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complexity associated with measuring the total costs directly associated with bailout programs (which she refers to as "programmatic expenses"), but also discusses the indirect costs such as tax expenditures associated with "covert" or "hidden bailouts."[53]

One of the main takeaways from Block's extensive research is that what the public broadly refers to as a bailout actually encompasses many different forms of government assistance. This spectrum ranges from profitable bailouts — such as the Chrysler bailout in the late 1980s, which resulted in a profit to the government — to general revenue bailouts — which are the most controversial because the "costs are broadly spread among the general taxpaying public."[54] Block's careful analysis of the myriad bailout types and the challenges associated with streamlining the process of properly accounting for the costs of those programs highlights the importance of clarity and precision in any government relief initiative. Not all bailouts are created equal, and Congress has broad discretion to structure a relief program that is specifically tailored to the immediate needs of specific companies, industries, or the national economy as a whole while preserving the government's interest in recouping at least a portion of its expenditures.

Although TARP's preferred equity structure was successful in securing repayment of at least a portion of the program's cost,[55] this structure was irreconcilable with the government's interest in ensuring that the companies spent the relief payments properly. For example, TARP never imposed specific conditions on the companies that received TARP funds. Alan B. White, who was chair of PlainsCapital Bank of Dallas, captured the sentiment of many bank executives when he referred to TARP money as "opportunity capital."[56] When federal regulators invited PlainsCapital and other banks to apply for TARP dollars, there were no conditions attached[57] — the government cash was treated just the same as cash from any other investor. Accordingly, banks used the cash from TARP investments for purposes other than lending[58] — such as acquisitions of competitors — that many considered to be inconsistent with the underlying purpose of TARP to increase "the flow of financing available to small businesses and consumers."[59]

B. Airline Bailouts — 2001 and 2020

The 2001 airline bailout, which was enacted by President George W. Bush on September 23, 2001, was structured as a $15 billion total relief package for airlines whose survival was jeopardized by the dramatic decrease in air traffic as a result of the September 11 terrorist attacks.[60] The relief package authorized the distribution of up to $5 billion in direct payments, and up to $10 billion in loans and loan guarantees, to affected airlines.[61] The structure of the 2001 airline bailout bears some basic similarities to the PPP provisions of the CARES Act by creating a bifurcated system of direct payments (with no expectation of repayment) and loans (which are federal credit instruments that require repayment). Unlike the administration of PPP loans, however, the administration of the 2001 airline bailout was criticized for the complexity of the loan application process and the overly rigorous scrutiny of loan applicants.[62] The 2001 airline

[53] Block discusses relaxed net operating loss rules under section 172 and relaxed loss limitation rules following corporate ownership changes under section 382 as prominent examples of bailout relief in the form of tax expenditures. *Id.* at 206-210.

[54] *Id.* at 163-169.

[55] *See id.* at 164 (although the Treasury Office of Financial Stability reported "that it had spent less TARP money than anticipated and received a return higher than expected from its TARP investments . . . aggregate TARP bailout actions are expected to contribute $116.8 billion to the federal deficit.").

[56] Mike McIntire, "Bailout Is a Windfall to Banks, if Not to Borrowers," *The New York Times*, Jan. 17, 2009.

[57] *Id.*

[58] *See id.* ("A review of investor presentations and conference calls by executives of some two dozen banks around the country found that few cited lending as a priority. An overwhelming majority saw the bailout program as a no-strings-attached windfall that could be used to pay down debt, acquire other businesses or invest for the future.").

[59] Treasury release, "Treasury Provides Funding to Bolster Healthy, Local Banks: Capital Purchase Program Funds 23 Banks to Help Meet Lending Needs of Local Consumers, Businesses" (Jan. 27, 2009).

[60] Air Transportation Safety and System Stabilization Act (2001).

[61] *Id.* at section 101(a)(1)-(2).

[62] *See, e.g.*, Micheline Maynard, "New Scrutiny for Airline Bailout Plan Three Years After Sept. 11," *The New York Times*, Sept. 15, 2004 ("In the end, the loan guarantees did little to help the biggest airlines recover, either because they did not seek them, their bids were turned down, or they were unable to use the aid to their advantage.").

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bailout illustrates that the overarching goals of any government relief program must be consistent with its administration. If the goal of a particular bailout is to provide broad-based relief to the airline industry, the application process should not be so rigid as to effectively exclude all but a handful of smaller businesses from participation.

The 2020 airline bailout was introduced in CARES Act section 3102, which authorizes the Treasury secretary to make or guarantee loans to eligible businesses in an amount not to exceed $25 billion for passenger air carriers, $4 billion for cargo air carriers, and $17 billion for businesses "critical to maintaining national security."[63] CARES Act section 3102 also authorizes the use of up to $454 billion (plus any amounts not used for loans to the specific businesses described earlier) for programs established by the board of governors of the Federal Reserve System "for the purpose of providing liquidity to the financial system that supports lending to eligible businesses, States, or municipalities."[64] Eligible businesses include air carriers or any U.S. business that has incurred losses as a direct result of COVID-19 that has "not otherwise applied for or received economic relief in the form of loans or loan guarantees" provided under any other provision of the CARES Act.[65]

Although the 2020 airline bailout is ostensibly structured as a loan program under the CARES Act, 70 percent of the amounts paid to airlines that meet specified conditions is in the form of a grant that need not be repaid, and the remaining 30 percent is in the form of low-interest loans.[66] The conditions that Treasury requires for grant eligibility include limits on some types of executive compensation, and special qualification and certification requirements for businesses, states, and municipalities participating in the $454 billion liquidity lending program.[67] Based on Treasury's announcement regarding the closing of loans to seven major airlines,[68] it appears likely that the 2020 airline bailout package will have a greater overall impact on the airline industry than the 2001 package. The basic themes of the 2020 package are that (1) PPP loans are not the only aspects of the CARES Act that provide conditional grants-in-aid in the guise of loan forgiveness, and (2) Congress has the discretion to delegate to Treasury the determination of exactly how much of a particular bailout payment should be treated as a conditional grant and how much should be treated as a low-interest loan.

IV. Public Policy Considerations

The following discusses some of the public policy and other explanations for the IRS's reluctance to characterize forgiven government loans as general welfare payments. Although it took place over a decade ago, the following transcript of an exchange between White House press secretary Robert Gibbs and CBS News correspondent Chip Reid on June 10, 2009 — which addresses the broader implications of Dodd-Frank on private industry — identifies how public perception can influence the national debate on private sector relief such as PPP loan forgiveness:

> Q (CHIP REID): So isn't this a pretty extraordinary departure from the way American capitalism has — I know these are extraordinary circumstances, but, still,

[63] CARES Act section 4003(b), 15 U.S.C. section 9042(b).

[64] *Id.*

[65] CARES Act section 4002(4), 15 U.S.C. section 9041(4).

[66] *See* David Shepardson and Tracy Rucinski, "Exclusive: Treasury Wants Warrants, Repayment From Major U.S. Airlines on 30% of Grant Money," Reuters, Apr. 10, 2020 ("Mnuchin spoke with the chief executives of major airlines in separate calls on Friday and told them the department was offering 70 percent of the aid in grants that would not need to be repaid, and 30 percent in low-interest loans for which the airlines would be required to offer warrants, the sources said.").

[67] Businesses participating in the liquidity lending program must not engage in stock repurchases in the 12-month period after the disbursement date unless they are under a preexisting contractual obligation, and they must not issue capital gain or dividend distributions on common stock. CARES Act section 4003(c)(3)(A)(ii). Further, CARES Act section 4003(c)(3)(D)(i) requires that eligible applicants make several good-faith certifications, including that (1) the funds are required to support the applicant's ongoing business operations; (2) the applicant will retain at least 90 percent of its workforce as of March 24, 2020, until September 30, 2020; (3) the applicant will restore at least 90 percent of its workforce as of February 1, 2020, not later than four months after the termination of the public health emergency; (4) the applicant is created or organized in the United States or under U.S. law and has significant operations and employees based in the United States; and (5) the applicant is not a debtor in bankruptcy.

[68] Treasury release, "Treasury Concludes Loans to Seven Major Airlines, Supports Additional Relief for Aviation Industry Workers" (Sept. 29, 2020) (listing Alaska Airlines, American Airlines, Frontier Airlines, JetBlue Airways, Hawaiian Airlines, SkyWest Airlines, and United Airlines as the seven loan recipients).

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to have a government employee setting the salaries for hundreds of private-sector employees —

MR. GIBBS: Well, again, Chip, these are private-sector employees that, in many ways, have their job based on the extraordinary assistance that has been provided by taxpayers to ensure that they can continue to have their job.

Q: — all companies have taxpayer assistance in one way or another.

MR. GIBBS: How so?

Q: Well, I mean, there are all different forms of so-called corporate welfare all through the tax code.

MR. GIBBS: Well, I think that — I'm not entirely sure what you're getting at, but —

Q: I'm getting at if any company that gets any kind of government assistance can have their salary set by the federal government, where does that stop?

MR. GIBBS: Chip, that was the appropriate question if what I had outlined met that criteria. Again, I denoted there are seven companies that have received extraordinary taxpayer assistance, anywhere from — I don't know the rankings of how much they've made, but obviously these seven companies have received extraordinary assistance. Congress passed the Dodd amendment that relates to any company that receives funding or money directly through the TARP program. But again, this is not an effort to set the salaries, as you said, to the penny of every publicly owned or traded company in this country. This is a proposal that protects the taxpayer.

Q: But there are many in the business community who think once you've set this precedent, where does it stop?

MR. GIBBS: Well, Chip, you guys have asked me any number of times about the role that the government has to play in the event that it's providing, as I've said, the exceptional or extraordinary assistance that has been provided by the taxpayers. The President believes and Congress believed that that was something that was important to do to protect the taxpayers, to ensure that compensation, either through salary or bonuses, was done in a way that was consistent with sound and appropriate practices and that limited risk for taxpayers. *I think that's what's important here, is that these are investments that have been made through the TARP program by taxpayers through taxpayer money.* This is an effort both congressionally mandated and through the Treasury Department to ensure that that investment is protected in order not to rationalize an irrationally risky compensation package.[69] [Emphasis added.]

The debate implicit in this exchange is the extent to which the federal government should be able to condition the receipt of extraordinary assistance on the basis of specified criteria that are intended to protect the government's investment in troubled companies using taxpayer money. The concept of the government investing in troubled companies is a recurring analogy in bailouts and other relief measures,[70] but the comparison is deeply problematic for several reasons. First, the analogy is flawed because it erroneously suggests that Congress has a duty to account to taxpayers just as officers or directors of a corporation have a duty to account to their shareholders. Second, there is a fundamental difference between a bailout or other relief payment — which is solely intended to promote the general welfare of a particular company or industry — and an investment — which is solely intended to produce a return of capital.

This is not to say that the corporation-shareholder analogy is entirely without merit. The federal government is committing a significant amount of capital to a particular company or industry and should be able to impose restrictions to ensure that this capital is properly spent. But the purpose of an investment

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[69] White House, "Press Briefing by Press Secretary Robert Gibbs and Secretary of Commerce Gary Locke" (June 10, 2009).

[70] *See, e.g.*, Mitchell Hartman, "What Did America Buy With the Auto Bailout, and Was It Worth It?" Marketplace.org, Nov. 13, 2018.

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in the open market (to maximize profits) and that of a relief payment in a bailout or other relief setting (to prevent financial catastrophe for a particular industry and, by extension, the national economy) are so different as to render the analogy untenable.

If TARP is an illustration of the limitations in the corporation-shareholder approach, and PPP is an illustration of the limitations in the creditor-borrower approach, what is the proper analogy to apply when considering how to frame the relationship between the federal government and troubled companies? The answer might be to dispense with analogies altogether and focus instead on the true nature of the relationship between the federal government and its corporate citizens in need of federal assistance. Without misleading comparisons, we are left with the much simpler task of determining how Congress may condition the receipt of federal aid in a manner that is consistent with the spending clause of the Constitution.[71] The debate regarding the proper scope of the spending clause is older than the Constitution itself,[72] but few would assert that Congress exceeds its authority under the spending clause if it issues grants to troubled businesses in the midst of a pandemic or other national crisis when those grants are specifically conditioned on the payment of qualified expenses.

Although the Supreme Court requires specific conditions to be met for Congress's exercise of the spending clause to be valid, Congress has substantial latitude to condition the receipt of federal funds if those conditions are unambiguous, related to the "federal interest in particular national projects or programs," and consistent with other constitutional provisions.[73] Despite this broad latitude, the potential for constitutional challenges under the spending clause and the potential for abuse and non-accountability in a general welfare-based system could explain why Congress has traditionally used debt and equity arrangements over conditional grants-in-aid and other relief structures.

V. Recommendations

Although the business and practitioner community breathed a collective sigh of relief when the deductibility provision in CARES Act section 1106(i) was enacted, we should take some time to reflect on the source of the dispute and how it might be avoided in the future. Specifically, we should ask ourselves (1) why PPP, TARP, and other government relief programs result in so many areas of controversy and confusion from a federal tax perspective and (2) whether these areas of controversy and confusion might be resolved by characterizing specific amounts under these relief programs as general welfare payments or conditional grants-in-aid instead of tax-free forgiven loan proceeds (PPP) or equity investments in troubled companies (TARP).

This is not to say that all relief payments should be characterized as general welfare payments. For amounts that companies choose to apply to purposes other than the specific expenses that qualify for PPP loan forgiveness (that is, expenses other than payroll, mortgage, rent, and utilities), the government should have the flexibility to structure these payments as bona fide loans because they are amounts that Congress never intended to forgive. But by creating a system in which the SBA disbursed loans first and asked questions later regarding eligibility for forgiveness, the PPP was almost certain to result in confusion and inefficiency from a federal tax perspective.

Congress could avoid this confusion and inefficiency in future relief programs by bifurcating relief payments into (1) nontaxable general welfare grants-in-aid (based on specific conditions, such as the types of expenses that can

[71] *See* U.S. Const. Art. I, section 8, cl. 1 ("Congress shall have the Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.").

[72] *Compare The Federalist No. 30* (Alexander Hamilton) ("Congress, by the articles which compose that compact . . . are authorized to ascertain and call for any sums of money necessary, in their judgment, to the service of the United States; and their requisitions, if conformable to the rule of apportionment, are in every constitutional sense obligatory upon the States."), *with The Federalist No. 41* (James Madison) ("It has been urged and echoed, that the power 'to lay and collect taxes, duties, imposts, and excises, to pay the debts, and provide for the common defense and general welfare of the United States,' amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense or general welfare. No stronger proof could be given of the distress under which these writers labor for objections, than their stooping to such a misconstruction.").

[73] *See South Dakota v. Dole*, 483 U.S. 203, 207-208 (1987).

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be paid with the funds) and (2) nontaxable loan proceeds (structured like bona fide debt instruments with no conditions for forgiveness). That bifurcated structure would streamline the administration of future relief programs by creating separate categories of grant and loan applicants and removing applicants that meet the grant qualifications from the pool of loan applicants. It is likely that businesses would want to apply both for grants for the qualified expenses and loans for the nonqualified expenses, but keeping the expense categories separate would help to create a more transparent tax structure.

Recipients of the general welfare grants-in-aid and government loans would be entitled to deduct expenses paid with those relief payments, and neither category of recipients would be required to report the relief payments in gross income. As much as critics might object to the concept of a double dip by recipients of the conditional grants-in-aid, taxpayers have a long history of IRS administrative guidance and case law to rely on in support of those deductions. Congress could (and should) address the deductibility issue proactively in future relief programs by including language similar to that included in CRTRA section 266(a)(1).[74]

Moreover, the solution to the double-dip controversy from a public policy perspective might be to add "demonstrated financial need" as one of the conditions required for a federal grant. This type of condition would require the SBA to remove profitable businesses (that is, those that are profitable without accounting for the impact of the relief payment) from the pool of grant applicants, which would address at least some of the actual or perceived injustices of the PPP loan program.

VI. Conclusion

There are several reasons that the federal government structures bailouts and other relief measures as loans or equity investments. One of the most significant reasons is the public's perception of the government's role as that of a fiduciary charged with protecting taxpayers' investments in or loans to troubled companies. As revealed by the double-dip controversy regarding the deductibility of PPP loan expenses and the no-strings-attached controversy regarding TARP's preferred equity investments, framing government relief in the guise of loans or equity is bound to yield controversy. The government's loan terms rarely measure up to those found in bona fide instruments, and the notion of the federal government as a fiduciary or guardian of an investment using taxpayer funds is incompatible with the analogy of an equity investment in the open market.

The solution for future relief programs might be for Congress to avoid the typical debt and equity analogies and to clarify that the forgiven proceeds are in the nature of general welfare payments or a conditional grants-in-aid for companies with demonstrated financial need rather than bona fide loan forgiveness. In response to the inevitable public critique of this form of corporate welfare, Congress could focus on the specific conditions required for these companies to receive relief and on the fact that a grant-in-aid provides greater flexibility for imposing restrictions on the relief payments than that allowed in traditional debt or equity structures. Once Congress strips these relief payments of the guise of debt or equity, the public should have a clearer understanding of the relationship between the federal government and troubled companies in the private sector. ■

[74] *See* CRTRA section 276(a)(1), amending CARES Act section 1106(i) ("No deduction shall be denied or reduced, no tax attribute shall be reduced, and no basis increase shall be denied, by reason of the exclusion from gross income provided by paragraph (1).").

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