111TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { 111–50

END GOVERNMENT REIMBURSEMENT OF EXCESSIVE EXECUTIVE DISBURSEMENTS (END GREED) ACT

MARCH 24, 2009.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CONYERS, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 1575]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1575) to authorize the Attorney General to limit or recover excessive compensation paid or payable by entities that have received Federal financial assistance on or after September 1, 2008, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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PURPOSE AND SUMMARY

In the wake of widespread financial instability and the failures of multiple large financial institutions, the United States government has implemented programs beginning in 2008 to provide billions of dollars in assistance to financial entities. News reports have revealed that some of the very same companies that received government funds, rewarded executives with bonus payments that for some companies reached hundreds of millions, even billions, of dollars.[1]

H.R. 1575 statutorily authorizes the United States Attorney General to recover a portion of these funds on behalf of companies that have received more than $10 billion in Federal financial assistance since September 1, 2008. The legislation has two key components. First, it creates a Federal fraudulent transfer statute that will authorize the Attorney General to bring suit to recover prior excessive payments by the company to employees. This permits the Government, standing in the shoes of a creditor, to show that there were excessive compensation payments having no relationship to fair value, and to recover those payments for the company. Second, it authorizes the Attorney General to bring suit to limit future payments to company executives to ten times the average of non-management wages, just as would have been the case if the company had been forced into bankruptcy. In addition, the bill authorizes the Attorney General to issue a subpoena to obtain pertinent information from these companies about employee bonus and compensation payments.

BACKGROUND AND NEED FOR THE LEGISLATION

BACKGROUND

In August 2007, financial instability became widely apparent in the credit markets. Although initially thought to be limited to subprime mortgages, this instability spread throughout our Nation's financial system by 2008, causing several large financial institutions to fail and potentially leading to a global-wide freeze in the credit market.

At first, the Government intervened to address these failures on a case-by-case basis.[2] When such efforts failed to stem the credit crisis, Congress passed several bills that were enacted into law by the President.

On July 24, 2008, Congress passed the Housing and Economic Recovery Act of 2008, which was signed by President George W. Bush on July 30, 2008. This Act sought to restore confidence in Fannie Mae and Freddie Mac, two of the Nation's largest suppliers of mortgage financing, by strengthening regulations and injecting capital into these entities.[3]

In early October 2008, Congress passed and President Bush signed the Emergency Economic Stabilization Act of 2008, which

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[1] See, e.g., Louise Story, $2.5 Billion in Merrill Bonuses Would Elude Tax, N.Y. Times, Mar. 20, 2009; Dawn Kopecki, Frank Asks Regulator to Pull Fannie, Freddie Bonuses, Bloomberg, Mar. 20, 2009; Dennis Cho & Brady Dennis, Bailout King AIG Still to Pay Millions in Bonuses, Wash. Post, Mar. 15, 2009, at A01.

[2] See Baird Webel & Edward V. Murphy, The Emergency Stabilization Act and Recent Financial Turmoil: Issues and Analysis, Congressional Research Service, Jan. 23, 2009.

[3] Pub. L. No. 110–289 (2008).

established the Troubled Assets Relief Program (TARP). Under TARP, the Treasury Department was authorized to purchase mortgage-backed securities and to provide Government funding for other purposes.[4]

Most recently, Congress passed and President Barack Obama signed the American Recovery and Reinvestment Act of 2009 last month. This Act included tax reduction provisions and authorized various spending programs to stimulate the economy.[5]

In each of these three major pieces of legislation addressing the economic crisis, the Government sought to impose executive compensation limits on those entities receiving taxpayer funding. The Housing and Economic Recovery Act of 2008, for example, imposes restrictions on compensation for executives of Federal home loan banks, Fannie Mae, and Freddie Mac, and limits golden parachute payments to executives.[6] Under the Emergency Economic Stabilization Act of 2008, the Secretary of the Treasury was tasked with requiring financial institutions whose troubled assets are purchased to meet appropriate standards for executive compensation.[7] The American Recovery and Reinvestment Act of 2009 replaced and expanded the executive compensation requirements previously imposed under the Emergency Economic Stabilization Act of 2008.[8]

In the months following the passage of these initiatives, reports began to surface alleging excessive executive compensation arrangements by companies that had received billions of dollars in government funds. For example, the revelation that one company that had received $20 billion in taxpayer funds had paid out $3.6 billion in executive bonuses prompted a State attorney general to file suit alleging the bonuses were fraudulent.[9] Evidence also emerged that another company had awarded a total of $4.4 million in retention bonuses to four of its top executives after it was taken over by the government.[10] In March 2009, reports emerged that another company had given its executives hundreds of millions of dollars in bonus payments after receiving $180 billion from the government.[11] Despite prior legislative efforts to limit excessive executive compensation and bonuses paid by recipients of government assistance, these efforts have proven to be ineffective.

[4] Pub. L. No. 110–343 (2008).

[5] Pub. L. No. 111–5 (2009).

[6] Specifically, Section 1117 allows the Secretary of the Treasury, in exercising temporary authority to purchase obligations issued by any Federal home loan bank, Fannie Mae, or Freddie Mac to consider limitations on the payment of executive compensation. Sections 1113 and 1114 allow the Director of the Federal Housing Finance Agency to prohibit and withhold executive compensation from executives of Federal home loan banks, Fannie Mae, or Freddie Mac if wrongdoing has occurred. Section 1114 also provides authority to the Director of the Federal Housing Finance Agency to limit golden parachute payments to these executives.

[7] Pursuant to Section 111, these standards are required to include limits on incentive-based compensation for unnecessary and excessive risks, recovery of bonuses and incentive compensation based on criteria later proven to be materially inaccurate, and a prohibition on golden parachutes.

[8] As amended by the American Recovery and Reinvestment Act of 2009, Section 111 provides a more comprehensive and uniform set of rules for all TARP recipients.

[9] Louise Story, Cuomo Wins Ruling to Name Merrill Bonus Recipients, N.Y. Times, Mar. 19, 2009, at B1.

[10] See, e.g., Dawn Kopecki, Frank Asks Regulator to Pull Fannie, Freddie Bonuses, Bloomberg, Mar. 20, 2009.

[11] See, e.g., Dennis Cho & Brady Dennis, Bailout King AIG Still to Pay Millions in Bonuses, Wash. Post, Mar. 15, 2009, at A01.

LEGAL ANALYSIS OF H.R. 1575

Fraudulent Transfer Law and Its Applicability to H.R. 1575

Overview

A fraudulent transfer [12] essentially involves the act of placing assets beyond the reach of one's creditors. Thus, being able to undo a fraudulent transfer is one of the "most powerful tools" available to creditors who otherwise would have been able to satisfy their claims from those assets, if they had not been transferred.[13] The modern law of fraudulent transfers dates back at least to Elizabethan times, with the enactment in 1571 of the Statute of Elizabeth,[14] and possibly earlier.[15]

The classic illustration of a fraudulent transfer is where someone—rather than using his or her assets to repay debts owed to his or her creditors—transfers them to a friend or relative with actual intent to defraud his or her creditors. The law of fraudulent transfers also applies to an asset transfer made by an entity who is in a precarious financial condition and who received less than reasonably equivalent value in exchange for the transfer.

Types of Fraudulent Transfer Laws

Four States, including New York,[16] have adopted the Uniform Fraudulent Conveyance Act (UFCA), which essentially codifies the Statute of Elizabeth.[17] Thirty-nine States and the District of Columbia have adopted the Uniform Fraudulent Transfer Act (UFTA),[18] a modernized, though very similar, successor to the UFCA.[19] Other States rely on common law theories of fraudulent transfer.

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[12] As used here, the term "fraudulent transfer" is intended to be interchangeable with the term "fraudulent conveyance."

[13] 5 Alan N. Resnick & Henry J. Sommer, eds., Collier on Bankruptcy, ¶548.01 at 548–8 (15th ed. rev'd 2007).

[14] See, e.g., Statute of 13 Eliz. c. 5 (1571) (deemed void any conveyance made with intent to delay, hinder or defraud creditors); Twyne's Case, 3 Coke 80b, 76 Eng. Rep. 809 (Star Chamber 1601) (thought to be one of the oldest cases interpreting the 1571 Statute of Elizabeth). As one leading bankruptcy law treatise observes, "The substance of the Statute of Elizabeth is part of the common law of every state, and forms the basis of the actual fraudulent intent avoidance provisions of section 548(a)(1)(A) of the [Bankruptcy] Code, as well as the uniform laws that most states have enacted." 5 Alan N. Resnick & Henry J. Sommer, eds., Collier on Bankruptcy, ¶548.LH[1] at 548–89 (15th ed. rev'd 2007).

[15] See Bruce A. Markell, Lawyer-Made Law, Lex Juris and Confusing the Message with the Messenger—A Comment on Frankel, 12 Duke J. of Comp. & Int'l L. 493, 497 n. 18 (2002) ("Roman law had recognized as a nominate tort an action fraus creditiorum similar in purpose and effect to the modern intentional fraudulent conveyance.").

[16] These states are: Maryland, New York, Tennessee, and Wyoming. Cornell University Law School Legal Information Institute—Uniform Business and Financial Laws Locator, at http://www.law.cornell.edu/uniform/vol7.html#frcon

[17] The National Conference of Commissioners on Uniform State Laws proposed the Uniform Fraudulent Conveyance Act (UFCA) in 1918. According to the Conference, "It was created to supersede the Statute of 13 Elizabeth which was enacted in some form by many states, and which introduced the concept of the fraudulent conveyance into the law of every American jurisdiction, with or without enactment." National Conference of Commissioners on Uniform State Laws, Uniform Fraudulent Transfer Act—Summary, at http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-ufta.asp (last visited Mar. 22, 2009).

[18] Cornell University Law School Legal Information Institute—Uniform Business and Financial Laws Locator, at http://www.law.cornell.edu/uniform/vol7.html#frcon

[19] The National Conference of Commissioners on Uniform State Laws approved the UFTA in 1984. The principal differences between the UFCA and the UFTA are summarized by the Conference as follows:

> Much of the UFTA resembles the UFCA, its predecessor. What, then, are some of the differences? . . . To begin with, the term "transfer" taken from the Federal Bankruptcy Act replaces the term "conveyance." UFCA uses the term "fair consideration" instead of "reasonably equivalent value." "Reasonably equivalent value" does not include the element of good faith as "fair consideration" does, and is more sharply defined than

The law of bankruptcy is currently the only federally codified source of fraudulent transfer law. Under bankruptcy law, a trustee (a fiduciary for creditors) may undo or "avoid" a fraudulent transfer on behalf of all of the debtor's creditors. If the trustee's action is successful, the assets are brought into the bankruptcy estate for distribution to the debtor's creditors.

A bankruptcy trustee may pursue a fraudulent transfer under two authorities. First, section 548 of the Bankruptcy Code [20] codifies Federal fraudulent transfer law for bankruptcy cases. It is substantively identical to the UFTA. Second, Section 544(b) of the Bankruptcy Code [21] allows the trustee to "step into the shoes of a creditor of the debtor" and assert that creditor's rights under applicable state fraudulent transfer law.[22] Thus, in a bankruptcy case filed in New York where the debtor transferred assets for less than reasonably equivalent value while insolvent, the trustee may invoke the applicable New York law with respect to such transfers.[23]

Section 548, in pertinent part, authorizes a trustee to undo a transfer by a debtor in exchange for less than reasonably equivalent value in a case where the debtor:

> (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
>
> (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;
>
> (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or
>
> (IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.[24]

It should be noted that the last item, concerning employment contracts, was added on a retroactive basis in 2005, based on a bipartisan floor amendment passed by voice vote by the House during

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> "fair consideration" is in the UFCA. UFTA overcomes the problem raised in the case of *Durrett v. Washington National Insurance Co.*, 621 F.2d 201 (5th Cir. 1980), a case that jeopardized mortgage foreclosure sales. Under UFTA, a properly conducted foreclosure sale is not a fraudulent transfer, notwithstanding the fact that it does not recover an amount somewhat near the actual market value of the property. The concept of the "insider" is new in the UFTA. UFTA provides for defenses of transferees and for a statute of limitations. Both issues are not addressed in the UFCA.

National Conference of Commissioners on Uniform State Laws, Uniform Fraudulent Transfer Act—Summary, at http://www.nccusl.org/nccusl/uniformact__summaries/uniformacts-s-ufta.asp (last visited Mar. 22, 2009).

[20] 11 U.S.C. § 548 (2008).

[21] 11 U.S.C. § 544(b) (2008).

[22] 5 Alan N. Resnick & Henry J. Sommer, eds., Collier on Bankruptcy, ¶548.01[4] at 548–12 (15th ed. rev'd 2007).

[23] See N.Y. Debtor & Creditor L. § 273 (2008) ("Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration."); N.Y. Debtor & Creditor L. § 275 (2008) ("Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.").

[24] 11 U.S.C. § 548(a)(1)(B) (2008).

the course of its consideration of bankruptcy reform legislation in the 108th Congress.[25]

Relation to the End the GREED Act

H.R. 1575 is intended to, among other things, establish a uniform law giving the United States Attorney General similar authority to what a bankruptcy trustee has under relevant portions of sections 548(a)(1)(B)(i)(I), (II), 544(b), and 550 of the Bankruptcy Code with respect to a entity's payment of compensation to its employees. Accordingly, the Attorney General would have the discretion under H.R. 1575 to commence a civil action to avoid and recover any transfer of compensation made by a recipient entity (as defined in section 6 of the bill), and to avoid the obligation pursuant to which the transfer occurred, to the extent of the transfer, under certain circumstances.

Much like Bankruptcy Code section 548(a)(1)(B)(ii), the Attorney would be so authorized to pursue this action if: (1) the recipient entity was insolvent on the date that such compensation was transferred (not taking into account any line of credit, loan, or payment in exchange of stock received by such entity from the United States); or (2) such entity was engaged in business or in a transaction (or about to engage in such activities) that left the entity with an unreasonably small capital for the continuation of such business or transaction.

In addition, H.R. 1575 is intended to empower the Attorney General with the same authority as under Bankruptcy Code section 544(b). As such, the Attorney General would be authorized to "step into the shoes of a creditor" of the entity and assert that creditor's rights under applicable State fraudulent transfer law.

In determining whether an entity is insolvent for purposes of H.R. 1575, the court should use the long-established definition of this term under section 101(32) of the Bankruptcy Code,[26] which is "essentially a balance sheet test in which the sum of the debts is greater than the sum of the assets, at a fair valuation," exclusive of certain types of property interests.[27] Likewise, the term "transfer," as it is used under H.R. 1575, is intended to have the same

[25] 149 Cong. Rec. H2055 (daily ed. Mar. 19, 2003). In the 108th Congress, the House adopted, by voice vote, an amendment offered by Representative Chris Cannon (R-UT) and William Delahunt (D-MA), which, in relevant part, increased the reach-back period during which fraudulent transfers can be avoided from 1 to 2 years, and clarified that section 548(a)(1)(B) applied to compensation paid to insiders under an employment contract.

[26] 11 U.S.C. § 101(32) (2008). Section 101(32), in pertinent part, defines "insolvent" as follows:

(A) with reference to an entity other than a partnership and a municipality, financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of—

(i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and

(ii) property that may be exempted from property of the estate under section 522 of this title;

(B) with reference to a partnership, financial condition such that the sum of such partnership's debts is greater than the aggregate of, at a fair valuation—

(i) all of such partnership's property, exclusive of property of the kind specified in subparagraph (A)(i) of this paragraph; and

(ii) the sum of the excess of the value of each general partner's nonpartnership property, exclusive of property of the kind specified in subparagraph (A) of this paragraph, over such partner's nonpartnership debts[.]

Id.

[27] 5 Alan N. Resnick & Henry J. Sommer, eds., Collier on Bankruptcy, ¶548.05[1][a] at 548–32–33 (15th ed. rev'd 2007).

breadth of application as that term has under the Bankruptcy Code, which defines it in section 101(54) of the Code.[28]

Under H.R. 1575, an employee who received a bonus or excessive compensation has an opportunity to prove why he or she provided value warranting such payment. Thus, where the employee, in good faith, received such compensation, the court should allow the employee to retain that portion of the compensation representing fair value provided by the employee in exchange.[29]

CONSTITUTIONAL CONSIDERATIONS

The Committee has considered carefully the constitutional issues implicated in H.R. 1575, and is confident that the bill is constitutionally sound. It is well within Congress's authority under the Bankruptcy Clause, the Commerce Clause, the Spending Clause, and the Necessary and Proper Clause. Nor is H.R. 1575 an unconstitutional taking of property in violation of due process under the Fifth Amendment, or an unconstitutional bill of attainder.

Congress's authority under article I, section 8, clause 4 to "establish . . . uniform Laws on the subject of Bankruptcies throughout the United States" applies not only to laws regarding bankruptcy itself, but also to laws regarding companies facing insolvency generally. "While attempts have been made to formulate a distinction between bankruptcy and insolvency, it has long been settled that, within the meaning of the [Bankruptcy Clause], the terms are convertible."[30] Although the Supreme Court has "noted that '[t]he subject of bankruptcies is incapable of final definition,' [it has] previously defined 'bankruptcy' as the 'subject of relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief.'"[31] As the Supreme Court noted in *Wright v. Union Central Life Ins. Co.,*[32] Congress also has a broad general grant of enhancing power under the Necessary and Proper Clause, article 1, section 8, clause 18.

Congress also has broad authority under the Commerce Clause, article I, section 8, clause 3, "to regulate Commerce with foreign Nations and among the several States. . . ." The Supreme Court has reiterated the breadth of the Commerce Clause power on numerous occasions.[33] And again, Congress also has broad applicable enhancing authority under the Necessary and Proper Clause.

Aside from these authorities, in this instance, where the bill is limited to companies that have received extraordinary Federal financial support of at least $10 billion since last September 1, Congress also has ample authority under the Spending Clause to set conditions on how these funds are spent[34]—again, enhanced by the Necessary and Proper Clause.

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[28] In relevant part, Bankruptcy Code section 101(54) defines transfer to mean "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with—(i) property; or (ii) an interest in property." 11 U.S.C. § 101(54) (2008).

[29] Cf. 11 U.S.C. § 548(c) (2008).

[30] Continental Illinois National Bank & Trust Co. v. Chicago Rock Island & Pacific Railway, 294 U.S. 648, 667–68 (1945).

[31] Railway Labor Executives' Ass'n v. Gibbons, 455 U.S. 457, 466 (1982) (quoting Wright v. Union Central Life Ins. Co., 304 U.S. 502, 513–14 (1938)).

[32] 304 U.S. at 513.

[33] See, e.g., Gonzales v. Raich, 545 U.S. 1, 17 (2005); *Perez v. United States,* 402 U.S. 146, 150–152 (1971); Wickard v. Filburn, 317 U.S. 111, 123–24 (1942).

[34] See, e.g., South Dakota v. Dole, 483 U.S. 203, 206–07 (1987); Lau v. Nichols, 414 U.S. 563, 569 (1974); Steward Machine Co. v. Davis, 301 U.S. 548 (1937).

H.R. 1575 is clearly *not* an unconstitutional taking without due process. First, the Attorney General would not be recovering the unjustified bonuses and other compensation for the Government's own use, but rather would be restoring them to the company where they originated, for *its* proper benefit and use. "Congress has considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties."[35] And second, the threshold burden for the claimant in a takings case is demonstrating a legitimate interest in the property in question.[36] It is axiomatic that there is no legitimate property interest in the proceeds of a fraudulent transfer. Moreover, the determination that a particular transfer of compensation was for "less than a reasonably equivalent value in exchange" is made by the court, after trial, based on the evidence presented. The Act, including its application to existing compensation arrangements, is manifestly "supported by a legitimate legislative purpose furthered by rational means."[37]

Nor is H.R. 1575 a bill of attainder or violation of the Ex Post Facto Clause. It is an essential hallmark of a bill of attainder that it must "inflict punishment without a judicial trial."[38] As the Court explained in *United States v. Brown,*[39] "[t]he Bill of Attainder Clause was intended . . . as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature." In contrast, under H.R. 1575, no one would be required to surrender any compensation except pursuant to court action. Thus, even assuming that the act of avoiding, and recovering for the benefit of the company, a bonus unjustifiably given might be considered "punishment"—doubtful under well-settled precedents[40]—it is the court, not the legislature, that would impose it. And because the legislation is not criminal in nature, it cannot violate the Ex Post Facto Clause.[41]

HEARINGS

The Committee on the Judiciary held no hearings on H.R. 1575.

COMMITTEE CONSIDERATION

On March 18, 2009, the Committee met in open session and ordered the bill, H.R. 1575, favorably reported without amendment by voice vote, a quorum being present.

COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were

[35] Eastern Enterprises v. Apfel, 524 U.S. 498, 528 (1998).
[36] See Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005); Bair v. U.S., 515 F.3d 1323, 1327 (Fed. Cir. 2008).
[37] United States v. Carlton, 512 U.S. 26, 32 (1994); *Pension Benefit Guaranty Corporation v. R.A. Gray & Co., 467 U.S. 717, 729 (1984); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16 (1976).*
[38] Garner v. Board of Public Works, 341 U.S. 716, 722 (1951); Cummings v. Missouri, 17 U.S. (4 Wall.) 277, 323 (1866).
[39] 381 U.S. 437, 442 (1965).
[40] See, e.g., Nixon v. Administrator of General Services, 433 U.S. 425, 471–73 (1977).
[41] See, e.g., Collins v. Youngblood, 497 U.S. 37, 41 (1990); Calder v. Bull, 3 U.S. (3 Dall.) 386, 397 (1798).

no recorded votes during the Committee's consideration of H.R. 1575.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1575, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 23, 2009.

Hon. JOHN CONYERS, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1575, the End Government Reimbursement of Excessive Executive Disbursements (End GREED) Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Leigh Angres, who can be reached at 226–2860.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable Lamar S. Smith.
Ranking Member

H.R. 1575—End Government Reimbursement of Excessive Executive Disbursements (End GREED) Act.

H.R. 1575 would invoke the bankruptcy power of the U.S. Constitution to authorize the U.S. Attorney General (AG), after consultation with the Secretary of the Treasury, to recoup existing, and limit future, payments for employment compensation made by companies that have received federal financial assistance since September 2008. The bill would apply to those companies that received a loan, line of credit, payment made in exchange for stock purchases, or some combination of assistance that exceeds a total of $10 billion.

Specifically, the bill would allow the AG to commence a civil action under certain circumstances to recover any payment made by a company to an employee on or after September 1, 2008, if such employee received an amount that was unreasonably greater than the value received by the company. Such recoveries would be returned to the company. The AG could also commence a civil action to limit the amount of the compensation paid or payable under an employment contract to a company's employees on or after the date of enactment, if such compensation exceeds a certain amount. That amount would be greater than 10 times the average amount of compensation paid or payable to such company's nonmanagement employees during a calendar year.

Any costs to pursue such cases would be subject to the availability of appropriated funds. Because CBO expects few cases would be pursued under the bill, any associated costs would be negligible.

H.R. 1575 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

H.R. 1575 would impose a private-sector mandate, as defined in UMRA, to the extent that it would require individuals to pay back certain compensation received from companies that accepted $10 billion or more in financial assistance from the federal government on or after September 1, 2008. The costs of complying with that mandate would be the lost compensation, plus court costs and attorney fees. Because those costs, if any, would depend on future court decisions and settlements, CBO cannot determine whether they would exceed the annual threshold established in UMRA for private-sector mandates ($139 million in 2009, adjusted annually for inflation).

The CBO staff contacts for this estimate are Leigh Angres (for federal costs) and Paige Piper/Bach (for the private-sector impact). This estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 1575 will promote the stewardship of taxpayer dollars that have been used to stabilize entities in financial distress.

Constitutional Authority Statement

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8, clauses 1, 3, 4, and 18 of the Constitution.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1575 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of Rule XXI.

SECTION-BY-SECTION ANALYSIS

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short Title. Section 1 sets forth the short title of the bill as the "End Government Reimbursement of Excessive Executive Disbursements (End GREED) Act."

Sec. 2. Statement of Authority. Section 2 sets forth a statement of congressional authority. Pursuant to this authority, section 2 authorizes the Attorney General, after consultation with the Secretary of the Treasury, to: (1) seek recovery of previous excessive payments of compensation made by recipient entities (as defined in section 6 of the bill); and (2) limit excessive payments of compensation to be made by such entities.

Sec. 3. Recovery of Excessive Compensation. Subsection (a) of section 3 authorizes the Attorney General, after consultation with the Secretary of the Treasury, to review on behalf of the Government any employment contract made by a recipient entity, and any payment made by a recipient entity to an employee on or after September 1, 2008.

Subsection (b) authorizes the Attorney General to commence a civil action in the appropriate United States district court to avoid any payment made by a recipient entity to an employee (including a payment under an employment contract) that was made on or after September 1, 2008, if such entity received less than a reasonably equivalent value in exchange for such payment, under certain circumstances. The provision applies if such entity was either: (1) insolvent on the date that the payment was made, not taking into account any line of credit, loan, or payment in exchange for stock, received by such entity from the United States on or after September 1, 2008; or (2) engaged in business or a transaction (or about to engage in business or a transaction) for which property remaining in the recipient entity was an unreasonably small capital.

For purposes of this subsection, the Attorney General may avoid any interest of a recipient entity in property, or any obligation incurred by such entity, that is avoidable under applicable law by a creditor holding an unsecured claim against such entity.

Subsection (c) authorizes the Attorney General to commence a civil action in the appropriate United States district court to limit the amount of compensation paid or payable on or after the date of enactment of this Act by a recipient entity under an employment contract if such compensation is greater than an amount equal to ten times the amount of the mean amount of compensation paid or payable to such entity's non-management employees for any purpose during the calendar year in which compensation was paid or payable by such entity.

Sec. 4. Subpoena Authority. Section 4 authorizes the Attorney General to issue a subpoena to require the attendance and testimony of witnesses as well as require the production of documentary evidence relating to any matter relevant to the implementation of this Act, including the circumstances surrounding any employment contract or payment of compensation. In any instance of contumacy or refusal to obey, section 4 provides that the subpoena shall be enforceable by order of an appropriate district court of the United States.

Sec. 5. Rule of Construction. Section 5 sets forth a rule of construction. Other than limiting compensation paid or payable under employment contracts or providing for the recovery of previously paid compensation, section 5 provides that nothing in this Act shall be construed to have any impact on a recipient entity, its financial status, or the financial status of its creditors.

Sec. 6. Definitions. Section 6 defines two terms used in the Act. First, it defines "employment contract" as a contract that provides for the payment of compensation (including performance or incentive compensation, bonus, or other financial return designed to replace or enhance incentive, stock, or other compensation. Second, it defines "recipient entity" as a person (including any subsidiary of such person) that receives during any period beginning on September 1, 2008 from the United States, in excess of $10 billion in the aggregate, (1) a line of credit or a loan, (2) a payment in exchange for stock of such person (or such subsidiary), or (3) any combination of such lines of credit, loans, or payments.

Additional Views

As the financial crisis of Fall 2008 sprang to life, the United States bailed out of imminent financial disaster the insurance giant American International Group (AIG). This decision was attended by no small controversy. It preceded a much greater controversy still, that over the passage of the Emergency Economic Stabilization Act of 2008.

Since those actions, federal bailouts have continued to come to the rescue of financial institutions. The Executive and the Department of the Treasury have attempted multiple strategies to revive the Nation's ailing finance system, its associated institutions, and the broader economy. Chief among these was the American Recovery and Reinvestment Act of 2009, commonly known as the "Stimulus Bill." Governments around the world have taken parallel actions to save their ravaged systems and economies. Yet still the crisis rages on. Public frustration mounts, and global anxiety has not diminished.

In this tension-filled environment, over the weekend of March 14–15, 2009, it was revealed that, out of the $180 billion-plus dollars that AIG has received from the federal government to date, AIG had just distributed more than $160 million in retention bonuses to its executives and members of its Financial Products Subsidiary, the AIG unit principally responsible for the firm's meltdown. According to the Attorney General of New York, the most richly paid bonus recipient received more than $6.4 million in taxpayer funds. The top seven bonus recipients received more than $4 million each. The top ten bonus recipients received a combined $42 million. Twenty-two individuals received bonuses of $2 million or more; combined they received more than $72 million. Seventy-three individuals received bonuses of $1 million or more. Eleven of the individuals who received "retention" bonuses of $1 million or more are no longer working at AIG. One of these received $4.6 million. Meanwhile, in the devastated economy AIG helped to unleash upon the American public, unemployment has risen by leaps and bounds, standing now at over eight percent. The stock market has plunged by well over 30 percent. Trillions of dollars of American wealth has evaporated.

As the week of March 15, 2009 has unfolded, the chairman of the Senate Banking Committee has admitted that he inserted into the Stimulus Bill a stealth provision protecting AIG's ability to pay these bonuses, in response to the urging of the Obama Administration. The Secretary of the Treasury has admitted that it was his department that urged the Banking Committee chairman to insert the provision into the Stimulus Bill, in response to concerns over lawsuits that could be filed if the bonuses were not paid. It has been revealed that Executive Branch officials knew about the bonuses but made no effort to prevent them. And AIG has responded that it had no choice but to pay these sums, due to contractual obligations that were part of its employee retention plan.

The American people have had a different response. Outrage has swept the country. The AIG bonuses have detonated the powder keg that was first filled, and has since progressively smoldered, as the congressional majority and the Administration have failed to take the steps needed to halt the economy's bleeding.

The House majority, for its part, has taken yet another response to this debacle. It could have held itself accountable for its role in the scandal. After all, the House majority passed the bonus-enabling Stimulus Bill without even reading it, over the opposition of every Republican member of the House. But the majority did not hold itself accountable. The House majority also could have held the Executive and the Department of the Treasury accountable for their failures. But it did not, and, adding insult to injury, it blocked Republican legislation that would have helped to ensure that the Executive, including the Treasury Secretary, would never let this happen again. What is more, the House majority has failed to introduce legislation to recoup the taxpayers' lost funds through the course of future dealings with a company the U.S. government now effectively owns, AIG—which will surely come as the crisis drags on. Rather than hold itself, the Executive or the Secretary accountable, the House majority has even gone so far as to offer and debate a resolution that the Executive Branch has done *everything it could* to avoid what has gone wrong in this crisis. Stunningly, this resolution, H. Con. Res. 76, garnered nearly every House Democrat's vote.

The majority has, in addition, introduced the bill before us, H.R. 1575, entitled the "End the Government Reimbursement of Excessive Executive Disbursements (End the GREED) Act." Ostensibly using the Congress' power under the Bankruptcy Clause, the bill asserts that AIG, had it not been bailed out, would be insolvent; that AIG, were it insolvent, would be subject to the bankruptcy power; that, in bankruptcy, AIG's bonus contracts could have been abrogated, so that the bonuses need not have been paid; and that, accordingly, the still solvent AIG should be subject to the abrogation of contracts outside of bankruptcy, in civil actions brought by the Attorney General and involving no other AIG creditors. In addition to this gerrymandering of the Bankruptcy Clause, the bill extends the power to abrogate contracts, not simply to the employment contracts of AIG, but to those of any institution receiving $10 billion or more from a loan, line of credit, or payment by a federal agency. It establishes the power for the Attorney General to suppress significantly, not just executive compensation, but any employee's compensation. And it enshrines these powers in perpetuity.

This sweeping bill raises clear constitutional concerns under the Bankruptcy Clause and the Takings Clause. It may raise concerns under other clauses of the Constitution as well, such as Article III's Case or Controversy Clause. It is likely to trigger litigation on one or more of these grounds; if those challenges are successful, the statute will accomplish nothing to remedy the enormity that is the AIG bonuses. The bill also, by its highly unusual, overly broad and open-ended incursion on contracts, threatens to chill lenders from seeking needed federal aid, and to chill investors from investing in our markets for fear of what the Congress might do next.

For example, the Bankruptcy Clause, residing in Article I, section 8, clause 4 of the Constitution, provides that the Congress has the authority to establish "uniform Laws on the subject of Bankruptcies throughout the United States." This power, while broad, is not without limit. In *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555, 589 (1935), the Supreme Court held that "[t]he bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment." Similarly in *United States v. Security Industrial Bank,* 459 U.S. 70, 75 (1982), the Court stated that "[t]he bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation." As a result, because the bill relies on the Bankruptcy Clause as authority for its enactment, the bill must respect, not only the limits of the Bankruptcy Clause's terms in and of themselves, but the limits which the Fifth Amendment superimposes on those terms. We believe it fair to presume that the bill relies on the Bankruptcy Clause specifically to try to skirt the reach of the Takings Clause. But the notion that the federal government can provide financial assistance to a company to keep it from becoming insolvent and filing for bankruptcy, then claim that it can treat the company outside of bankruptcy as if it had become insolvent and filed in bankruptcy, just to avoid takings claims that might be brought against its interference with contracts—*under which contracts the Congress essentially pre-authorized payment*—is highly questionable and presents an unprecedented (or, at least, the majority has offered no precedent) use of the Bankruptcy Clause. Certainly, it is not a concept that we should rush to embrace, or should expect with confidence that the courts will affirm.

What is more, while it may be true that, in a case brought in bankruptcy court, bonus compensation might be subject to limitation or recapture provisions in the Bankruptcy Code, *see* 11 U.S.C. secs. 503(c) and section 544(b), such a limitation or recovery would generally accrue to the benefit of all of the creditors in the case. The federal government would ordinarily be a party to the case only if it were owed tax payments, or if a government agency such as the Pension Benefit Guaranty Corporation had a legitimate seat at the table. H.R. 1575's quasi-bankruptcy proposal, however, makes the federal government the only party in interest. Any and all recoveries of excessive executive compensation will flow back to the U.S. Treasury. Not one dime will accrue to other AIG creditors, of whom there assuredly are many. We understand that, in this instance, the Congress desires to recover specifically federal monies. We raise the point, however, merely to illustrate how clearly the bill stands outside the ordinary bankruptcy framework.

Also departing from usual bankruptcy norms is the complete lack of any end to the reach of the bill. In a true bankruptcy case, there is always an end, and a prompt one. That end is called "discharge," *see, e.g.,* 11 U.S.C. sec. 727, or ultimately liquidation. Under H.R. 1575, however, there is no release from the reach of the federal government. There is no discharge. On the contrary, once an entity has received government assistance that exceeds $10 billion it is subject to the bill's tortured, quasi-bankruptcy control of executive compensation—and non-executive compensation—until the end of time. In other words, a continuous government presence to determine compensation.

In an attempt to smooth over the bill's lurking Bankruptcy Clause problems, the majority has advanced the theory that state and federal fraudulent conveyance laws provide a foundation for incorporating bankruptcy powers into the bill. This is a provocative theory; we are willing to concede for purposes of argument that there may be at least partial merit to it. The Committee, however, has not had time to explore this claim fully through the testing of witnesses at a hearing, and serious questions remain. For example, what is to be done with AIG bonuses that may not have constituted "fraudulent conveyances?" Let it not be forgotten that the congressional majority, at the behest of the Administration, snuck into the Stimulus Bill a provision specifically to protect AIG's right to pay these bonuses after removing a bipartisan Senate amendment that could have prevented the payment of these bonuses, and that the bonus-protecting provision was signed into law. Could that not drastically undermine the theory that the bonuses were fraudulently conveyed? If the bonuses were not fraudulently conveyed, might not an attempt to recoup the bonuses through the civil actions H.R. 1575 would authorize amount to an attempted taking? Might not that attempt strain this stretch of the Bankruptcy Clause beyond the breaking point? Finally, if it is a fraudulent conveyance theory that the majority embraces, why does the majority not simply introduce a fraudulent conveyance statute, eschewing any reliance on the Bankruptcy Clause? Is it because the majority knows that there are serious obstacles to proving that any of these bonuses were fraudulently—as opposed to foolishly—conveyed?

The above issues do not exhaust our concerns under the Bankruptcy Clause. But for the sake of brevity—and because the majority's hasty tactics have not permitted time to plumb these questions fully—let us turn to our concerns under the Takings Clause and the Case or Controversy Clause.

To begin with the Takings Clause, contracts, of course, are constitutionally protected property. *See, e.g., Lynch v. United States,* 292 U.S. 571, 579 (1934) ("Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States."); *United States Trust Co. v. New Jersey,* 431 U.S. 1, 19 (1977) ("Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid."). As a result, the proposal to exact from recipients payments that have already been paid, pursuant to pre-existing contracts that are not suggested to be invalid, under the shadow of Stimulus Bill authority that could easily be viewed to have *ratified* the contractual rights to the payments, could very well be a proposal to exact a taking. Of course, if this were a taking, it would have to be either compensated—defeating the very purpose of the exaction—or held unconstitutional. *United Trust Co.,* 431 U.S. at 19. This quandary, no doubt, lies at the root of the majority's invocation of the Bankruptcy Clause.

The Case or Controversy Clause may also present an issue that is destined to doom the bill. In the case of *In re TMI Litigation Cases II,* 940 F.2d 832 (3rd Cir., 1982), for example, the federal courts held once again that, under this clause of the Constitution, for Congress to confer a valid grant of federal jurisdiction, the cause of action concerned must be one which "arises under" the laws of the United States. Yet while H.R. 1575 certainly endeavors to grant the courts jurisdiction to hear, and the Attorney General authority to bring, cases that would undo the AIG bonus contracts, the bill cites no underlying substantive federal law which the bonus payments violated. And, again, struggle as it might, it is questionable whether the bill could, given that the Stimulus Bill appears to have ratified the payment of the bonuses under existing AIG contracts.

Amendments to the bill might have been reached that could have avoided these and other problems, had we been given time to work the problems through and craft appropriate solutions. That time was available, and the Constitution deserved it. The AIG bonuses have already been paid. The time for urgent action to keep them from being paid has passed us, however so much in the night. The time to take steps to recover them is ample. Yet this bill was brought to our attention in draft form on the morning of March 17, 2009; introduced in a new form on the evening of that day; and brought directly to full Committee mark-up on March 18, 2009. No Subcommittee or full Committee hearings were held. No Subcommittee mark-up was entertained. No time for reasoned consideration was allowed. And no time is being lost in hurrying this bill to the floor of the House. We understand that the majority will bring the bill to a vote as soon as three legislative days after our Committee's mark-up, under a suspension of the House rules, preventing any final possibility of amendment.

AIG's bonus payments are astounding. Still more astounding, however, is the rush by the majority to legislate, when that rush risks trampling the Constitution. In the current environment, we can only conclude that this haste is being indulged in, not so much to address the AIG bonuses, but to deflect attention from, and deter reflection on, the role of the congressional majority and the current Administration in allowing the outrage of the bonuses to occur in the first place. Our Constitution and our people deserve better.

LAMAR SMITH.
STEVE KING.
TRENT FRANKS.
JIM JORDAN.
TED POE.
JASON CHAFFETZ.
GREGG HARPER.