

## **A Proposal to Eliminate the Privatization of Profits and the Socialization of Losses.**

### **The “good bank” / “good trust” proposal.** (An alternative to the “good” bank/ “bad” bank proposal)

#### **The Basis for Making the Proposal: Our Constitutional Right to Petition**

The first amendment to the Constitution of the United States gives citizens the right to petition the federal government and ask for a redress of their grievances. The framers of the Bill of Rights considered this activity to be so central to the rights and responsibility of citizenship they specifically forbid Congress from ever passing a law that inhibits citizens from exercising it.

It was the exercise of this right to petition the federal government by which citizens from New England first asked their Congressional representatives to abolish the practice of slavery in the District of Columbia. It was the exercise of this right to petition that forced the Congressional debate on the topic of slavery into a more open forum. The tactics of representatives from slave holding states notwithstanding, it was the exercise of this sacred right to petition that developed the fertile soil from which the seeds of abolition grew into a mighty force the tides of racism could not wash away.

Those individuals and institutions to whom we have entrusted the stability and integrity of this country’s financial infrastructure have demonstrated a profound disregard and unambiguous contempt for the trust placed in them. The quality of leadership that has been exhibited by members of prior Administrations, various regulatory and Congressional oversight authorities and various corporate officers and Directors unequivocally demonstrates a lack of fiscal discipline, personal responsibility and moral fortitude. It is in the context of this catastrophic economic environment, in which the US taxpayer must serve as the lender of last resort, that this petition for a redress of our grievances is made.

**Personal responsibility either begins with leadership or it will fail  
from the weight of its own inauthentic nature.**

#### **How to Read This Document**

There are two sections to the Proposal: the **Principles** and the **Provisions for Action**. The Principles speak for themselves. In the **Provisions for Action** section you will find a description of specific actions called for by this **Proposal**.

Each provision is numbered. In the **Provisions** section, the sentences in **bold** introduce the subject matter. For those who want to read the highlights of the Petition, read the **Bold** print first. Once you’ve read each of the **Provisions**, please go back to read the explanation that accompanies each one. If you have suggestions for how to improve upon the details of the Provisions, consistent with their intent, please write to us to share your insight.

**Thank you.**

**PRINCIPLES of PROPOSAL:** (1 ½ pages)

**Whereas...**

- (1) The business leadership of many financial institutions and industrial enterprises has been short sighted, reckless and all too frequently incompetent. In addition, the prior leadership of various government regulatory agencies, having abrogated their oversight duties, failed to defend and serve the interests of the American people. Their failure to exercise their guardianship role consistent with their position of leadership and authority has led to America's most dire economic conditions since the 1930's.
  
- (2) We taxpayers have been told that we must rescue the banks and other industrial enterprises before it is too late. We have been asked to commit our capital to sustain the same management (using the same thought process to manage) that drove the business to insolvency in the first place. **What sense does it make to retain the same leadership that led to such subject failure?** If taxpayers did not provide the capital or financial backing to rescue these businesses they would have to file bankruptcy and face a complete liquidation of their assets. Their executives would have to forfeit their special pensions. Such is the consequence of gross mismanagement and a **key principle of our free enterprise system.**
  
- (3) It is clear that too many individuals in positions of leadership (be it business or government), have been inattentive, irresponsible and driven by the insatiable hunger of self importance. They have created dire financial consequences for the companies they led or were to have overseen. In so doing they have damaged the financial stability of the country, the sanctity of our currency and our ability to finance the needs of the Republic. By their hand they have condemned future generations of Americans to toil under a crushing burden of debt.
  
- (4) We citizens are asked to raise capital by issuing massive public debt then use our capital to buy "bad" assets from banks. We are told to be patient to see what proceeds may come from the sale of those "bad" assets. American taxpayers, as the lenders of last resort, have not been properly advised on the purpose, design, management or oversight efforts by regulatory authorities to bring financial stability to our banking system. Those regulatory authorities (most are former bankers) responsible for alleviating such dire economic consequences do not blink when committing future generations of Americans to pay for the debts issued in their plan. Hundreds of billions in taxpayer money have been given and hundreds of billions more have been committed to provide financial guarantees for assets of questionable value. **We citizens are no longer interested in tolerating the privatization of profits and the socialization of losses.** The Provisions of this Petition represent a responsible alternative to the "good" bank/ "bad" bank proposal.

In our market-based economic system the owners of an enterprise (shareholders) elect a Board of Directors to oversee management's stewardship of the business. If shareholders do not pay attention to the effectiveness of management's stewardship of their assets and members of the Board of Directors fail to exercise prudence in their oversight of management, then Board

**PRINCIPLES of PROPOSAL** (continued) **Whereas...**

members, management and shareholders must all bear the consequences of their irresponsible conduct.

- (5) If US taxpayers are to rescue bankrupt institutions from liquidation by recapitalizing them with the promise of our toil and the toil of our children, then we have the right to own them. Like any other investor, we have the right to dictate the terms of our investment OR not make it. Like any enterprise seeking investment capital, management has the right to refuse the people's terms and live with the consequences of their behavior.

**As citizens, we must be responsible for what we do as well as for what we fail to do. An enterprise that wants to operate within our borders and use our capital must be made to live by the same principles.**

**PROVISIONS FOR ACTION**

**PROVISION #1: US taxpayers have been asked to serve as the lender of last resort to businesses that are functionally bankrupt. Management's acknowledgement of the company's insolvency will exemplify the personal responsibility and quality of leadership that is required to solve the turmoil of their business and the broader economic crisis. Their failure to acknowledge their insolvency speaks volumes about the inadequacy of their continued leadership.**

**EXPLANATION:**

All businesses that have received direct capital infusions (or indirect financial guarantees) from the US taxpayers (since January 1<sup>st</sup>, 2008) shall be given 60 days to replace the financial position of the US taxpayers with an independent source of capital. Prior to March 30<sup>th</sup>, 2009 the management of such enterprises must certify to the SEC that they can or cannot secure an independent source of capital to replace the financial position of the US taxpayer (as the lender of last resort or supplier of financial guarantees). Until a certification is made, the federal government, its agencies, departments and agents as well as the Federal Reserve Bank or any of its regional affiliates shall be forbidden from engaging in any transactions that supply capital, financial guarantees or indirect financial backing to the enterprise. If the enterprise is unable to replace the financial position of the US taxpayer then a financial rescue of the business can proceed but only if the following provisions of this Petition are implemented.

**PROVISION #2: In a market-based economy individuals and organizations must bear responsibility for their actions. If US taxpayers must serve as the lender of last resort it is because no independent party could or would engage in such a transaction. We must not ignore what the marketplace is telling us.**

**EXPLANATION:**

If no independent source can or will supply capital infusions to those institutions seeking US taxpayer capital, then the marketplace has made an unfavorable assessment of such a recapitalization. Taxpayers should heed the wisdom of this free market assessment and demand compensation commensurate with the risk we are being asked to take. If the institutions seeking capital have so damaged themselves that the marketplace is unwilling to supply capital, then such conditions are sufficient to deem the enterprise the equivalent of insolvent. In our market-based economic system when a business enters bankruptcy, the existing owners of the capital structure (equity shareholders and holders of unsecured debt) normally suffer a catastrophic loss of value.

**PROVISION #3: If the US taxpayers provide capital to an insolvent enterprise thereby allowing it to continue business operations, then all holders of the business's capital structure (those who own equity interest and debt interests) should suffer the same result as they would otherwise suffer in the event of a bankruptcy filing.**

**EXPLANATION:**

As of February 5<sup>th</sup>, 2009, in exchange for receiving a direct infusion of capital, financial guarantees or indirect financial backing from US taxpayers, the shareholders of all such

enterprises shall be deemed to have lost all value to their ownership interest in the enterprise. This action shall generate the equivalent monetary result to that of a bankruptcy filing in which the value of equity holder ownership interests fall to zero. An effort will be made to repay, in a proportionate manner, the holders of unsecured debt instruments issued by the enterprise. The funds to make such repayments shall come from whatever amount of assets can be recovered by virtue of the actions described in Provision #4 below. These actions are consistent with both the intent of our current economic and legal structure as well as the rules we citizens must live by in the conduct of our own affairs. The ownership interests represented by secured debt holders of the enterprise shall be maintained as such owners, in seeking to collect their debts, would normally be granted the highest priority for repayment by a bankruptcy court.

**PROVISION #4: In a bankruptcy filing, all special (non-ERISA) executive pension programs sponsored by the business would be subject to the claims of creditors. Thus, all assets set aside to fund such non-ERISA benefits would be liquidated and used to pay unsecured creditors of the enterprise on a pro-rata basis.**

**EXPLANATION:**

As of February 5<sup>th</sup>, 2009, all business enterprises that receive direct or indirect capital infusions, or financial guarantees from US taxpayers, shall forfeit all assets held within Grantor trusts otherwise known as funding vehicles for SERP and Top Hat Plans - specialized executive pension programs. Further, all benefit payments promised by such Trusts, except those currently being paid under the total disability provisions of the trust agreement, shall be forfeited as though the Grantor trusts were vacated in a bankruptcy filing. All real assets held within the Grantor trusts shall be liquidated and the proceeds used to pay the unsecured creditors of the enterprise in an equitable manner. In addition, all employment contracts and individualized compensation programs, for all officers of the enterprise, including provisions for compensation payable upon termination of service, shall be vacated as they would otherwise be in a bankruptcy filing.

Upon voting to accept US taxpayer recapitalization, the members of the Board of Directors, CEO and CFO of the enterprise shall be absolved of liability for any breach of fiduciary duty claims that could be made by shareholders by virtue of agreeing to accept a US taxpayer recapitalization of the enterprise. However, no individual they shall not be absolved of liability for any breach of fiduciary duty claims for any period of time prior to that decision.

**PROVISION #5: When an enterprise is recapitalized with funds from the US taxpayers – all ownership interests of the business will be owned by the US taxpayers. As an economic recovery unfolds, the value of owning those shares will increase. The US taxpayers reserve the right to own those shares for a minimum period of time or until a rate of return, commensurate with the risk taken, is realized.**

**EXPLANATION:**

When serving as the lender of last resort, the US taxpayers should operate as any other investor. Any rational investor of capital in an insolvent enterprise would demand a controlling interest. They would terminate the leadership whose actions led to the financial collapse of the enterprise.

Then they would identify new human capital that would be measured and compensated by the manner and degree to which they serve the interests of the new owners and produce economic results consistent with those interests. In short, the American taxpayer, in rescuing failed businesses, has the right to dictate the terms of recapitalization and do so in **OUR** best interests.

Other than the secured debt of the business, the US taxpayers will own all elements of the capital structure of any enterprise receiving capital or financial backing from the US Treasury. This action is consistent with free market principles (rational investment behavior) and with events that would otherwise prevail in bankruptcy court where an insolvent enterprise, with no credible prospects of a recapitalization, would undergo complete liquidation.

**PROVISION #6: The ownership interests of all businesses that receive a US taxpayer led rescue will be immediately deposited into a new Trust called the SOCIAL SECURITY TRUST. The purpose of the Trust is to segregate these securities from general tax receipts held by the US Treasury and to hold those assets on behalf of all citizens who participate in the Social Security system.**

**EXPLANATION:**

The securities representing ownership of all businesses that receive direct capital infusions or indirect financial backing from US taxpayers shall be deposited into a new Trust, hereafter known as the SOCIAL SECURITY TRUST (SST). These securities shall be managed for the exclusive benefit of participants and beneficiaries of the Social Security program. As the value of the SST investments increase, the increase in value will accrue to the collective benefit of those American citizens who participate in the Social Security system.

Finally, our Social Security program will have some real assets that can serve as a financial backbone for the promises that have been made. The long-term solvency and financial integrity of America's social insurance system will be dramatically enhanced. By demanding that this action be taken, we citizens shall reduce the financial burden that will otherwise be imposed upon younger generations to pay for the Social Security benefits older generations have promised themselves. **The timing for implementing this measure of generational responsibility on behalf of our children could never be better.**

**PROVISION #7: The individuals chosen to manage the SST shall have a fiduciary duty to the US taxpayers. They must exercise this duty to a Prudent Expert standard of care. This standard is more rigorous than the standard of care now required by bankers or their regulators neither of which have a fiduciary duty to taxpayers.**

**EXPLANATION:**

Albert Einstein said: "You cannot solve a problem using the same thought process that created it in the first place." Bankers and the people who regulate them (generally former bankers) tend to think alike. This uniformity of thought process means that the quality of analysis and decision making necessary for the operation of an authentic regulatory oversight function cannot be

assured. Looking at how well our banking oversight infrastructure has worked one might think this statement is obvious. If the governance structure of our banking system is not engineered to generate a critical self assessment, then affirming the existing oversight structure would be foolish, lest we re-create the same problem we are trying to solve. A description of the solution requires a brief review of customary corporate governance practices.

While a member of a corporate Board of Directors has a fiduciary duty to the company's shareholders, that duty is guided by a fiduciary standard of care known as the Business Judgment Rule (BJR). While the BJR is well defined by Delaware courts (one reason why many businesses incorporate in Delaware) it is less rigorous standard of oversight than the Prudent Expert standard of care required of investment fiduciaries who manage pension assets. Therefore, to assure a more rigorous standard of care, the Board of Directors of each rescued business shall be terminated. Individuals, well skilled in exercising a Prudent Expert standard of care, shall be appointed to a Fiduciary Oversight Board and shall be responsible for the management of the SST and its assets. The management of all rescued institutions will report directly to these SST fiduciaries who will not be subject to oversight by the Federal Reserve. However, the SST fiduciaries will have the right to institute whatever regulatory framework they deem appropriate and necessary to honor their guardianship role and duty of loyalty to the US taxpayer.

**As we manage our personal assets, we citizens are often told that diversification reduces risk.** Therefore, given that the Federal Reserve's diminished capacity to exercise authentic oversight over banking institutions, a diversification away from the Federal Reserve regulatory command structure is both compelling and prudent.

Only those investment fiduciaries skilled in the management of ERISA (the federal law that governs the management of pension funds) retirement funds have the depth of personal experience to invoke a rigorous Prudent Expert oversight standard. Therefore, to be considered for service on the Fiduciary Oversight Board an individual must have a minimum ten years of personal experience serving as an investment fiduciary for an ERISA retirement trust.

**PROVISION #8: The Fiduciary Oversight Board (FIDOB) members will report directly to the President of the United States. Their operations shall be audited annually by the General Accountability Office.**

**EXPLANATION:**

The President of the United States shall appoint individuals to serve as members of the SST FIDOB. The President will appoint a Chairperson and Vice-Chairperson and no member of the FIDOB shall have either direct or indirect economic ties to any financial institution. The President shall appoint members of the Fiduciary Oversight Board to assure representation from multiple political perspectives. The SST fiduciaries shall be held to the highest ethical and moral standards embedded in law and by moral imperative. All management assessments and decision making processes used by SST FIDOB members shall be recorded in writing and be open to inspection by citizens of the United States. An administrative budget for the operations of the SST, the members of the FIDOB and an appropriate staff shall be constructed from the existing budget allocation for the US Treasury.