Section Two: Additional Views

A. Damon Silvers

I wish to make the following additional points:

As is the case in housing, foreclosure is usually a mutually destructive option in farm lending. This was confirmed in our hearing in Greeley, CO, by witnesses from the banking industry and the Farm Credit System.

In other instances where federal money or guarantees are injected into the farm credit system, the Congress has required various forms of foreclosure mitigation policies to be adopted by lenders.

It is clearly the policy of the Treasury Department in administering TARP to seek to prevent home foreclosures, and properly so, given the explicit mandate in the EESA to do so.

It should be the policy of the Treasury Department to administer TARP in such a manner to encourage TARP recipient banks to pursue options other than foreclosure in dealing with troubled loans to family farmers.

B. Rep. Jeb Hensarling and Senator John E. Sununu

Although we commend the Panel and its staff for their efforts in producing the Special Report on Farm Loan Restructuring under a tight time frame, we do not concur with the all of the analysis and conclusions presented in the report.

We do agree with the Panel's conclusion that agriculture is a vital part of our nation's economy. However, we think a retroactive restructuring mandate would burden TARP recipients unduly and amplify the overall risk of extending credit to borrowers, causing adverse ripple effects to the farm industry it intends to assist.[351] In addition, such action would send the wrong message to the private sector and enhance the uncertainty associated with participation in public sector programs. The tepid response to the TALF program and the protracted start-up period for the PPIP program are attributable in part to the concern that private sector participants may be subjected to burdensome rules and regulations on a retroactive basis. Private sector participants have taken a circumspect and guarded approach to public sector programs, and the Panel's suggestion that Congress sanction a retroactive restructuring mandate for TARP recipients is clearly counterproductive.[352]

More significantly, we are troubled that the private sector must now incorporate the concept of "political risk" into its due diligence analysis before engaging in any transaction with the United States government.[353] While private sector participants are accustomed to operating

[351] In this regard, we refer only to TARP recipients that have not repaid all amounts owed to the United States government. It is our understanding that no member of the Panel advocates the imposition of any restructuring mandate on any TARP recipient that has repaid all such amounts.

[352] Many recipients have been stigmatized by their association with TARP and wish to leave the program as soon as their regulators permit. Some of the adverse consequences that have arisen for TARP recipients include, without limitation, executive compensation restrictions, corporate governance and conflict of interest issues, employee retention difficulties, and the distinct possibility that TARP recipients (including those who have repaid all Capital Purchase Program advances but have warrants outstanding to Treasury) may be subjected to future adverse rules and regulations. In our opinion, the TARP program should be terminated due to, among other reasons: (1) the clear desire of the American taxpayers for the TARP recipients to repay all TARP related investments sooner rather than later; (2) the troublesome corporate governance and regulatory conflict of interest issues raised by Treasury's ownership of equity interests in the TARP recipients; (3) the stigma associated with continued participation in the TARP program by the recipients; and (4) the demonstrated ability of the current Administration to use the program to promote its economic, social, and political agenda. Rep. Hensarling introduced legislation (H.R. 2745) to end the TARP program on December 31, 2009. In addition, the legislation (1) requires Treasury to accept TARP repayment requests from well capitalized banks; (2) requires Treasury to divest its warrants in each TARP recipient following the redemption of all outstanding TARP-related preferred shares issued by such recipient and the payment of all accrued dividends on such preferred shares; (3) provides incentives for private banks to repurchase their warrant preferred shares from Treasury; and (4) reduces spending authority under the TARP program for each dollar repaid.

[353] While scholars have not agreed on a single definition of "political risk," the term generally refers to the inappropriate interference of the public sector in the affairs of the private sector.

within a complex legal and regulatory environment, many are unfamiliar with the emerging trend of public sector participants to bend or restructure rules and regulations so as to promote their economic, social, and political agenda. The realm of political risk is generally reserved for business transactions undertaken in developing countries and not interactions between private sector participants and the United States government. Private sector participants are beginning to view interactions with the United States government through the same jaundiced eye they are accustomed to directing toward third-world governments. It appears somewhat ironic that the Panel champions transparency and accountability for the private sector but fails to note that retroactive mandates are their public sector antithesis. How is it possible for directors and managers of private sector enterprises to discharge their fiduciary duties and responsibilities when policy makers legislate and regulate without respect for precedent and without thoughtfully vetting the unintended consequences of their actions?

The business community is sorting through this sea change and may appear intimidated by the Administration. The public sector should not, however, view the reticence of the private sector to challenge the Administration and Congress as acquiesce to their policies. Time will tell, but the private sector has no doubt learned much from the circuitous and unpredictable nature of the TARP, TALF, and PPIP programs, as well as from the treatment of the non-UAW creditors in the Chrysler and GM bankruptcies.[354] Any suggestion by the Panel that Congress should consider the imposition of a retroactive restructuring mandate on TARP recipients is not helpful in restoring a sense of confidence between the private and public sectors.

[354] It will be interesting to note if the cost of capital of business enterprises with large unionized workforces increases after the treatment of the private sector secured and unsecured creditors in the Chrysler and GM bankruptcies.