

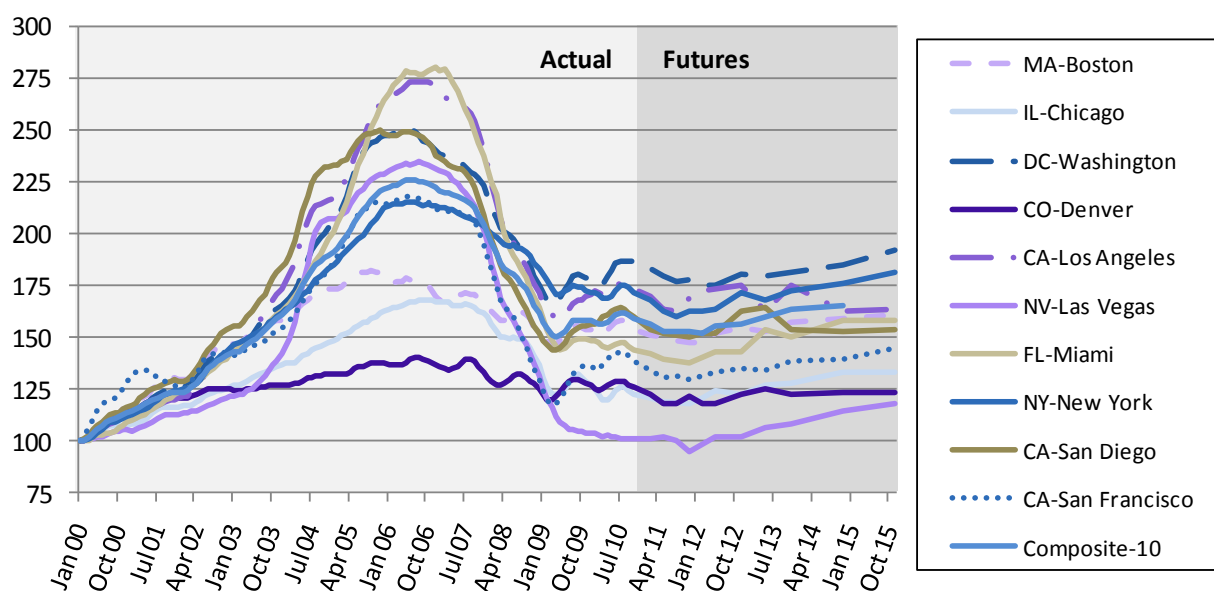
⁴⁶² Data accessed through Bloomberg Data Service (Jan. 3, 2011). The Case-Shiller Futures contract is traded on the Chicago Mercantile Exchange (CME) and is settled to the Case-Shiller Index two months after the previous calendar quarter. For example, the February contract will be settled against the spot value of the S&P Case-Shiller Home Price Index values representing the fourth calendar quarter of the previous year, which is released in February one day after the settlement of the contract. Note that most close observers believe that the accuracy of these futures contracts as forecasts diminishes the farther out one looks.

A Metropolitan Statistical Area is defined as a core area containing a substantial population nucleus, together with adjacent communities having a high degree of economic and social integration with the core. U.S. Census Bureau, *About Metropolitan and Micropolitan Statistical Areas* (online at www.census.gov/population/www/metroareas/aboutmetro.html) (accessed Dec. 10, 2010).

Figure 38: Housing Indicators

Indicator	Most Recent Monthly Data	Percent Change from Data Available at Time of Last Report	Percent Change Since October 2008
Monthly foreclosure actions ⁴⁶³	262,339	(21.0)%	(6.2)%
S&P/Case-Shiller Composite 20 Index ⁴⁶⁴	143.52	(0.1)%	(8.2)%
FHFA Housing Price Index ⁴⁶⁵	190.83	0.2%	(5.4)%

Figure 39: Case-Shiller Home Price Index and Futures Values⁴⁶⁶



C. Financial Update

Each month, the Panel summarizes the resources that the federal government has committed to the rescue and recovery of the financial system. The following financial update

⁴⁶³ RealtyTrac – Foreclosure Activity Decreases, *supra* note 458. The most recent data available are for November 2010.

⁴⁶⁴ S&P/Case-Shiller Home Price Indices, *supra* note 461. The most recent data available are for October 2010.

⁴⁶⁵ FHFA Monthly Purchase Only Index, *supra* note 461. The most recent data available are for October 2010.

⁴⁶⁶ All data normalized to 100 in January 2000. Futures data accessed through Bloomberg Data Service (Jan. 3, 2011). S&P/Case-Shiller Home Price Indices, *supra* note 461.

provides: (1) an updated accounting of the TARP, including a tally of dividend income, repayments, and warrant dispositions that the program has received as of November 30, 2010; and (2) an updated accounting of the full federal resource commitment as of December 30, 2010.

1. The TARP

a. Program Updates⁴⁶⁷

Treasury's spending authority under the TARP officially expired on October 3, 2010. Though it can no longer make new funding commitments, Treasury can continue to provide funding for programs for which it has existing contracts and previous commitments. To date, \$396.2 billion has been spent under the TARP's \$475 billion ceiling.⁴⁶⁸ Of the total amount disbursed, \$240.4 billion has been repaid. Treasury has also incurred \$6.1 billion in losses associated with its Capital Purchase Program (CPP) and Automotive Industry Financing Program (AIFP) investments. About two-thirds of the \$149.8 billion in TARP funds currently outstanding relates to Treasury's investments in AIG and assistance provided to the automotive industry.

CPP Repayments

As of December 30, 2010, 131 of the 707 banks that participated in the CPP have fully redeemed their preferred shares either through capital repayment or exchanges for investments under the Community Development Capital Initiative (CDCI). During December 2010, Treasury received the funds from the sale of the final outstanding Citigroup shares, equaling full repayment of the \$25 billion investment as well as an additional \$6.9 billion in profit from the sale of these shares.⁴⁶⁹ An additional 14 banks fully repaid their remaining CPP capital, returning \$3.3 billion in principal to Treasury. See Figure 40 below for repayment amounts.

⁴⁶⁷ U.S. Department of the Treasury, *Cumulative Dividends, Interest and Distributions Report as of September 30, 2010* (Oct. 11, 2010) (online at financialstability.gov/docs/dividends-interest-reports/September%202010%20Dividends%20&%20Interest%20Report.pdf); Treasury Transactions Report, *supra* note 24.

⁴⁶⁸ The original \$700 billion TARP ceiling was reduced by \$1.26 billion as part of the Helping Families Save Their Homes Act of 2009. 12 U.S.C. § 5225(a)-(b) (online at www.gpo.gov/fdsys/pkg/PLAW-111publ22/pdf/PLAW-111publ22.pdf). On June 30, 2010, the House-Senate Conference Committee agreed to reduce the amount authorized under the TARP from \$700 billion to \$475 billion as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act that was signed into law on July 21, 2010. See *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203 (2010) (online at www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf); The White House, *Remarks by the President at Signing of Dodd-Frank Wall Street Reform and Consumer Protection Act* (July 21, 2010) (online at www.whitehouse.gov/the-press-office/remarks-president-signing-dodd-frank-wall-street-reform-and-consumer-protection-act).

⁴⁶⁹ This figure is comprised of the \$4.2 billion in net proceeds from the sale of Citigroup common stock between April 26 and December 6, 2010 as well as \$2.7 billion in proceeds from the December 6 equity underwriting.

Figure 40: Banks that Fully Repaid Their CPP Loans in December 2010⁴⁷⁰

Bank	Amount Repaid	Remaining Investment
First Horizon National Corporation	\$866,540,000	Warrants
Huntington Bancshares	1,398,071,000	Warrants
Heritage Financial Corporation	24,000,000	Warrants
First PacTrust Bancorp, Inc.	19,300,000	Warrants
East West Bancorp	406,546,000	Warrants
Wintrust Financial Corporation	250,000,000	Warrants
Capital Bancorp, Inc.	4,700,000	None
Surrey Bancorp	2,000,000	None
1st Source Corporation	111,000,000	None
California Oaks State Bank	3,300,000	None
The Bank of Currituck	1,742,850	None
Haviland Bancshares, Inc.	425,000	None
Signature Bancshares, Inc.	1,700,000	None
Nationwide Bankshares, Inc.	2,000,000	None
Total	\$3,332,871,850	

Additionally, during December 2010, United Financial Banking Companies, Inc. made a partial repayment of \$3 million, and The Bank of Kentucky Financial Corporation made a partial repayment of \$17 million. A total of \$167.9 billion has been repaid under the program, leaving \$34.4 billion in funds currently outstanding.⁴⁷¹

b. Income: Dividends, Interest, and Warrant Sales

In conjunction with its preferred stock investments under the CPP and the Targeted Investment Program (TIP), Treasury generally received warrants to purchase common equity.⁴⁷² As of December 30, 2010, 46 institutions have repurchased their warrants from Treasury at an agreed-upon price. Treasury has also sold warrants for 15 other institutions at auction. To date, income from warrant dispositions totals \$8.2 billion.

In addition to warrant proceeds, Treasury also receives dividend payments on the preferred shares that it holds under the CPP, 5 percent per year for the first five years and 9

⁴⁷⁰ Treasury Transactions Report, *supra* note 24.

⁴⁷¹ The \$34.4 billion currently outstanding reflects the \$2.6 billion in announced losses associated with the program. See Figure 42 for further details on losses associated with programs.

⁴⁷² For its CPP investments in privately held financial institutions, Treasury also received warrants to purchase additional shares of preferred stock, which it exercised immediately. Similarly, Treasury received warrants to purchase additional subordinated debt that were immediately exercised along with its CPP investments in subchapter S corporations. Treasury Transactions Report, *supra* note 24, at 14.

percent per year thereafter.⁴⁷³ For preferred shares issued under the TIP, Treasury received a dividend of 8 percent per year.⁴⁷⁴ In total, Treasury has received approximately \$30.3 billion in net income from warrant repurchases, dividends, interest payments, profit from the sale of stock, and other proceeds deriving from TARP investments, after deducting losses.⁴⁷⁵ For further information on TARP profit and loss, see Figure 42.

⁴⁷³ U.S. Department of the Treasury, *Capital Purchase Program* (Oct. 3, 2010) (online at www.financialstability.gov/roadtostability/capitalpurchaseprogram.html).

⁴⁷⁴ U.S. Department of the Treasury, *Targeted Investment Program* (Oct. 3, 2010) (online at www.financialstability.gov/roadtostability/targetedinvestmentprogram.html).

⁴⁷⁵ U.S. Department of the Treasury, *Cumulative Dividends, Interest and Distributions Report as of November 30, 2010* (Dec. 10, 2010) (online at financialstability.gov/docs/dividends-interest-reports/November%202010%20Dividends%20&%20Interest%20Report.pdf) (hereinafter “Cumulative Dividends, Interest and Distributions Report”); Treasury Transactions Report, *supra* note 24. Treasury also received an additional \$1.2 billion in participation fees from its Guarantee Program for Money Market Funds. U.S. Department of the Treasury, *Treasury Announces Expiration of Guarantee Program for Money Market Funds* (Sept. 18, 2009) (online at www.treasury.gov/press-center/press-releases/Pages/tg293.aspx).

c. TARP Accounting

Figure 41: TARP Accounting (as of December 30, 2010) (billions of dollars)ⁱ

Program	Maximum Amount Allotted	Actual Funding	Total Repayments/ Reduced Exposure	Total Losses	Funding Currently Outstanding	Funding Available
Capital Purchase Program (CPP)	\$204.9	\$204.9	ⁱⁱ \$(167.9)	ⁱⁱⁱ \$(2.6)	\$34.4	\$0
Targeted Investment Program (TIP)	40.0	40.0	(40.0)	0	0	0
Asset Guarantee Program (AGP)	5.0	^{iv} 5.0	^v (5.0)	0	0	0
AIG Investment Program (AIGIP)	69.8	^{vi} 47.5	0	0	47.5	22.3
Auto Industry Financing Program (AIFP)	81.3	81.3	(26.4)	^{vii} (3.5)	^{viii} 51.4	0
Auto Supplier Support Program (ASSP) ^{ix}	0.4	0.4	(0.4)	0	0	0
Term Asset-Backed Securities Loan Facility (TALF)	^x 4.3	^{xi} 0.1	0	0	0.1	4.2
Public-Private Investment Program (PPIP) ^{xii}	22.4	^{xiii} 15.1	^{xiv} (0.6)	0	14.5	7.4
SBA 7(a) Securities Purchase Program	0.4	^{xv} 0.4	0	0	0.4	^{xvi} 0
Home Affordable Modification Program (HAMP)	29.9	0.8	0	0	0.7	29.1
Hardest Hit Fund (HHF)	^{xvii} 7.6	^{xviii} 0.1	0	0	0.1	7.5
FHA Refinance Program	8.1	^{xix} 0.1	0	0	0.1	8.0
Community Development Capital Initiative (CDCI)	0.8	^{xx} 0.6	0	0	0.6	0
Total	\$475.0	\$396.2	\$(240.4)	\$(6.1)	\$149.8	\$78.5

ⁱ Figures affected by rounding. Unless otherwise noted, data in this table are from the following sources: U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010* (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf); U.S. Department of the Treasury, *Troubled Assets Relief Program Monthly 105(a) Report – November 2010* (Dec. 10, 2010) (online at [www.financialstability.gov/docs/November%20105\(a\)%20FINAL.pdf](http://www.financialstability.gov/docs/November%20105(a)%20FINAL.pdf)).

ⁱⁱ In June 2009, Treasury exchanged \$25 billion in Citigroup preferred stock for 7.7 billion shares of the company's common stock at \$3.25 per share. As of December 30, 2010, Treasury had sold the entirety of its Citigroup common shares for \$31.85 billion in gross proceeds. The amount repaid under CPP includes \$25 billion Treasury received as part of its sales of Citigroup common stock. The difference between these two numbers represents the \$6.85 billion in net profit Treasury has received from the sale of Citigroup common stock.

Total CPP repayments also include amounts repaid by institutions that exchanged their CPP investments for investments under the CDCI, as well as proceeds earned from the sale of preferred stock issued by South Financial Group, Inc., TIB Financial Corp, and the Bank of Currituck. See U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010*, at 2, 13-15 (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf); U.S. Department of the Treasury, *Troubled Asset Relief Program: Two-Year Retrospective*, at 25 (Oct. 2010) (online at www.financialstability.gov/docs/TARP%20Two%20Year%20Retrospective_10%2005%2010_transmittal%20letter.pdf); U.S. Department of the Treasury, *Treasury Commences Plan to Sell Citigroup Common Stock* (Apr. 26, 2010) (online at www.treasury.gov/press-center/press-releases/Pages/tg660.aspx).

ⁱⁱⁱ In the TARP Transactions Report, Treasury has classified the investments it made in two institutions, CIT Group (\$2.3 billion) and Pacific Coast National Bancorp (\$4.1 million), as losses. In addition, Treasury sold its preferred ownership interests, along with warrants, in South Financial Group, Inc., TIB Financial Corp., and the Bank of Currituck to non-TARP participating institutions. These shares were sold at prices below the value of the original CPP investment, at respective losses of \$217 million, \$25 million, and \$2.3 million. Therefore, Treasury's net current CPP investment is \$34.4 billion due to the \$2.6 billion in losses thus far. See U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010*, at 1-14 (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf).

^{iv} The \$5.0 billion AGP guarantee for Citigroup was unused since Treasury was not required to make any guarantee payments during the life of the program. U.S. Department of the Treasury, *Troubled Asset Relief Program: Two-Year Retrospective*, at 31 (Oct. 2010) (online at www.financialstability.gov/docs/TARP%20Two%20Year%20Retrospective_10%2005%2010_transmittal%20letter.pdf); U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010*, at 20 (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf).

^v Although this \$5.0 billion is no longer exposed as part of the AGP, Treasury did not receive a repayment in the same sense as with other investments. Treasury did receive other income as consideration for the guarantee, which is not a repayment and is accounted for in Figure 42. See U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010*, at 20 (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf).

^{vi} AIG has completely utilized the \$40 billion that was made available on November 25, 2008, in exchange for the company's preferred stock. See U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010*, at 21 (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf). It has also drawn down \$7.5 billion of the \$29.8 billion made available on April 17, 2009. American International Group, Inc., *Form 10-Q for the Quarterly Period Ended September 30, 2010*, at 119 (Nov. 5, 2010) (online at sec.gov/Archives/edgar/data/5272/000104746910009269/a2200724z10-q.htm). This figure does not

include \$1.6 billion in accumulated but unpaid dividends owed by AIG to Treasury due to the restructuring of Treasury's investment from cumulative preferred shares to non-cumulative shares. See U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010*, at 21 (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf). AIG expects to draw down up to \$22.3 billion in unutilized funds from the TARP as part of its plan to repay the revolving credit facility provided by the Federal Reserve Bank of New York. American International Group, Inc., *AIG Announces Plan to Repay U.S. Government* (Sept. 30, 2010) (online at www.aigcorporate.com/newsroom/2010_September/AIGAnnouncesPlantoRepay30Sept2010.pdf);

^{vii} On May 14, 2010, Treasury accepted a \$1.9 billion settlement payment for its \$3.5 billion loan to Chrysler Holding. The payment represented a \$1.6 billion loss from the termination of the debt obligation. See U.S. Department of the Treasury, *Chrysler Financial Parent Company Repays \$1.9 Billion in Settlement of Original Chrysler Loan* (May 17, 2010) (online at www.financialstability.gov/latest/pr_05172010c.html); U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010*, at 18-19 (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf). Also, following the bankruptcy proceedings for Old Chrysler, which extinguished the \$1.9 billion debtor-in-possession (DIP) loan provided to Old Chrysler, Treasury retained the right to recover the proceeds from the liquidation of specified collateral. Although Treasury does not expect a significant recovery from the liquidation proceeds, Treasury is not yet reporting this loan as a loss in the TARP Transactions Report. As of December 30, 2010, Treasury had collected \$48.1 million in proceeds from the sale of collateral. Treasury included these proceeds as part of the \$26.4 billion repaid under the AIFP. U.S. Department of the Treasury, *Troubled Assets Relief Program Monthly 105(a) Report – September 2010* (Oct. 12, 2010) (online at [www.financialstability.gov/docs/105CongressionalReports/September 105\(a\) report_FINAL.pdf](http://www.financialstability.gov/docs/105CongressionalReports/September%20105(a)%20report_FINAL.pdf)); Treasury conversations with Panel staff (Aug. 19, 2010 and Nov. 29, 2010); U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010*, at 18 (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf).

^{viii} In the TARP Transactions Report, the \$1.9 billion Chrysler debtor-in-possession loan, which was extinguished April 30, 2010, was deducted from Treasury's current AIFP investment amount. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010*, at 18 (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf). See endnote vii, *supra*, for details on losses from Treasury's investment in Chrysler.

^{ix} On April 5, 2010, Treasury terminated its commitment to lend to the GM special purpose vehicle (SPV) under the ASSP. On April 7, 2010, it terminated its commitment to lend to the Chrysler SPV. In total, Treasury received \$413 million in repayments from loans provided by this program (\$290 million from the GM SPV and \$123 million from the Chrysler SPV). Further, Treasury received \$101 million in proceeds from additional notes associated with this program. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010*, at 19 (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf).

^x For the TALF, \$1 of TARP funds was committed for every \$10 of funds obligated by the Federal Reserve. The program was intended to be a \$200 billion initiative, and the TARP was responsible for the first \$20 billion in loan-losses, if any were incurred. The loan was incrementally funded. When the program closed in June 2010, a total of \$43 billion in loans was outstanding under the TALF, and the TARP's commitments constituted \$4.3 billion. The Federal Reserve Board of Governors agreed that it was appropriate for Treasury to reduce TALF credit protection from the TARP to \$4.3 billion. Board of Governors of the Federal Reserve System, *Federal Reserve Announces Agreement with the Treasury Department Regarding a Reduction of Credit Protection Provided for the Term Asset-Backed Securities Loan Facility (TALF)* (July 20, 2010) (online at www.federalreserve.gov/newsevents/press/monetary/20100720a.htm).

^{xi} As of January 5, 2011, Treasury had provided \$106 million to TALF LLC. This total is net of accrued interest payable to Treasury. Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1)* (Jan. 3, 2010) (online at www.federalreserve.gov/releases/h41/20110106/).

^{xii} As of September 30, 2010, the total value of securities held by the PPIP fund managers was \$19.3 billion. Non-agency residential mortgage-backed securities represented 82 percent of the total; commercial mortgage-backed securities represented the balance. U.S. Department of the Treasury, *Legacy Securities Public-Private Investment Program, Program Update – Quarter Ended September 30, 2010*, at 4 (Oct. 20, 2010) (online at www.financialstability.gov/docs/External%20Report%20-%2009-10%20vFinal.pdf).

^{xiii} U.S. Department of the Treasury, *Troubled Assets Relief Program Monthly 105(a) Report – November 2010*, at 4 (Dec. 10, 2010) (online at [www.financialstability.gov/docs/November%20105\(a\)%20FINAL.pdf](http://www.financialstability.gov/docs/November%20105(a)%20FINAL.pdf)).

^{xiv} As of December 30, 2010, Treasury has received \$593 million in capital repayments from two PPIP fund managers. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010*, at 23 (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf).

^{xv} As of December 30, 2010, Treasury's purchases under the SBA 7(a) Securities Purchase Program totaled \$368.1 million. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010*, at 22 (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf).

^{xvi} Treasury will not make additional purchases pursuant to the expiration of its purchasing authority under EESA. U.S. Department of the Treasury, *Troubled Asset Relief Program: Two-Year Retrospective*, at 43 (Oct. 2010) (online at www.financialstability.gov/docs/TARP%20Two%20Year%20Retrospective_10%2005%2010_transmittal%20letter.pdf).

^{xvii} On June 23, 2010, \$1.5 billion was allocated to mortgage assistance through the Hardest Hit Fund (HHF). Another \$600 million was approved on August 3, 2010. U.S. Department of the Treasury, *Obama Administration Approves State Plans for \$600 million of 'Hardest Hit Fund' Foreclosure Prevention Assistance* (Aug. 3, 2010) (online at www.financialstability.gov/latest/pr_08042010.html). As part of its revisions to TARP allocations upon enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Treasury allocated an additional \$2 billion in TARP funds to mortgage assistance for unemployed borrowers through the HHF. U.S. Department of the Treasury, *Obama Administration Announces Additional Support for Targeted Foreclosure-Prevention Programs to Help Homeowners Struggling with Unemployment* (Aug. 11, 2010) (online at www.financialstability.gov/latest/pr_08112010.html). In October 2010, another \$3.5 billion was allocated among the 18 states and the District of Columbia currently participating in HHF. The amount each state received during this round of funding is proportional to its population. U.S. Department of the Treasury, *Troubled Asset Relief Program: Two Year Retrospective*, at 72 (Oct. 2010) (online at www.financialstability.gov/docs/TARP%20Two%20Year%20Retrospective_10%2005%2010_transmittal%20letter.pdf).

^{xviii} As of December 31, 2010, a total of \$103.6 million has been disbursed to 12 state Housing Finance Agencies (HFAs). Data provided by Treasury (Jan. 4, 2011).

^{xix} This figure represents the amount Treasury disbursed to fund the advance purchase account of the Letter of Credit issued under the FHA Short Refinance Program. The \$53.3 million in the FHA Short Refinance program is broken down as follows: \$50 million for a deposit into an advance purchase account as collateral to the initial \$50 million Letter of Credit, \$2.9 million for the closing and funding of the Letter of Credit, \$115,000 in trustee fees, \$175,000 in claims processor fees, and \$156,000 for an unused commitment fee for the Letter of Credit. Data provided by Treasury (Dec. 2, 2010).

^{xx} U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010*, at 1-13, 16-17 (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf). Treasury closed the program on September 30, 2010, after investing \$570 million in 84 CDFIs. U.S. Department of the Treasury, *Treasury*

Announces Special Financial Stabilization Initiative Investments of \$570 Million in 84 Community Development Financial Institutions in Underserved Areas (Sept. 30, 2010) (online at www.financialstability.gov/latest/pr_09302010b.html).

Figure 42: TARP Profit and Loss (millions of dollars)

TARP Initiative^{xxi}	Dividends^{xxii} (as of 11/30/2010)	Interest^{xxiii} (as of 11/30/2010)	Warrant Disposition Proceeds^{xxiv} (as of 12/30/2010)	Other Proceeds (as of 11/30/2010)	Losses^{xxv} (as of 12/30/2010)	Total
Total	\$17,345	\$1,083	\$8,160	\$9,801	(\$6,066)	\$30,353
CPP	10,169	59	6,905	^{xxvi} 6,852	(2,578)	21,407
TIP	3,004	–	1,256	–	–	4,260
AIFP	^{xxvii} 3,729	931	–	^{xxviii} 15	(3,488)	1,217
ASSP	–	15	–	^{xxix} 101	–	116
AGP	443	–	–	^{xxx} 2,246	–	2,689
PPIP	–	76	–	^{xxxi} 310	–	386
SBA 7(a)	–	3	–	–	–	3
Bank of America Guarantee	–	–	–	^{xxxii} 276	–	276

^{xxi} AIG is not listed in this table because no profit or loss has been recorded to date for AIG. Its missed dividends were capitalized as part of the issuance to Treasury of Series E preferred shares and are not considered to be outstanding. Treasury currently holds non-cumulative preferred shares, meaning AIG is not penalized for non-payment. Therefore, no profit or loss has been realized on Treasury's AIG investment to date.

HAMP is not listed in this table because HAMP is a 100 percent subsidy program, and no profit is expected.

^{xxii} U.S. Department of the Treasury, *Cumulative Dividends, Interest and Distributions Report as of November 30, 2010* (Dec. 10, 2010) (online at www.financialstability.gov/docs/dividends-interest-reports/November%202010%20Dividends%20&%20Interest%20Report.pdf).

^{xxiii} U.S. Department of the Treasury, *Cumulative Dividends, Interest and Distributions Report as of November 30, 2010* (Dec. 10, 2010) (online at www.financialstability.gov/docs/dividends-interest-reports/November%202010%20Dividends%20&%20Interest%20Report.pdf).

^{xxiv} U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010* (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf).

^{xxv} In the TARP Transactions Report, Treasury classified the investments it made in two institutions, CIT Group (\$2.3 billion) and Pacific Coast National Bancorp (\$4.1 million), as losses. Treasury has also sold its preferred ownership interests and warrants from South Financial Group, Inc., TIB Financial Corp., and the Bank of Currituck. This represents a \$244.0 million loss on its CPP investments in these three banks. Two TARP recipients, UCBH Holdings, Inc. (\$298.7 million) and a banking subsidiary of Midwest Banc Holdings, Inc. (\$89.4 million), are currently in bankruptcy proceedings. As of November 26, three TARP recipients, Pierce County Bancorp, Sonoma Valley Bancorp, and Tifton Banking Company, had entered receivership. Cumulatively, these three had received \$19.3 million in TARP funding. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010* (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf).

^{xxvi} This figure represents net proceeds to Treasury from the sale of Citigroup common stock to date. For details on Treasury's sales of Citigroup common stock, see endnote ii, *supra*. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010*, at 15 (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf); U.S. Department of the Treasury, *Troubled Asset Relief Program: Two-Year Retrospective*, at 25 (Oct. 2010) (online at www.financialstability.gov/docs/TARP%20Two%20Year%20Retrospective_10%2005%2010_transmittal%20letter.pdf).

^{xxvii} This figure includes \$815 million in dividends from GMAC/Ally Financial preferred stock, trust preferred securities, and mandatory convertible preferred shares. The dividend total also includes a \$748.6 million senior unsecured note from Treasury's investment in General Motors. U.S. Department of the Treasury, *Cumulative Dividends, Interest and Distributions Report as of November 30, 2010* (Dec. 10, 2010) (online at financialstability.gov/docs/dividends-interest-reports/November%202010%20Dividends%20&%20Interest%20Report.pdf); Data provided by Treasury (May 7, 2010).

^{xxviii} Treasury received proceeds from an additional note connected with the loan made to Chrysler Financial on January 16, 2009. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010*, at 18 (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf).

^{xxix} This represents the total proceeds from additional notes connected with Treasury's investments in GM Supplier Receivables LLC and Chrysler Receivables SPV LLC. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010*, at 19 (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf).

^{xxx} As a fee for taking a second-loss position of up to \$5 billion on a \$301 billion pool of ring-fenced Citigroup assets as part of the AGP, Treasury received \$4.03 billion in Citigroup preferred stock and warrants. Treasury exchanged these preferred stocks for trust preferred securities in June 2009. Following the early termination of the guarantee in December 2009, Treasury cancelled \$1.8 billion of the trust preferred securities, leaving Treasury with \$2.23 billion in Citigroup trust preferred securities. On September 30, 2010, Treasury sold these securities for \$2.25 billion in total proceeds. At the end of Citigroup's participation in the FDIC's Temporary Liquidity Guarantee Program (TLGP), the FDIC may transfer \$800 million of \$3.02 billion in Citigroup Trust Preferred Securities it received in consideration for its role in the AGP to Treasury. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010*, at 20 (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf); U.S. Department of the Treasury, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and Citigroup Inc., *Termination Agreement*, at 1 (Dec. 23, 2009) (online at www.financialstability.gov/docs/Citi%20AGP%20Termination%20Agreement%20-%20Fully%20Executed%20Version.pdf); U.S. Department of the Treasury, *Treasury Announces Further Sales of Citigroup Securities and Cumulative Return to Taxpayers of \$41.6 Billion* (Sept. 30, 2010) (online at financialstability.gov/latest/pr_09302010c.html); Federal Deposit Insurance Corporation, *2009 Annual Report*, at 87 (June 30, 2010) (online at www.fdic.gov/about/strategic/report/2009annualreport/AR09final.pdf).

^{xxxi} As of November 30, 2010, Treasury has earned \$289.6 million in membership interest distributions from the PPIP. Additionally, Treasury has earned \$20.6 million in total proceeds following the termination of the TCW fund. See U.S. Department of the Treasury, *Cumulative Dividends, Interest and Distributions Report as of November 30, 2010*, at 14 (Dec. 10, 2010) (online at financialstability.gov/docs/dividends-interest-reports/November%202010%20Dividends%20&%20Interest%20Report.pdf); U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010*, at 23 (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf).

^{xxxii} Although Treasury, the Federal Reserve, and the FDIC negotiated with Bank of America regarding a similar guarantee, the parties never reached an agreement. In September 2009, Bank of America agreed to pay each of the prospective guarantors a fee as though the guarantee had been in place during the negotiations period. This agreement resulted in payments of \$276 million to Treasury, \$57 million to the Federal Reserve, and \$92 million to the FDIC. U.S. Department of the Treasury, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and Bank of America Corporation, *Termination Agreement*, at 1-2 (Sept. 21, 2009) (online at www.financialstability.gov/docs/AGP/BofA%20-%20Termination%20Agreement%20-%20executed.pdf).

d. CPP Unpaid Dividend and Interest Payments⁴⁷⁶

As of November 30, 2010, 140 institutions have missed at least one dividend payment on outstanding preferred stock issued under the CPP.⁴⁷⁷ Among these institutions, 111 are not current on cumulative dividends, amounting to \$151.5 million in missed payments. Another 29 banks have not paid \$9.7 million in non-cumulative dividends. Of the \$49.5 billion currently outstanding in CPP funding, Treasury's investments in banks with non-current dividend payments total \$7.2 billion. A majority of the banks that remain delinquent on dividend payments have under \$1 billion in total assets on their balance sheets. Also, there are 21 institutions that no longer have outstanding unpaid dividends, after previously deferring their quarterly payments.⁴⁷⁸

Twelve banks have failed to make six dividend payments, six banks have missed seven quarterly payments, and one bank has missed all eight quarterly payments. These institutions have received a total of \$897.2 million in CPP funding. Under the terms of the CPP, after a bank fails to pay dividends for six periods, Treasury has the right to elect two individuals to the company's board of directors.⁴⁷⁹ Figure 43 below provides further details on the distribution and the number of institutions that have missed dividend payments.

In addition, eight CPP participants have missed at least one interest payment, representing \$4.0 million in cumulative unpaid interest payments. Treasury's total investments in these non-public institutions represent less than \$1 billion in CPP funding.

⁴⁷⁶ Cumulative Dividends, Interest and Distributions Report, *supra* note 475, at 20.

⁴⁷⁷ This figure does not include banks with missed dividend payments that have either repaid all delinquent dividends, exited the TARP, gone into receivership, or filed for bankruptcy.

⁴⁷⁸ Fifteen of these institutions made payments later. The 21 institutions also include those that have either (a) fully repaid their CPP investment and exited the program or (b) entered bankruptcy or their subsidiary was placed into receivership. Cumulative Dividends, Interest and Distributions Report, *supra* note 475, at 21.

⁴⁷⁹ U.S. Department of the Treasury, *Frequently Asked Questions: Capital Purchase Program (CPP): Related to Missed Dividend (or Interest) Payments and Director Nomination* (online at www.financialstability.gov/docs/PPP/PPP%20Directors%20FAQs.pdf) (accessed Jan. 11, 2011).

Figure 43: CPP Missed Dividend Payments (as of November 30, 2010)⁴⁸⁰

Number of Missed Payments	1	2	3	4	5	6	7	8	Total
Cumulative Dividends									
Number of Banks, by asset size	17	28	20	20	14	9	3	0	111
Under \$1B	10	21	17	16	9	6	1	0	80
\$1B-\$10B	6	6	3	3	5	3	2	0	28
Over \$10B	1	1	0	1	0	0	0	0	3
Non-Cumulative Dividends									
Number of Banks, by asset size	6	1	6	6	3	3	3	1	29
Under \$1B	5	1	6	5	3	3	3	1	27
\$1B-\$10B	0	0	0	1	0	0	0	0	1
Over \$10B	1	0	0	0	0	0	0	0	1
Total Banks Missing Payments									140
Total Missed Payments									470

e. CPP Losses

As of December 30, 2010, Treasury has realized a total of \$2.6 billion in losses from investments in five CPP participants. CIT Group Inc. and Pacific Coast National Bancorp have both completed bankruptcy proceedings, and the preferred stock and warrants issued by the South Financial Group, TIB Financial Corp., and the Bank of Currituck were sold to third-party institutions at a discount. Excluded from Treasury's total losses are investments in institutions that have pending receivership or bankruptcy proceedings, as well as an institution that is currently the target of an acquisition.⁴⁸¹ Settlement of these transactions and proceedings would increase total losses in the CPP to \$3.0 billion. Figure 44 below details settled and unsettled investment losses from CPP participants that have declared bankruptcy, been placed into receivership, or renegotiated the terms of their CPP contracts.

⁴⁸⁰ Cumulative Dividends, Interest and Distributions Report, *supra* note 475, at 17-20. Data on total bank assets compiled using SNL Financial data service (accessed Jan. 6, 2011).

⁴⁸¹ Treasury Transactions Report, *supra* note 24, at 13.

Figure 44: CPP Settled and Unsettled Losses⁴⁸²

Institution	Investment Amount	Investment Disposition Amount	Warrant Disposition Amount	Dividends & Interest	Possible Losses/ Reduced Exposure	Action
Cadence Financial Corporation	\$44,000,000	\$38,000,000	–	\$2,970,000	\$(6,000,000)	10/29/2010: Treasury agreed to sell preferred stock and warrants issued by Cadence Financial to Community Bancorp LLC for \$38 million plus accrued and unpaid dividends. Completion of the sale subject to fulfillment of certain closing conditions.
Capital Bank Corporation ⁴⁸³	41,279,000	–	–	3,457,117	(20,639,500)	11/9/2010: Capital Bank Corp. is seeking to enter an agreement with Treasury pursuant to which the company will repurchase outstanding TARP preferred shares at 50 percent of liquidation value, plus accrued unpaid dividends. The company will use cash proceeds from its acquisition by North American Financial Holdings Inc. As of Nov. 30, 2010, no agreement has been reached between Capital Bank Corp. and Treasury.
CIT Group Inc.*	2,330,000,000	–	–	43,687,500	(2,330,000,000)	12/10/2009: Bankruptcy reorganization plan for CIT Group Inc. became effective. CPP preferred shares and warrants were extinguished and replaced with contingent value rights (CVR). On Feb. 8, 2010, the CVRs expired without value.

⁴⁸² Treasury Transactions Report, *supra* note 24, at 14. The asterisk (“*”) denotes recognized losses on Treasury’s Transactions Report.

⁴⁸³ Capital Bank Corporation, *Schedule 14A*, at 5 (Nov. 19, 2010) (online at www.sec.gov/Archives/edgar/data/1071992/000095012310107474/g25191ddef14a.htm).

Midwest Banc Holdings, Inc.	89,388,000	—	—	824,289	(89,388,000)	5/14/2010: Midwest Banc Holdings, Inc. subsidiary, Midwest Bank and Trust, Co., placed into receivership. Midwest Banc Holdings is currently in bankruptcy proceedings.
Pacific Coast National Bancorp*	4,120,000	—	—	18,088	(4,120,000)	2/11/2010: Pacific Coast National Bancorp dismissed its bankruptcy proceedings without recovery to creditors or investors. Investments, including Treasury's CPP investments, were extinguished.
Pierce County Bancorp	6,800,000	—	—	207,948	(6,800,000)	11/5/2010: Pierce County Bancorp subsidiary, Pierce Commercial Bank, placed into receivership.
Sonoma Valley Bancorp	8,653,000	—	—	347,164	(8,653,000)	8/20/2010: Sonoma Valley Bancorp subsidiary, Sonoma Valley Bank, placed into receivership.
South Financial Group*	347,000,000	130,179,219	\$400,000	16,386,111	(216,820,781)	9/30/2010: Preferred stock and warrants sold to Toronto-Dominion Bank.
The Bank of Currituck*	4,021,000	1,742,850	—	169,834	(2,278,150)	12/3/2010: The Bank of Currituck completed its repurchase of all preferred stock (including preferred stock received upon exercise of warrants) issued to Treasury.
TIB Financial Corp.*	37,000,000	12,119,637	40,000	1,284,722	(24,880,363)	9/30/2010: Preferred stock and warrants sold to North American Financial Holdings.
Tifton Banking Company	3,800,000	—	—	223,208	(3,800,000)	11/12/2010: Tifton Banking Company placed into receivership.
UCBH Holdings, Inc.	298,737,000	—	—	7,509,920	(298,737,000)	11/6/2009: United Commercial Bank, a wholly owned subsidiary of UCBH Holdings, Inc., was placed into receivership. UCBH Holdings is currently in bankruptcy proceedings.
Total	\$3,214,798,000	\$182,041,706	440,000	77,085,901	\$(3,012,116,794)	

f. Rate of Return

As of January 3, 2011, the average internal rate of return for all public financial institutions that participated in the CPP and fully repaid the U.S. government (including preferred shares, dividends, and warrants) remained at 8.4 percent, with only one institution, Central Jersey Bancorp, exiting the program in December.⁴⁸⁴ The internal rate of return is the annualized effective compounded return rate that can be earned on invested capital.

g. Warrant Disposition

Figure 45: Warrant Repurchases/Auctions for Financial Institutions that have fully Repaid CPP Funds (as of January 3, 2011)

Institution	Investment Date	Warrant Repurchase Date	Warrant Repurchase/Sale Amount	Panel's Best Valuation Estimate at Disposition Date	Price/Estimate Ratio	IRR
Old National Bancorp	12/12/2008	5/8/2009	\$1,200,000	\$2,150,000	0.558	9.3%
Iberiabank Corporation	12/5/2008	5/20/2009	1,200,000	2,010,000	0.597	9.4%
Firstmerit Corporation	1/9/2009	5/27/2009	5,025,000	4,260,000	1.180	20.3%
Sun Bancorp, Inc.	1/9/2009	5/27/2009	2,100,000	5,580,000	0.376	15.3%
Independent Bank Corp.	1/9/2009	5/27/2009	2,200,000	3,870,000	0.568	15.6%
Alliance Financial Corporation	12/19/2008	6/17/2009	900,000	1,580,000	0.570	13.8%
First Niagara Financial Group	11/21/2008	6/24/2009	2,700,000	3,050,000	0.885	8.0%
Berkshire Hills Bancorp, Inc.	12/19/2008	6/24/2009	1,040,000	1,620,000	0.642	11.3%
Somerset Hills Bancorp	1/16/2009	6/24/2009	275,000	580,000	0.474	16.6%
SCBT Financial Corporation	1/16/2009	6/24/2009	1,400,000	2,290,000	0.611	11.7%
HF Financial Corp.	11/21/2008	6/30/2009	650,000	1,240,000	0.524	10.1%
State Street	10/28/2008	7/8/2009	60,000,000	54,200,000	1.107	9.9%

⁴⁸⁴ Calculation of the internal rate of return (IRR) also includes CPP investments in public institutions not repaid in full (for reasons such as acquisition by another institution), such as The South Financial Group and TIB Financial Corporation. The Panel's total IRR calculation now includes CPP investments in public institutions recorded as a loss on the TARP Transactions Report due to bankruptcy, such as CIT Group Inc. Going forward, the Panel will continue to include losses due to bankruptcy when Treasury determines that any associated contingent value rights have expired without value. When excluding CIT Group from the calculation, the resulting IRR is 10.4 percent. Treasury Transactions Report, *supra* note 24.

U.S. Bancorp	11/14/2008	7/15/2009	139,000,000	135,100,000	1.029	8.7%
The Goldman Sachs Group, Inc.	10/28/2008	7/22/2009	1,100,000,000	1,128,400,000	0.975	22.8%
BB&T Corp.	11/14/2008	7/22/2009	67,010,402	68,200,000	0.983	8.7%
American Express Company	1/9/2009	7/29/2009	340,000,000	391,200,000	0.869	29.5%
Bank of New York Mellon Corp	10/28/2008	8/5/2009	136,000,000	155,700,000	0.873	12.3%
Morgan Stanley	10/28/2008	8/12/2009	950,000,000	1,039,800,000	0.914	20.2%
Northern Trust Corporation	11/14/2008	8/26/2009	87,000,000	89,800,000	0.969	14.5%
Old Line Bancshares Inc.	12/5/2008	9/2/2009	225,000	500,000	0.450	10.4%
Bancorp Rhode Island, Inc.	12/19/2008	9/30/2009	1,400,000	1,400,000	1.000	12.6%
Centerstate Banks of Florida Inc.	11/21/2008	10/28/2009	212,000	220,000	0.964	5.9%
Manhattan Bancorp	12/5/2008	10/14/2009	63,364	140,000	0.453	9.8%
CVB Financial Corp.	12/5/2008	10/28/2009	1,307,000	3,522,198	0.371	6.4%
Bank of the Ozarks	12/12/2008	11/24/2009	2,650,000	3,500,000	0.757	9.0%
Capital One Financial	11/14/2008	12/3/2009	148,731,030	232,000,000	0.641	12.0%
JPMorgan Chase & Co.	10/28/2008	12/10/2009	950,318,243	1,006,587,697	0.944	10.9%
CIT Group Inc.	12/31/2008	–	–	562,541	–	(97.2)%
TCF Financial Corp.	1/16/2009	12/16/2009	9,599,964	11,825,830	0.812	11.0%
LSB Corporation	12/12/2008	12/16/2009	560,000	535,202	1.046	9.0%
Wainwright Bank & Trust Company	12/19/2008	12/16/2009	568,700	1,071,494	0.531	7.8%
Wesbanco Bank, Inc.	12/5/2008	12/23/2009	950,000	2,387,617	0.398	6.7%
Union First Market Bankshares Corporation (Union Bankshares Corporation)	12/19/2008	12/23/2009	450,000	1,130,418	0.398	5.8%
Trustmark Corporation	11/21/2008	12/30/2009	10,000,000	11,573,699	0.864	9.4%
Flushing Financial Corporation	12/19/2008	12/30/2009	900,000	2,861,919	0.314	6.5%
OceanFirst Financial Corporation	1/16/2009	2/3/2010	430,797	279,359	1.542	6.2%
Monarch Financial Holdings, Inc.	12/19/2008	2/10/2010	260,000	623,434	0.417	6.7%

Bank of America	10/28/2008 ⁴⁸⁵ 1/9/2009 ⁴⁸⁶ 1/14/2009 ⁴⁸⁷	3/3/2010	1,566,210,714	1,006,416,684	1.533	6.5%
Washington Federal Inc./Washington Federal Savings & Loan Association	11/14/2008	3/9/2010	15,623,222	10,166,404	1.537	18.6%
Signature Bank	12/12/2008	3/10/2010	11,320,751	11,458,577	0.988	32.4%
Texas Capital Bancshares, Inc.	1/16/2009	3/11/2010	6,709,061	8,316,604	0.807	30.1%
Umpqua Holdings Corp.	11/14/2008	3/31/2010	4,500,000	5,162,400	0.872	6.6%
City National Corporation	11/21/2008	4/7/2010	18,500,000	24,376,448	0.759	8.5%
First Litchfield Financial Corporation	12/12/2008	4/7/2010	1,488,046	1,863,158	0.799	15.9%
PNC Financial Services Group Inc.	12/31/2008	4/29/2010	324,195,686	346,800,388	0.935	8.7%
Comerica Inc.	11/14/2008	5/4/2010	183,673,472	276,426,071	0.664	10.8%
Valley National Bancorp	11/14/2008	5/18/2010	5,571,592	5,955,884	0.935	8.3%
Wells Fargo Bank	10/28/2008	5/20/2010	849,014,998	1,064,247,725	0.798	7.8%
First Financial Bancorp	12/23/2008	6/2/2010	3,116,284	3,051,431	1.021	8.2%
Sterling Bancshares, Inc./Sterling Bank	12/12/2008	6/9/2010	3,007,891	5,287,665	0.569	10.8%
SVB Financial Group	12/12/2008	6/16/2010	6,820,000	7,884,633	0.865	7.7%
Discover Financial Services	3/13/2009	7/7/2010	172,000,000	166,182,652	1.035	17.1%
Bar Harbor Bancshares	1/16/2009	7/28/2010	250,000	518,511	0.482	6.2%
Citizens & Northern Corporation	1/16/2009	8/4/2010	400,000	468,164	0.854	5.9%
Columbia Banking System, Inc.	11/21/2008	8/11/2010	3,301,647	3,291,329	1.003	7.3%
Hartford Financial Services Group, Inc.	6/26/2009	9/21/2010	713,687,430	472,221,996	1.511	30.3%
Lincoln National Corporation	7/10/2009	9/16/2010	216,620,887	181,431,183	1.194	27.1%

⁴⁸⁵ Investment date for Bank of America in the CPP.

⁴⁸⁶ Investment date for Merrill Lynch in the CPP.

⁴⁸⁷ Investment date for Bank of America in the TIP.

Fulton Financial Corporation	12/23/2008	9/8/2010	10,800,000	15,616,013	0.692	6.7%
The Bancorp, Inc./ The Bancorp Bank	12/12/2008	9/8/2010	4,753,985	9,947,683	0.478	12.8%
South Financial Group, Inc./ Carolina First Bank	12/5/2008	9/30/2010	400,000	1,164,486	0.343	(34.2)%
TIB Financial Corp/TIB Bank	12/5/2008	9/30/2010	40,000	235,757	0.170	(38.0)%
Central Jersey Bancorp	12/23/2008	12/1/2010	319,659	1,554,457	0.206	6.3%
Total			\$8,148,651,825	\$8,001,397,712	1.018	8.4%

Figure 46: Valuation of Current Holdings of Warrants (as of January 3, 2011)

Financial Institutions with Warrants Outstanding	Warrant Valuation (millions of dollars)		
	Low Estimate	High Estimate	Best Estimate
Citigroup, Inc. ⁴⁸⁸	\$53.80	\$1,070.04	\$168.61
SunTrust Banks, Inc.	15.38	186.09	78.14
Regions Financial Corporation	11.40	199.48	106.32
Fifth Third Bancorp	137.43	428.31	228.42
KeyCorp	33.05	183.96	93.42
AIG	1,064.98	2,516.60	1,652.69
All Other Banks	684.87	1,786.36	1,203.84
Total	\$2,000.91	\$6,370.84	\$3,531.44

2. Federal Financial Stability Efforts

a. Federal Reserve and FDIC Programs

In addition to the direct expenditures Treasury has undertaken through the TARP, the federal government has engaged in a much broader program directed at stabilizing the U.S. financial system. Many of these initiatives explicitly augment funds allocated by Treasury under specific TARP initiatives, such as FDIC and Federal Reserve asset guarantees for Citigroup, or operate in tandem with Treasury programs. Other programs, like the Federal Reserve's extension of credit through its Section 13(3) facilities and special purpose vehicles (SPVs) and the FDIC's Temporary Liquidity Guarantee Program (TLGP), operate independently of the TARP.

⁴⁸⁸ Includes warrants issued under the CPP, the AGP, and the TIP.

b. Total Financial Stability Resources

Beginning in its April 2009 report, the Panel broadly classified the resources that the federal government has devoted to stabilizing the economy through myriad new programs and initiatives such as outlays, loans, or guarantees. With the reductions in funding for certain TARP programs, the Panel calculates the total value of these resources to be approximately \$2.5 trillion. However, this would translate into the ultimate “cost” of the stabilization effort only if: (1) assets do not appreciate; (2) no dividends are received, no warrants are exercised, and no TARP funds are repaid; (3) all loans default and are written off; and (4) all guarantees are exercised and subsequently written off.

With respect to the FDIC and Federal Reserve programs, the risk of loss varies significantly across the programs considered here, as do the mechanisms providing protection for the taxpayer against such risk. As discussed in the Panel’s November 2009 report, the FDIC assesses a premium of up to 100 basis points, or 1 percentage point, on TLGP debt guarantees.⁴⁸⁹ In contrast, the Federal Reserve’s liquidity programs are generally available only to borrowers with good credit, and the loans are over-collateralized and with recourse to other assets of the borrower. If the assets securing a Federal Reserve loan realize a decline in value greater than the “haircut,” the Federal Reserve is able to demand more collateral from the borrower. Similarly, should a borrower default on a recourse loan, the Federal Reserve can turn to the borrower’s other assets to make the Federal Reserve whole. In this way, the risk to the taxpayer on recourse loans only materializes if the borrower enters bankruptcy.

c. Mortgage Purchase Programs

On September 7, 2008, Treasury announced the GSE Mortgage Backed Securities Purchase (MBS) Program. The Housing and Economic Recovery Act of 2008 provided Treasury with the authority to purchase MBS guaranteed by government-sponsored enterprises (GSEs) through December 31, 2009. Treasury purchased approximately \$225 billion in GSE MBS by the time its authority expired.⁴⁹⁰ As of December 2010, there was approximately \$144.4 billion in MBS still outstanding under this program.⁴⁹¹

⁴⁸⁹ Congressional Oversight Panel, *November Oversight Report: Guarantees and Contingent Payments in TARP and Related Programs*, at 36 (Nov. 6, 2009) (online at cop.senate.gov/documents/cop-110609-report.pdf).

⁴⁹⁰ U.S. Department of the Treasury, *FY2011 Budget in Brief*, at 138 (Feb. 2010) (online at [www.treasury.gov/about/budget-performance/budget-in-brief/Documents/FY%202011%20BIB%20\(2\).pdf](http://www.treasury.gov/about/budget-performance/budget-in-brief/Documents/FY%202011%20BIB%20(2).pdf)).

⁴⁹¹ U.S. Department of the Treasury, *MBS Purchase Program: Portfolio by Month* (online at www.financialstability.gov/docs/December%202010%20Portfolio%20by%20month.pdf) (accessed Jan. 11, 2011). Treasury has received \$75.9 billion in principal repayments and \$15.6 billion in interest payments from these securities. See U.S. Department of the Treasury, *MBS Purchase Program Principal and Interest Received* (online at www.financialstability.gov/docs/December%202010%20MBS%20Principal%20and%20Interest%20Monthly%20Breakout.pdf) (accessed Jan. 11, 2011).

In March 2009, the Federal Reserve authorized purchases of \$1.25 trillion MBS guaranteed by Fannie Mae, Freddie Mac, and Ginnie Mae, and \$200 billion of agency debt securities from Fannie Mae, Freddie Mac, and the Federal Home Loan Banks.⁴⁹² The intended purchase amount for agency debt securities was subsequently decreased to \$175 billion.⁴⁹³ All purchasing activity was completed on March 31, 2010. As of January 6, 2010, the Federal Reserve held \$992 billion of agency MBS and \$147 billion of agency debt.⁴⁹⁴

d. Federal Reserve Treasury Securities Purchases⁴⁹⁵

On November 3, 2010, the Federal Open Market Committee (FOMC) announced that it has directed the Federal Reserve Bank of New York (FRBNY) to begin purchasing an additional \$600 billion in longer-term Treasury securities. In addition, FRBNY will reinvest \$250 billion to \$300 billion in principal payments from agency debt and agency MBS in Treasury securities.⁴⁹⁶ The additional purchases and reinvestments will be conducted through the end of the second quarter of 2011, meaning the pace of purchases will be approximately \$110 billion per month. In order to facilitate these purchases, FRBNY will temporarily lift its System Open Market Account per-issue limit, which prohibits the Federal Reserve's holdings of an individual security from surpassing 35 percent of the outstanding amount.⁴⁹⁷ As of January 6, 2010, the Federal Reserve held \$1.03 trillion in Treasury securities.⁴⁹⁸

⁴⁹² Board of Governors of the Federal Reserve System, *Federal Reserve System Monthly Report on Credit and Liquidity Programs and the Balance Sheet*, at 5 (Dec. 2010) (online at federalreserve.gov/monetarypolicy/files/monthlyclbsreport201012.pdf).

⁴⁹³ *Id.* at 5.

⁴⁹⁴ Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1)* (Jan. 6, 2011) (online at www.federalreserve.gov/releases/h41/20110106/) (hereinafter “Factors Affecting Reserve Balances (H.4.1)”).

⁴⁹⁵ Board of Governors of the Federal Reserve System, *Press Release – FOMC Statement* (Nov. 3, 2010) (online at www.federalreserve.gov/newsevents/press/monetary/20101103a.htm); Federal Reserve Bank of New York, *Statement Regarding Purchases of Treasury Securities* (Nov. 3, 2010) (online at www.federalreserve.gov/newsevents/press/monetary/monetary20101103a1.pdf).

⁴⁹⁶ On August 10, 2010, the Federal Reserve began reinvesting principal payments on agency debt and agency MBS holdings in longer-term Treasury securities in order to keep the amount of their securities holdings in their System Open Market Account portfolio at their then-current level. Board of Governors of the Federal Reserve System, *FOMC Statement* (Aug. 10, 2010) (online at www.federalreserve.gov/newsevents/press/monetary/20100810a.htm).

⁴⁹⁷ Federal Reserve Bank of New York, *FAQs: Purchases of Longer-term Treasury Securities* (Nov. 3, 2010) (online at www.newyorkfed.org/markets/lttreas_faq.html).

⁴⁹⁸ Factors Affecting Reserve Balances (H.4.1), *supra* note 494.

Figure 47: Federal Government Financial Stability Effort (as of December 30, 2010)^{xxxiii}

Program <i>(billions of dollars)</i>	Treasury (TARP)	Federal Reserve	FDIC	Total
Total	\$475.0	\$1,311.6	\$690.9	\$2,477.5
<i>Outlays^{xxxiv}</i>	201.4	1,166.0	188.9	1,556.3
<i>Loans</i>	23.6	145.6	0	169.6
<i>Guarantees^{xxxv}</i>	4.3	0	502	506.3
<i>Repaid and Unavailable TARP Funds</i>	245.8	0	0	245.8
AIG^{xxxvi}	69.8	81.7	0	151.4
<i>Outlays</i>	^{xxxvii} 69.8	^{xxxviii} 26.4	0	96.2
<i>Loans</i>	0	^{xxxix} 55.2	0	55.2
<i>Guarantees</i>	0	0	0	0
Citigroup	0	0	0	0
<i>Outlays</i>	^{xl} 0	0	0	0
<i>Loans</i>	0	0	0	0
<i>Guarantees</i>	0	0	0	0
Capital Purchase Program (Other)	34.4	0	0	34.4
<i>Outlays</i>	^{xli} 34.4	0	0	34.4
<i>Loans</i>	0	0	0	0
<i>Guarantees</i>	0	0	0	0
Capital Assistance Program	N/A	0	0	^{xlii} N/A
TALF	4.3	38.7	0	43.0
<i>Outlays</i>	0	0	0	0
<i>Loans</i>	0	^{xliv} 38.7	0	38.7
<i>Guarantees</i>	^{xliii} 4.3	0	0	4.3
PPIP (Loans)^{xlv}	0	0	0	0
<i>Outlays</i>	0	0	0	0
<i>Loans</i>	0	0	0	0
<i>Guarantees</i>	0	0	0	0
PPIP (Securities)	^{xlvi} 22.4	0	0	22.4
<i>Outlays</i>	7.4	0	0	7.4
<i>Loans</i>	15.1	0	0	15.1
<i>Guarantees</i>	0	0	0	0
Making Home Affordable Program/ Foreclosure Mitigation	45.6	0	0	45.6
<i>Outlays</i>	^{xlvii} 45.6	0	0	45.6
<i>Loans</i>	0	0	0	0
<i>Guarantees</i>	0	0	0	0
Automotive Industry Financing Program	^{xlviii} 51.4	0	0	51.4
<i>Outlays</i>	43.3	0	0	43.3
<i>Loans</i>	8.1	0	0	8.1
<i>Guarantees</i>	0	0	0	0
Automotive Supplier Support Program	0.4	0	0	0.4
<i>Outlays</i>	0	0	0	0
<i>Loans</i>	^{xlix} 0.4	0	0	0.4
<i>Guarantees</i>	0	0	0	0

SBA 7(a) Securities Purchase	0.37	0	0	0.37
<i>Outlays</i>	0.37	0	0	0.37
<i>Loans</i>	0	0	0	0
<i>Guarantees</i>	0	0	0	0
Community Development Capital Initiative	ⁱⁱ 0.57	0	0	0.57
<i>Outlays</i>	0	0	0	0
<i>Loans</i>	0.57	0	0	0.57
<i>Guarantees</i>	0	0	0	0
Temporary Liquidity Guarantee Program	0	0	502.0	502.0
<i>Outlays</i>	0	0	0	0
<i>Loans</i>	0	0	0	0
<i>Guarantees</i>	0	0	^{lii} 502.0	502.0
Deposit Insurance Fund	0	0	188.9	188.9
<i>Outlays</i>	0	0	^{liii} 188.9	188.9
<i>Loans</i>	0	0	0	0
<i>Guarantees</i>	0	0	0	0
Other Federal Reserve Credit Expansion	0	1,191.3	0	1,191.3
<i>Outlays</i>	0	^{liv} 1,139.6	0	1,139.6
<i>Loans</i>	0	^{lv} 51.7	0	51.7
<i>Guarantees</i>	0	0	0	0

^{xxxiii} Unless otherwise noted, all data in this figure are as of December 30, 2010.

^{xxxiv} The term “outlays” is used here to describe the use of Treasury funds under the TARP, which are broadly classifiable as purchases of debt or equity securities (e.g., debentures, preferred stock, exercised warrants, etc.). These values were calculated using (1) Treasury’s actual reported expenditures, and (2) Treasury’s anticipated funding levels as estimated by a variety of sources, including Treasury statements and GAO estimates. Anticipated funding levels are set at Treasury’s discretion, have changed from initial announcements, and are subject to further change. Outlays used here represent investment and asset purchases – as well as commitments to make investments and asset purchases – and are not the same as budget outlays, which under section 123 of EESA are recorded on a “credit reform” basis.

^{xxxv} Although many of the guarantees may never be exercised or will be exercised only partially, the guarantee figures included here represent the federal government’s greatest possible financial exposure.

^{xxxvi} U.S. Department of the Treasury, *Treasury Update on AIG Investment Valuation* (Nov. 1, 2010) (online at financialstability.gov/latest/pr_11012010.html). AIG values exclude accrued dividends on preferred interests in the AIA and ALICO SPVs and accrued interest payable to FRBNY on the Maiden Lane LLCs.

^{xxxvii} This number includes investments under the AIGIP/SSFI Program: a \$40 billion investment made on November 25, 2008, and a \$30 billion investment made on April 17, 2009 (less a reduction of \$165 million representing bonuses paid to AIG Financial Products employees). As of November 1, 2010, AIG had utilized \$47.5 billion of the available \$69.8 billion under the AIGIP/SSFI. U.S. Department of the Treasury, *Treasury Update on AIG Investment Valuation* (Nov. 1, 2010) (online at www.financialstability.gov/latest/pr_11012010.html); U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010*, at 21 (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf).

^{xxxviii} As part of the restructuring of the U.S. government's investment in AIG announced on March 2, 2009, the amount available to AIG through the Revolving Credit Facility was reduced by \$25 billion in exchange for preferred equity interests in two special purpose vehicles, AIA Aurora LLC and ALICO Holdings LLC. Board of Governors of the Federal Reserve System, *Federal Reserve System Monthly Report on Credit and Liquidity Programs and the Balance Sheet*, at 18 (Dec. 2010) (online at www.federalreserve.gov/monetarypolicy/files/monthlyclbsreport201012.pdf). These SPVs were established to hold the common stock of two AIG subsidiaries: American International Assurance Company Ltd. (AIA) and American Life Insurance Company (ALICO). As of January 6, 2011, the book value of the Federal Reserve Bank of New York's holdings in AIA Aurora LLC and ALICO Holdings LLC was \$26.4 billion in preferred equity (\$16.9 billion in AIA and \$9.5 billion in ALICO). Federal Reserve Bank of New York, *Factors Affecting Reserve Balances (H.4.1)* (Jan. 6, 2011) (online at www.federalreserve.gov/releases/h41/20110106/).

^{xxxix} This number represents the full \$28.9 billion made available to AIG through its Revolving Credit Facility (RCF) with FRBNY (\$20.0 billion had been drawn down as of January 5, 2011) and the outstanding principal of the loans extended to the Maiden Lane II and III SPVs to buy AIG assets (as of January 5, 2011, \$12.8 billion and \$13.5 billion, respectively). Federal Reserve Bank of New York, *Factors Affecting Reserve Balances (H.4.1)* (Jan. 6, 2011) (online at www.federalreserve.gov/releases/h41/20110106/); Board of Governors of the Federal Reserve System, Federal Reserve System, *Federal Reserve System Monthly Report on Credit and Liquidity Programs and the Balance Sheet*, at 16 (Dec. 2010) (online at www.federalreserve.gov/monetarypolicy/files/monthlyclbsreport201012.pdf). The amounts outstanding under the Maiden Lane II and III facilities do not reflect the accrued interest payable to FRBNY. Income from the purchased assets is used to pay down the loans to the SPVs, reducing the taxpayers' exposure to losses over time. Board of Governors of the Federal Reserve System, *Federal Reserve System Monthly Report on Credit and Liquidity Programs and the Balance Sheet*, at 15 (Nov. 2010) (online at www.federalreserve.gov/monetarypolicy/files/monthlyclbsreport201011.pdf).

The maximum amount available through the RCF decreased from \$34.4 billion to \$28.9 billion between March and November 2010, primarily as a result of the sale of several subsidiaries. The reduced ceiling also reflects a \$3.95 billion repayment to the RCF from proceeds earned from a debt offering by the International Lease Finance Corporation (ILFC), an AIG subsidiary. The balance on the RCF increased \$0.7 billion between October 27 and November 24, 2010, primarily due to recapitalized interest and fees as principal repayments. Board of Governors of the Federal Reserve System, *Federal Reserve System Monthly Report on Credit and Liquidity Programs and the Balance Sheet*, at 16, 19 (Dec. 2010) (online at www.federalreserve.gov/monetarypolicy/files/monthlyclbsreport201012.pdf).

^{xi} The final sale of Treasury's Citigroup common stock resulted in full repayment of Treasury's investment of \$25 billion. See endnote ii, *supra*, for further details of the sales of Citigroup common stock. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010*, at 1, 13 (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf).

^{xii} This figure represents the \$204.9 billion Treasury disbursed under the CPP, minus the \$25 billion investment in Citigroup identified above, \$139.5 billion in repayments (excluding the amount repaid for the Citigroup investment) that are in "repaid and unavailable" TARP funds, and losses under the program. This figure does not account for future repayments of CPP investments and dividend payments from CPP investments. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010*, at 13 (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf).

^{xiii} On November 9, 2009, Treasury announced the closing of the CAP and that only one institution, GMAC/Ally Financial, was in need of further capital from Treasury. GMAC/Ally Financial, however, received further funding through the AIFP. Therefore, the Panel considers the CAP unused. U.S. Department of the Treasury, *Treasury Announcement Regarding the Capital Assistance Program* (Nov. 9, 2009) (online at www.financialstability.gov/latest/tg_11092009.html).

^{xliii} This figure represents the \$4.3 billion adjusted allocation to the TALF SPV. However, as of January 6, 2011, TALF LLC had drawn only \$106 million of the available \$4.3 billion. Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1)* (Jan. 6, 2011) (online at www.federalreserve.gov/releases/h41/20110106/); U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010*, at 21 (Dec. 30, 2010) (online at financialstability.gov/latest/tg_11092009.html). On June 30, 2010, the Federal Reserve ceased issuing loans collateralized by newly issued CMBS. As of this date, investors had requested a total of \$73.3 billion in TALF loans (\$13.2 billion in CMBS and \$60.1 billion in non-CMBS) and \$71 billion in TALF loans had been settled (\$12 billion in CMBS and \$59 billion in non-CMBS). Earlier, it ended its issues of loans collateralized by other TALF-eligible newly issued and legacy ABS (non-CMBS) on March 31, 2010. Federal Reserve Bank of New York, *Term Asset-Backed Securities Loan Facility: Terms and Conditions* (online at www.newyorkfed.org/markets/talf_terms.html) (accessed Jan. 6, 2011); Federal Reserve Bank of New York, *Term Asset-Backed Securities Loan Facility: CMBS* (online at www.newyorkfed.org/markets/cmbs_operations.html) (accessed Jan. 6, 2011); Federal Reserve Bank of New York, *Term Asset-Backed Securities Loan Facility: CMBS* (online at www.newyorkfed.org/markets/CMBS_recent_operations.html) (accessed Jan. 6, 2011); Federal Reserve Bank of New York, *Term Asset-Backed Securities Loan Facility: non-CMBS* (online at www.newyorkfed.org/markets/talf_operations.html) (accessed Jan. 6, 2011); Federal Reserve Bank of New York, *Term Asset-Backed Securities Loan Facility: non-CMBS* (online at www.newyorkfed.org/markets/TALF_recent_operations.html) (accessed Jan. 6, 2011).

^{xliiv} This number is derived from the unofficial 1:10 ratio of the value of Treasury loan guarantees to the value of Federal Reserve loans under the TALF. U.S. Department of the Treasury, *Fact Sheet: Financial Stability Plan*, at 4 (Feb. 10, 2009) (online at financialstability.gov/docs/fact-sheet.pdf) (describing the initial \$20 billion Treasury contribution tied to \$200 billion in Federal Reserve loans and announcing potential expansion to a \$100 billion Treasury contribution tied to \$1 trillion in Federal Reserve loans). Since only \$43 billion in TALF loans remained outstanding when the program closed, Treasury is currently responsible for reimbursing the Federal Reserve Board only up to \$4.3 billion in losses from these loans. Thus, the Federal Reserve's maximum potential exposure under the TALF is \$38.7 billion. See Board of Governors of the Federal Reserve System, *Federal Reserve Announces Agreement with Treasury Regarding Reduction of Credit Protection Provided for the Term Asset-Backed Securities Loan Facility (TALF)* (July 20, 2010) (online at www.federalreserve.gov/newsevents/press/monetary/20100720a.htm); Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1)* (Jan. 6, 2011) (online at www.federalreserve.gov/releases/h41/20110106/).

^{xlv} No TARP resources were expended under the PPIP Legacy Loans Program, a TARP program that was announced in March 2009 but never launched. Since no TARP funds were allocated for the program by the time the TARP expired in October 2010, this or a similar program cannot be implemented unless another source of funding is available.

^{xlvi} This figure represents Treasury's final adjusted investment amount in the Legacy Securities Public-Private Investment Program (PPIP). As of December 30, 2010, Treasury reported commitments of \$15.1 billion in loans and \$7.4 billion in membership interest associated with the PPIP. See U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010*, at 23 (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf). On January 4, 2010, Treasury and one of the nine fund managers, UST/TCW Senior Mortgage Securities Fund, L.P. (TCW), entered into a "Winding Up and Liquidation Agreement." U.S. Department of the Treasury, *Winding Up and Liquidation Agreement Between the United States Department of the Treasury and UST/TCW Senior Mortgage Securities Fund, L.P.* (Jan. 4, 2010) (online at [financialstability.gov/docs/TCW%20Winding%20Up%20Agmt%20\(Execution%20Copy\)%20Redacted.pdf](http://financialstability.gov/docs/TCW%20Winding%20Up%20Agmt%20(Execution%20Copy)%20Redacted.pdf)). Treasury's final investment amount in TCW totaled \$356 million. Following the liquidation of the fund, Treasury's initial \$3.3 billion obligation to TCW was reallocated among the eight remaining funds on March 22, 2010. See U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010*, at 23 (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf).

On October 20, 2010, Treasury released its fourth quarterly report on PPIP. The report indicates that as of September 30, 2010, all eight investment funds have realized an internal rate of return since inception (net of any management fees or expenses owed to Treasury) above 19 percent. The highest performing fund, thus far, is AG GECC PPIF Master Fund, L.P., which has a net internal rate of return of 52 percent. U.S. Department of the Treasury, *Legacy Securities Public-Private Investment Program*, at 7 (Oct. 20, 2010) (online at financialstability.gov/docs/External%20Report%20-%2009-10%20vFinal.pdf).

^{xlvii} The total amount of TARP funds committed to HAMP is \$29.9 billion. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010*, at 45 (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf); U.S. Department of the Treasury, *Troubled Assets Relief Program Monthly 105(a) Report – November 2010*, at 4 (Dec. 10, 2010) (online at [financialstability.gov/docs/November%20105\(a\)%20Report.pdf](http://financialstability.gov/docs/November%20105(a)%20Report.pdf)). However, as of December 31, 2010, only \$840.1 million in non-GSE payments have been disbursed under HAMP. Data provided by Treasury (Jan. 4, 2011).

^{xlviii} A substantial portion of the total \$81.3 billion in debt instruments extended under the AIFP has since been converted to common equity and preferred shares in restructured companies. \$8.1 billion has been retained as first-lien debt (with \$1 billion committed to Old GM and \$7.1 billion to Chrysler). \$51.4 billion represents Treasury's current obligation under the AIFP after repayments and losses. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010*, at 18 (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf).

^{xlix} This figure represents Treasury's total adjusted investment amount in the ASSP. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010*, at 19 (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf).

ⁱ U.S. Department of the Treasury, *Troubled Asset Relief Program: Two Year Retrospective*, at 43 (Oct. 2010) (online at www.financialstability.gov/docs/TARP%20Two%20Year%20Retrospective_10%2005%2010_transmittal%20letter.pdf).

ⁱⁱ U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 30, 2010*, at 17 (Dec. 30, 2010) (online at www.financialstability.gov/docs/transaction-reports/12-30-10%20Transactions%20Report%20as%20of%2012-30-10.pdf).

ⁱⁱⁱ This figure represents the current maximum aggregate debt guarantees that could be made under the program, which is a function of the number and size of individual financial institutions participating. \$286.8 billion of debt subject to the guarantee is currently outstanding, which represents approximately 57.1 percent of the current cap. Federal Deposit Insurance Corporation, *Monthly Reports Related to the Temporary Liquidity Guarantee Program: Debt Issuance Under Guarantee Program* (Dec. 21, 2010) (online at www.fdic.gov/regulations/resources/tlgp/total_issuance11-10.html). The FDIC has collected \$10.4 billion in fees and surcharges from this program since its inception in the fourth quarter of 2008. Federal Deposit Insurance Corporation, *Monthly Reports Related to the Temporary Liquidity Guarantee Program: Fees Under Temporary Liquidity Guarantee Debt Program* (Dec. 21, 2010) (online at www.fdic.gov/regulations/resources/tlgp/fees.html).

ⁱⁱⁱⁱ This figure represents the FDIC's provision for losses to its deposit insurance fund attributable to bank failures in the third and fourth quarters of 2008; the first, second, third, and fourth quarters of 2009; and the first, second, and third quarters of 2010. Federal Deposit Insurance Corporation, *Chief Financial Officer's (CFO) Report to the Board: DIF Income Statement – Third Quarter 2010* (Nov. 12, 2010) (online at www.fdic.gov/about/strategic/corporate/cfo_report_3rdqtr_10/income.html). For earlier reports, see Federal Deposit Insurance Corporation, *Chief Financial Officer's (CFO) Report to the Board* (Sept. 23, 2010) (online at www.fdic.gov/about/strategic/corporate/index.html). This figure includes the FDIC's estimates of its future losses under loss-sharing agreements that it has entered into with banks acquiring assets of insolvent banks during these eight quarters. Under a loss-sharing agreement, as a condition of an acquiring bank's agreement to purchase the assets of an insolvent bank, the FDIC typically agrees to cover 80 percent of an acquiring bank's future losses on an

initial portion of these assets and 95 percent of losses on another portion of assets. See, e.g., Federal Deposit Insurance Corporation, *Purchase and Assumption Agreement – Whole Bank, All Deposits – Among FDIC, Receiver of Guaranty Bank, Austin, Texas, Federal Deposit Insurance Corporation and Compass Bank*, at 65-66 (Aug. 21, 2009) (online at www.fdic.gov/bank/individual/failed/guaranty-tx_p_and_a_w_addendum.pdf).

^{liv} Outlays are comprised of the Federal Reserve Mortgage Related Facilities. The Federal Reserve balance sheet accounts for these facilities under federal agency debt securities and mortgage-backed securities held by the Federal Reserve. Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1)* (Jan. 6, 2011) (online at www.federalreserve.gov/releases/h41/20110106/ (accessed Jan. 6, 2011)). Although the Federal Reserve does not employ the outlays, loans, and guarantees classification, its accounting clearly separates its mortgage-related purchasing programs from its liquidity programs. See, e.g., Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1)*, at 2 (Jan. 6, 2011) (online at www.federalreserve.gov/releases/h41/20110106/) (accessed Jan. 6, 2011).

^{lv} Federal Reserve Liquidity Facilities classified in this table as loans include primary credit, secondary credit, central bank liquidity swaps, Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility, loans outstanding to Commercial Paper Funding Facility LLC, seasonal credit, term auction credit, the Term Asset-Backed Securities Loan Facility, and loans outstanding to Bear Stearns (Maiden Lane LLC). Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1)* (Jan. 6, 2011) (online at www.federalreserve.gov/releases/h41/20110106/ (accessed Jan. 6, 2011)). For further information, see the data that the Federal Reserve recently disclosed on these programs pursuant to its obligations under the Dodd-Frank Wall Street Reform and Consumer Protection Act. Board of Governors of the Federal Reserve System, *Credit and Liquidity Programs and the Balance Sheet: Overview* (May 11, 2010) (online at www.federalreserve.gov/monetarypolicy/bst.htm); Board of Governors of the Federal Reserve System, *Credit and Liquidity Programs and the Balance Sheet: Reports and Disclosures* (Aug. 24, 2010) (online at www.federalreserve.gov/monetarypolicy/bst_reports.htm); Board of Governors of the Federal Reserve System, *Usage of Federal Reserve Credit and Liquidity Facilities* (Dec. 3, 2010) (online at www.federalreserve.gov/newsevents/reform_transaction.htm).

Section Four: Oversight Activities

The Congressional Oversight Panel was established as part of the Emergency Economic Stabilization Act (EESA) and formed on November 26, 2008. Since then, the Panel has produced 26 oversight reports as well as a special report on regulatory reform, issued on January 29, 2009, and a special report on farm credit, issued on July 21, 2009. Since the release of the Panel's December oversight report, the following developments pertaining to the Panel's oversight of the TARP took place:

- The Panel held a hearing in Washington on December 16, 2010 with Secretary Geithner, his fifth appearance before the Panel. The Secretary had the opportunity to discuss the economic impact and ultimate cost of the TARP, the challenges that remain in supporting the financial system and the housing market now that the TARP's authority has expired, and other topics related to the Panel's recently published oversight reports.

Upcoming Reports and Hearings

The Panel will release its next oversight report in February. The report will discuss executive compensation restrictions for companies that received TARP assistance, expanding upon the Panel's hearing on the topic on October 21, 2010.⁴⁹⁹

⁴⁹⁹ See Congressional Oversight Panel, *COP Hearing on the TARP and Executive Compensation Restrictions* (Oct. 21, 2010) (online at cop.senate.gov/hearings/library/hearing-102110-compensation.cfm).

Section Five: About the Congressional Oversight Panel

In response to the escalating financial crisis, on October 3, 2008, Congress provided Treasury with the authority to spend \$700 billion to stabilize the U.S. economy, preserve home ownership, and promote economic growth. Congress created the Office of Financial Stability (OFS) within Treasury to implement the TARP. At the same time, Congress created the Congressional Oversight Panel to “review the current state of financial markets and the regulatory system.” The Panel is empowered to hold hearings, review official data, and write reports on actions taken by Treasury and financial institutions and their effect on the economy. Through regular reports, the Panel must oversee Treasury’s actions, assess the impact of spending to stabilize the economy, evaluate market transparency, ensure effective foreclosure mitigation efforts, and guarantee that Treasury’s actions are in the best interests of the American people. In addition, Congress instructed the Panel to produce a special report on regulatory reform that analyzes “the current state of the regulatory system and its effectiveness at overseeing the participants in the financial system and protecting consumers.” The Panel issued this report in January 2009. Congress subsequently expanded the Panel’s mandate by directing it to produce a special report on the availability of credit in the agricultural sector. The report was issued on July 21, 2009.

On November 14, 2008, Senate Majority Leader Harry Reid and the Speaker of the House Nancy Pelosi appointed Richard H. Neiman, Superintendent of Banks for the State of New York, Damon Silvers, Director of Policy and Special Counsel of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), and Elizabeth Warren, Leo Gottlieb Professor of Law at Harvard Law School, to the Panel. With the appointment on November 19, 2008, of Congressman Jeb Hensarling to the Panel by House Minority Leader John Boehner, the Panel had a quorum and met for the first time on November 26, 2008, electing Professor Warren as its chair. On December 16, 2008, Senate Minority Leader Mitch McConnell named Senator John E. Sununu to the Panel. Effective August 10, 2009, Senator Sununu resigned from the Panel, and on August 20, 2009, Senator McConnell announced the appointment of Paul Atkins, former Commissioner of the U.S. Securities and Exchange Commission, to fill the vacant seat. Effective December 9, 2009, Congressman Jeb Hensarling resigned from the Panel, and House Minority Leader John Boehner announced the appointment of J. Mark McWatters to fill the vacant seat. Senate Minority Leader Mitch McConnell appointed Kenneth Troske, Sturgill Professor of Economics at the University of Kentucky, to fill the vacancy created by the resignation of Paul Atkins on May 21, 2010. Effective September 17, 2010, Elizabeth Warren resigned from the Panel, and on September 30, 2010, Senate Majority Leader Harry Reid announced the appointment of Senator Ted Kaufman to fill the vacant seat. On October 4, 2010, the Panel elected Senator Kaufman as its chair.