



**AMERICAN  
ASSOCIATION  
OF BANK DIRECTORS**

*National Capital Office*

Suite P-15  
4701 Sangamore Road  
Bethesda, MD 20816  
Telephone: (301) 263-9841  
Facsimile: (301) 229-2443  
[www.aabd.org](http://www.aabd.org)

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November 3, 2008

The Honorable Henry Paulson  
Secretary  
U.S. Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, D.C. 20220

Dear Secretary Paulson:

Section 5.3 of the Securities Purchase Agreement – Standard Terms (the “Agreement”) posted on Treasury’s website on Friday, October 31, 2008 will permit Congress to make any changes it desires in the Agreement, without limitation, now or in the future. All participating institutions will be taking their chances that this Congress or future Congresses will not place onerous restrictions or obligations on them for having participated in the program.

Section 5.3, headed “Amendments”, states in part that “the Investor [meaning Treasury] may unilaterally amend any provision of this Agreement to the extent required to comply with any changes after the Signing Date in applicable federal statutes.”

This provision grants carte blanche for this or any other Congress to change any of the terms of the Agreement, which, we understand, must be executed by all publicly traded institutions that participate in the program (agreements for nonpublicly traded or reporting companies have not yet been posted). So, for example, if Sen. Bernie Sanders’ idea to put caps on executive compensation at firms that accept Treasury investment in the firm’s senior preferred stock becomes law in this Congress or future sessions of Congress, it can apply unilaterally and retroactively to all of the participants in the program.

Congress could do just about anything it wanted. For example, it could increase the dividend on the preferred, or require participating institutions to make loans at levels it decides are appropriate, require them to make certain types of loans on certain terms or to certain socio-economic groups, or stop foreclosing on properties securing past-due loans.

Absent the provision in Section 5.3 quoted above, Congress could not alter the terms of the Agreement without violating the U.S. Constitution, which prohibits the taking away of contractual rights without due process and fair consideration.

The American Association of Bank Directors is concerned that many boards of directors, which have a fiduciary duty to the institution’s shareholders, will not be able to agree to the Agreement because of the open-ended character of Section 5.3. It would be unheard of for an institution to consent to such a provision in a contract with a third party, nongovernmental entity.

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If Treasury does not delete this provision, we fear that many institutions that otherwise would qualify for the Capital Purchase Program will choose not to participate. This will have the effect of diminishing the capacity of those nonparticipating institutions to make loans to individuals and businesses in their communities.

If Treasury desires not to potentially limit the authority of Congress to pass legislation generally applicable to depository institutions and their holding companies, it could amend Section 5.3 by permitting changes in federal law that are applicable to depository institutions and their holding companies without regard to whether or not they have participated or will participate in the CPP or otherwise avail themselves of other programs under EESA.

We strongly urge Treasury to delete this provision and reassure prospective participants that they will not be subject to changes to the Agreement subsequent to the parties executing the Agreement.

Sincerely,

A handwritten signature in black ink, appearing to read 'David Baris', with a long horizontal flourish extending to the right.

David Baris  
Executive Director

cc: The Hon. Ben Bernanke, Chairman, Board of Governors, Federal Reserve System  
The Hon. Sheila Bair, Chairman, FDIC  
The Hon. John Dugan, Comptroller of the Currency  
The Hon. John Reich, Director, Office of Thrift Supervision