In Favor of a 'Bail-In': How a Trillion Dollars Might be Better Used to Start a Recovery

J. Scott Colesanti

Follow this and additional works at: https://scholarship.law.stjohns.edu/jcred

Recommended Citation
IN FAVOR OF A ‘BAIL-IN’:

HOW A TRILLION DOLLARS MIGHT BE BETTER USED TO START A RECOVERY

J. Scott Colesanti*

INTRODUCTION

Between October 2008 and February 2009, the federal government ("Government") took unprecedented action to keep a short list of very large corporate entities out of bankruptcy. Specifically, the Treasury Department appropriated approximately $1 trillion from sources unknown to, in large part, buoy the coffers of companies believed to have been victimized by a collective myopia on Wall Street. Spanning two Presidential administrations, the philosophy of this economic rescue belied partisan ties; overall, the monies contemplated were simply unfathomable.

Simply put, if we agree that immediate and massive Government spending was warranted, that unfathomable amount of money should have been spent elsewhere.

Not just because the handout was not always needed, as Congress later

---

* LL.M., Hofstra Law School. The author wishes to thank Kristen A. Truver, Hofstra University School of Law Class of 2011, for her diligent assistance and creative research.

1 Statistics show that approximately $514 billion of the initial bailout was committed to 11 entities and their subsidiaries. See Where is the Money? Eye on the Bailout, Pro Publica, http://bailout.propublica.org/main/list/index (last visited Sept. 15, 2010). A.I.G. received an additional $64 billion in federal rescue funds/lines of credit. See generally, Emergency Economic Stabilization Act of 2008 12 U.S.C. §5201 (2010) ("EESA"). The $1 trillion referenced in this Article combines (conservatively) the EESA monies and the separate monies expended in the subsequent American Recovery and Reinvestment Act. See generally, American Recovery and Reinvestment Act of 2009, 111 Pub.L. 5, 123 Stat. 115 (2009) ("ARRA"). ARRA committed another $787 billion in tax breaks, contracts, incentives, and grants to various entities and causes public and private, but nonetheless included a $224 billion commitment to "entitlements". See Track the Money, Recovery.gov, http://www.recovery.gov/Pages/home.aspx (last visited Sept. 15, 2010). This total for ARRA and EESA monies is then averaged against the reported $1.5 trillion in Federal Reserve money loaned to "banks, brokers, businesses and investors to keep the financial system functioning" at a time when the government agency was "trying to entice investors back into the markets." See Sewell Chan and Jo Craven McGinty, Fed Documents Breadth of Emergency Measures, N.Y. Times (December 1, 2010).
learned from executives disclosing pressure from the government to accede to the recovery plan,\textsuperscript{2} nor consistently successful, as 130 banks fell after the famed Troubled Asset Relief Program ("TARP") was implemented.\textsuperscript{3}

Not just because the gift money could not be monitored, although excesses and waste in the form of Super Bowl events and notorious bonuses pervaded the headlines throughout 2009.\textsuperscript{4} And not just because the overseer of the Bailout funds herself excoriated both the greed of banks and the blameless cash that rescued them.\textsuperscript{5}

Not just because the economic collapse may have been gamed by the Wall Street savvy.\textsuperscript{6}

Not just because discreet groups of market victims were reimbursed for market losses under disputed calculations.\textsuperscript{7}

Not just because the printing of Bailout money devalued American currency worldwide.\textsuperscript{8}

And not just because the Bailouts largely failed in their lofty goals of forestalling home foreclosures, minimizing unemployment, and loosening credit, although the data on each of these topics is harrowing and


\textsuperscript{5} See Ethan Porter, Editorial, \textit{The Woman Democrats Need}, BOSTON GLOBE, Jan. 24, 2010, at 9 http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2010/01/24/the_woman_democrats_need/ ("I think the problem has been all the way throughout this crisis, that the banks have been treated gently and everyone else has been treated really pretty tough.").


\textsuperscript{8} See Historical Exchange Rates, http://www.oanda.com/currency/historical-rates (detailing the drop in the U.S. dollar against the Euro and the Chinese Yuan from .78 to .69 between February 2009, the month of the second Bailout, and December 2009).
unavoidable.

The Bailout is arguably most culpable of ignoring market realities by shunning broad support for faltering stock market prices in favor of rescuing a 1-page roster of financial giants.\(^9\) These drastic and selective lifelines did little for the many entities and individuals who had trusted the stock market to act within reason. Concurrently, the most harmful bow struck by the Bailouts may have been to the faith of the retail investor, who has come to realize that, in times of exigency, he shall be last on the lifeboats.\(^10\)

Accordingly, this Article thus posits that, in terms of maintaining an economy that both benefits from and trusts the stock market, the Bailout money would have better served the masses had it been allocated across the spectrum of stocks comprising the Dow Jones Industrial Average ("DJIA"). Such direct Government intervention - equally costly and almost as unprecedented\(^11\) - would have served the dual purpose of 1) over the short term, permitting pension and retirement fund administrators the breathing room to diversify holdings, and 2) over the long-term, comforting both institutional and individual stock market participants that their savings and investments were just as vital as the well-being of A.I.G. and corporate bonuses.

To this end, Part II of the Article examines the goals and efficacy of the Bailouts. Part III looks at the DJIA, its peculiarities and some of its most glaringly unrecompensed victims since 2008. Part IV details the proposed alternative by demonstrating that $1 trillion of government money would have supported DJIA company stock prices for at least an additional nine months. Finally, Part V concludes by encouraging both creativity in fashioning repair strategies and concomitantly fostering skepticism of narrowly-drawn rescue plans.

---

\(^9\) As of June 2010, of the initial 829 recipients of EESA/TARP funds, 11 large entities and their subsidiaries had received commitments of over $427 billion, 83% of the $514 billion in total commitments. See Pro Publica, http://bailout.propublica.org/main/listlindex (last visited Sept. 15, 2010).

\(^10\) See Nina Easton, Will Fear of Big Government End Obama’s Audacity?, TIME, Dec. 14, 2009, http://www.time.com/time/magazine/article/0,9171,1945357,00.html (“While the New Deal is often remembered as a bailout for the little guy, the bailouts of Wall Street – launched by the Bush Administration and sustained by Obama – have been aimed at the affluent and have not merely made Americans skeptical of the explosion in spending but left them feeling shortchanged as well.”); Betsy Morris, Chuck Schwab Is Worried About Small Investors. Should We Worry Too?, BUSINESSWEEK, May 27, 2010, http://www.businessweek.com/magazine/content/10_23/b4181058561674.htm (“[I]t felt like one more sign that the deck was stacked against the little guy.”).

I. BACKGROUND: WHERE DID THE MONEY GO, AND DID IT COME COME BACK?

A. The Costs

Statistics reveal that the majority of "takers" under the Bailouts were financial service providers (and not banks injured by mortgage foreclosures). For example, of the $700 billion authorized for TARP, as of year end 2009, nearly half was borrowed by A.I.G and the large investment houses.\(^1\) Some companies recouped twice,\(^2\) for on occasion sizeable chunks of the Bailout passed through the borrower to existing counterparties who were separately receiving TARP funds.\(^3\)

Of course, another recipient of Bailout largesse was the U.S. government itself, which saw Treasury debt sales rise and borrowing costs plummet in 2009.\(^4\)

Most alarmingly, the largest bailed out company proved to be a bad investment. A.I.G. – which received over $130 billion in Bailout funds in return for a 80% government stake – posted a loss exceeding $8 billion for the fourth quarter of 2009 (down from a loss exceeding $61 billion in the fourth quarter of 2008).\(^5\) In 2010, other government proposals enlightened that a large sum of the Bailout money will not be coming back.\(^6\) Truly, the elimination of so much paper wealth might seem comical were it not for the attendant inflation, unemployment, and overall despair.


Not surprisingly, the Bailout that was sold to the American public as a necessary evil has been recast by many (the judiciary included) as Main Street paying for Wall Street excesses.\(^\text{18}\)

And yet the indirect consequences of the Bailout might be even worse.

The Government’s demands that these borrowers of the emergency loans meet heightened net capital requirements coerced a conservatism that worked foremost to curtail credit to the market.\(^\text{19}\) Specifically, the “stress test” demanded by the Treasury Department in 2009, strangely, asked banks receiving the Bailouts to conserve capital while fostering consumer credit.\(^\text{20}\) Consequentially, with bank ledgers under new and intense scrutiny, government treasuries became the soundest investment; in short, banks bypassed consumers and the pesty risks they present and simply ceased being banks.\(^\text{21}\) Simultaneously, the Government’s rush to salvage the largest institutions created a handful of super-institutions that collectively control about 40% of all deposits and two-thirds of all credit cards.\(^\text{22}\)

Further, there lingers the very real threat of the insolvency of numerous States. For while the federal government may adhere to a print, borrow, and spend economy, State governments are obliged to balance budgets, forcing them to “raise taxes or cut spending” after the Bailouts’ $140 billion of federal aid runs out.\(^\text{23}\)


\(^{19}\) See Cybele Weisser, Could Your Credit Be Too Good?, TIME, June 22, 2009, at 96, available at http://www.time.com/time/magazine/article/0,9171,1904129,00.html (noting that credit card issuers trimmed approximately $1 trillion in credit lines since 2008).


\(^{21}\) See George Melloan, Government Deficits and Private Growth, WALL ST. J., Nov. 24, 2009, at A23, available at http://online.wsj.com/article/SB1000142405274870393290457451124371238898.html (“The credit market has been tilted to favor a single borrower with a huge appetite for money, Washington. Private borrowers, particularly small businesses, have been sent to the end of the queue.”).


\(^{23}\) See James Surowiecki, Fifty Ways to Kill Recovery, NEW YORKER, July 27, 2009, at 23, available at http://www.newyorker.com/talk/financial/2009/07/27/090727ta_talk_surowiecki (arguing that the states are an impediment to economic recovery because of their tactic to increase taxes and cut
Depression-era unemployment levels remain the largest unsolved problem. As a reminder, in 2009, the national unemployment rate rose steadily from 7% to 10%. Perhaps expectedly, Federal Reserve Chairman Bernanke recently called unemployment “the biggest problem we have.” Further, white collar jobs have disappeared in record numbers, with little hope of the trend reversing in the near future. New York unemployment numbers have been particularly hard hit by the economic crisis, prompting the Governor to call upon Congress in 2010 to extend unemployment benefits to assist approximately 575,000 New Yorkers.

Largely unrecognized as of yet are the victimized savings accounts of millions of Americans. There currently is simply little incentive for middle class Americans to place money in intermediate term banking vehicles. Witness the decline of the certificate of deposit interest rate, another casualty of the economic crisis:

<table>
<thead>
<tr>
<th></th>
<th>6-month CD</th>
<th>1-yr CD</th>
<th>2.5 yr. CD</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nov. 2008</td>
<td>2.03%</td>
<td>2.49%</td>
<td>2.51%</td>
</tr>
<tr>
<td>Nov. 2009</td>
<td>0.55%</td>
<td>0.87%</td>
<td>1.32%</td>
</tr>
</tbody>
</table>

spending during the economic downturn).


27 See Peter S. Goodman, Despite Signs of Recovery, Chronic Joblessness Rises, N.Y. TIMES, Feb. 20, 2010, at A1, available at http://www.nytimes.com/2010/02/21/business/economy/21unemployed .html (noting that 6.3 million Americans have been unemployed for six months or longer, the largest number since the government began keeping track in 1948).

28 The full, February 24th statement of Governor Paterson reads as follows:

As we in government work to rebuild a broken economy, we must continue to protect those most affected by this catastrophic downturn: the unemployed. Many of our neighbors without jobs have come to rely on the unemployment insurance benefits that provide them with the means to make their mortgage payments, buy groceries or simply make ends meet. However, if Congress does not act quickly, this much-needed resource will expire, leaving many without the support they need to weather this storm.

I strongly urge Congress to extend the unemployment insurance benefits beyond the February 28 deadline through the end of this year. Without this extension, approximately 575,000 New Yorkers will see an end to their benefits. With it, we will help to ensure the economic security of those who have already made sacrifices, scaled down spending and gone without.


29 Snapshot, USA TODAY, Nov. 27, 2009, at 1.
Meanwhile, the traditional savings account has all but evaporated.\textsuperscript{30} Of course, the core obstacle of depressed real estate remains mammoth. In March 2009, the White House provided details on its “Home Affordability and Stability Plan,” which disclosed the ideal of helping 4-5 million homeowners to refinance their mortgages.\textsuperscript{31} One year later, less than 120,000 of eligible homeowners had progressed through offer and trial modifications to “permanent modifications” under the noble project;\textsuperscript{32} moreover, after a year of scrutiny and relief, housing market statistics revealed that still one in 409 housing units received a foreclosure filing in January 2010.\textsuperscript{33} Also, annual mortgage delinquencies, which exceed 14%, were conceded by the Government at year-end 2009 to be “the highest ever recorded.”\textsuperscript{34}

\textbf{B. The Payback}

While exact numbers vary, fluctuating between 40% and 69% as of June 2010,\textsuperscript{35} it is undisputed that the actual payback of TARP monies will produce a shortfall measured in the billions of dollars.\textsuperscript{36} Of course, the intangible declines in stock market fortitude and Government trust are even more difficult to quantify, but surely no less worth mention. And any such mention must start with an honest appraisal of the significance of the stock market to our nation’s confidence.

\begin{itemize}
\item \textsuperscript{30} See Andy Kessler, “Was It a Sucker’s Rally?”, WALL ST. J., May 12, 2009, at A17, available at http://online.wsj.com/article/SB12420841502808497.html (noting, sarcastically, that “[s]avings accounts pay a whopping 0.2% interest”).
\item \textsuperscript{34} See Troubled Asset Relief Program: Year-End Review, Committee For a Responsible Federal Budget, Dec. 9, 2009, http://crfb.org/document/troubled-asset-relief-program-year-end-review (noting the continued rise in mortgage delinquencies).
\end{itemize}
II. THE IMPORTANCE OF THE STOCK MARKET

It is axiomatic that the DJIA reflects economic wealth and health. But, atop of its reflections of varied news from other sectors, the index itself creates and destroys wealth. Its effect upon oil prices has been empirically proven. Its stumble caps college hiring projections. Its downturn curtails further stock offerings, thus freezing capital formation and causing layoffs among its dependent professionals. Of course, its ebb and flow directly determines if trusts are solvent, university endowments are safe, and couples may retire. Thus, with all the daily references to the DJIA's rises and falls, what seems to have been forgotten is that the Dow itself is wealth and health.

All of which enlightens us that focus upon the disparate consequences of the crisis is perhaps misplaced. If seeking to restore equilibrium, emphases needed to be placed on the embodiment of collective health – namely, the 30 companies of the DJIA.

A. Background on the 'Index'

A weighted tally that has measured market fortunes for over 110 years, the Dow Jones Industrial Average is comprised of 30 equity stocks. Approximately two thirds of this group are manufacturers of industrial and/or consumer goods. Originally centering on 11 railroad stocks (the number of 30 was arrived at in 1928), the barometer remains the most quoted market measure in the world and has itself become a vehicle for investment (through speculative options). The actual number representing the "DJIA" is "calculated by adding the trading prices of the [30] component stocks and using a divisor adjusted for stock dividends and


IN Favor of a ‘Bail In’

splits, cash equivalent distributions equal to 10% or more of the closing prices of an issue, and substitutions and mergers.\(^{42}\)

And yet, this aged and delicately gauged indicator resists outright steerage. It defies actions by the Federal Reserve to preserve stability,\(^43\) and by the White House to stimulate trading.\(^{44}\) It even has proven impervious to the carefully calibrated constraints on volatility fashioned by the stock exchanges themselves.

For example, between October 2008 and February 2009 – as an inflated DJIA gradually declined over 40% - the NYSE ‘circuit breakers’ were not triggered once, raising questions concerning their purpose and effect.\(^{45}\) In fact, these artificial barriers (implemented in 1989 to halt trading during periods of excessive volatility) failed to trip during the famed market’s worst trading day (September 29, 2008: 778 point/7% decline), week (October 1 – 7, 2008: 1400 points/13%), or overall period (September 2008 – February 2009: 38%).\(^{46}\)

B. Its Less Publicized Victims

The direct consequences of the slow but steady market meltdown have manifested in the financial services industry; indeed, of the 45 banks receiving the most TARP money, 43 were public companies.\(^{47}\) But devastation on Main Street is just as noteworthy.

There being no true sanctuary in limit orders or circuit breakers, pensions and retirement funds were forced to suffer as the “stock-market


\(^{43}\) See Ray C. Fair, Fed Policy and the Effects of a Stock Market Crash on the Economy – Federal Reserve Board Unable to Offset Effects of Market Crash, April 2000, MONEYWATCH.COM, http://findarticles.com/p/articles/mi_m1094/is_2_35/ai_63607827/ (“[T]he Fed does not have the power to prevent a recession from taking place [when] there is a crash.”). \(^{44}\)


\(^{45}\) See, e.g., AnnaMaria Andriotis, Decode: When Circuit Breakers Get Triggered, SMARTMONEY, Oct. 24, 2008, www.smartmoney.com/investing/stocks/Decode-Setting-Off-Circuit-Breakers (“For a circuit breaker to go into effect now, the DJIA would have to drop by 1,100 points or more.”); Chedley A. Aouriri et al., Exchanges – Circuit Breakers, Curbs, and Other Trading Restrictions, INVEST FAQ, Oct. 6, 2008, http://invest-faq.com/cbc/exch-circuit-brkr.html (“The new game in town is how to outfox the circuit breakers and buy or sell quickly before the 50-point move triggers the halting of the automated trading [by broker-dealers] . . . .”). \(^{46}\)


\(^{47}\) See Bailout Recipients, Pro Publica, http://bailout.propublica.org/main/list/index (last visited Sept. 14, 2010) (listing companies that have received TARP money).
collapse of 2008” eradicated at least 30% of market equity. Early in the crisis, disclosures edified that states both large and small suffered sizeable market losses. After the Bailouts commenced, the largest investor plans actually brought suit over a government orchestrated merger, thus clarifying that what Washington, D.C. saw as urgent could in fact be disastrous for shareholders.

The connection between stock market losses and ensuing corporate layoffs cannot be overemphasized. Figure 2 below clarifies the link; note that the examples cross retail, credit and financial service sectors:

In short, the Dow is a mighty and often unwieldy beast. When it is wildly uneasy, the largest personnel departments tend to respond.

<table>
<thead>
<tr>
<th>Public Company</th>
<th>Fall 2008 High</th>
<th>Subsequent Low</th>
<th>Sample Layoffs</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Wal-Mart</td>
<td>c. $63</td>
<td>c. $47 (mid 2009)</td>
<td>11,000</td>
</tr>
<tr>
<td>2. American Express</td>
<td>c. $31</td>
<td>c. $10 (March 2009)</td>
<td>4,000x4</td>
</tr>
<tr>
<td>3. Boeing</td>
<td>c. $52</td>
<td>c. $31 (Feb. 2009)</td>
<td>1,020x5</td>
</tr>
<tr>
<td>4. General Electric</td>
<td>c. $23</td>
<td>c. $9 (Feb. 2009)</td>
<td>1,000 (1/09)x8, 1,480 (9/09)x9</td>
</tr>
</tbody>
</table>


C. Equally Uneasy Investors

Severe stock market losses inevitably affect strategies at the large investor entities. For instance, in mid-2009, approximately 9 months after the commencement of the market meltdown, the California State Retirement System dramatically altered its investor strategy. Moreover, the Bull Market felled by 2008 was said to have victimized even the most conservative of pools. The $64 billion Pension Benefit Guaranty Corporation was described as suffering a 6.5% decline because of its untimely switch from bonds to stocks, drawing heavy criticism from, among others, the White House.61

The problem thus becomes one of ensuring an escape window for the entities with glacial investment strategies. The unforgiving market plunge of 2008/2009 afforded no time for adjustment; conversely, the ensuing, selective lifeline was rushed. As a result, the economic/social class that did everything right – e.g., citizens who purchased homes within their means, made timely mortgage payments, provided for health care, saved money for a rainy day and planned for college costs and retirement - learned that they were (and are) last to be rescued. Perhaps such a forgotten class defies title – “indirect investors”? “Main Street”? “The middle class”? But the lack of a moniker or political champion should certainly not further forestall recognition. Maybe the grouping is best named simply “those not receiving the Bailouts.”

Then surely ‘Those Not Receiving the Bailouts’ deserved better.

III. WHERE THE MONEY COULD HAVE GONE

Between the fall of 2008 and the summer of 2009, the stock market exhibited a slow and steady plummet that evaded braking mechanisms and shocked practitioner and academic alike. The lingering downturn at once

---

60 See Press Release, California State Teachers Retirement System, CalSTRs Acts in Face of Global Historic Market Drop, July 21, 2009, available at http://www.calstrs.com/Newsroom/2009/news072109.aspx (describing the pension fund’s “shifting of 5 percent of the portfolio from global equities to fixed income, real estate and private equity to purchase quality assets from distressed sellers” and another 5 percent “to create a new asset class,” and adoption of “a new asset allocation mix that further diversifies the portfolio while reducing its stake in the global stock markets.”).
marginalized stock exchanges from any plans for economic recovery and emphasized the need for government intervention therein; indeed, by the spring of 2009, the nation's new president was openly encouraging retail investors to buy stock to expedite an end to the economic crisis.62

All of which raises the question: If the stock market – either empirically or symbolically – is vital to our collective economic recovery, then why have our leaders not bailed out the entire market? Simply put, the unfathomable amounts of money loaned to and/or bestowed upon a short list of teetering titans might just as readily been extended to the market makers and specialists obligated to providing liquidity on the stock markets.63 If prices kept falling because of a lack of stock buyers, then the parties of first resort should have been loaned money to buy stock. Such unprecedented intervention would have had three immediate advantages.

The first advantage would be inspirational. At the present time, Americans are forced to draw their own conclusions as to why in a recession plowing into its third year certain companies were bailed out, and others seemingly left to the cruel fate of a laissez-faire economy.64 The unavoidable question is, at best, whether some companies successfully courted favor in Washington,65 and, at worst, whether the stock market is simply too volatile of a place for investments.66 Conversely, a Bail-In of the middlemen to stock exchange transactions would be broad based and

---


63 Floored stock exchanges assign listed stocks to a handful of specialists (termed “Designated Market Makers” at the New York Stock Exchange since October 2008) to match buyers and sellers and generally provide market liquidity. Cyber-exchanges such as NASDAQ rely on a much broader roster of equivalent market makers to perform the same functions. See generally J. Scott Colesanti, Not Dead Yet: How New York's Finnerty Decision Salvaged the Stock Exchange Specialist, 23 ST. JOHN'S J. LEGAL COMMENT 1 (Spring 2008) (offering a summary on specialists).

64 See DAVID WESSEL, IN FED WE TRUST 21-26 (2009) (describing the September 2008 decision of the Treasury Department and the Federal Reserve to not put taxpayer money on the line to rescue Lehman Brothers).


66 See Kirk Shinkle, What the Economic Bust Left Behind, IHAVENET.COM, http://www.ihavenet.com/economy/What-Great-Recession-Economic-Bust-Left-Behind.html (“Other studies show that investors buffeted by poor returns in the market over a period of many years (think of the Lost Decade for the stock market) are loathe to take risks over the long term.”).
above suspicions of lobbying and influence.

Further, in terms of oversight and control, the stock exchanges have long-monitored each second of the trading day. Thus, any specialist/market maker not utilizing Bail-In funds to keep stock prices afloat could be immediately questioned/disciplined (as exchange analysts and enforcers routinely do in less volatile times). Such supervision of government largesse would stand in stark contrast to the unwieldy grants of cash that all too often evaporated in the form of questionable spending under the Bailout.

Additionally, while stock exchange specialists and market makers have been disciplined for self-dealing in recent years, such opportunism would actually serve to benefit the current markets. The goal of any remedial plan should be to reinvigorate stock trading; increased trading by the insiders – whether overly opportunistic or not – serves this purpose.

Most importantly, the propping up of stock market prices, even if short lived, would afford the retail investors, the pension funds, and the college savings plan administrators more time to diversify and shift strategies. On a grander scale, it would signal to countless future stock market participants that the government stands ready to protect everyone’s investment, not just those enjoying connection to entities “too big to fail.” It bears noting that studies confirm that retail stock market participation has grown dramatically in the last 25 years, and is intrinsically tied to social interaction and a sense of “community ownership.” Having grown to

---

67. See, e.g., NYSE Disc. Action 2006-174 (accepting a consent to findings that a former Specialist violated Exchange Rule 104.10 by failing to maintain a fair and orderly market).


69. See supra fn. 67.


71. See Harrison Hong et al., Social Interaction and Stock-Market Participation, 59 J. Fin. 137, 139, 141 (2004), available at http://www.economics.harvard.edu/faculty/stein/files/Social_InteractionJofF.pdf (positing that “social households” are much more likely to invest and that the “social” investor finds the market more attractive when his peers participate).

include so many denizens of Main Street, Wall Street now needs such retail participation to sustain its growth. And that retail participation has come seriously into question; on top of the vitriolic denunciations of the partially buoyed market filling up the nightly news and YouTube, one need only witness the empirical evidence of mounting and significant numbers of mutual fund withdrawals to appreciate the households and plans turning to alternative investment venues. Accordingly, for reasons ranging from the economic to the spiritual, an antidote for investor mistrust is warranted.

A. Solution: The Proposed Bail-In

The Dow Jones Average is computed by dividing the sum of the price of one share of each stock of the 30 included companies by a 'divisor' (which accounts for stock splits, among other changes). Thus, in order to approximate how long a certain sum of money could keep one Dow company afloat, the first step is to multiply the Dow Jones Average on a particular date by the divisor at the time to arrive at a raw number reflecting the cumulative price of one share of each of the 30 companies.

The solution proposed herein was evaluated in the context of maintaining the DJIA as it stood on December 31, 2007 (13, 364.82). The DJIA divisor at that time was 0.1222831016. By multiplying that divisor by the DJIA average of 13,264.82, we learn that the sum of each of the component stock prices as of December 31, 2007 was 1629.371, "the Price Sum."

Separately, the number of outstanding shares for each of the Dow companies at that time totaled 119,319,150,000. If we divide $1 trillion [the amount of the Bail-In] by that share figure of 119,319,150,000, a resulting figure of $8.31 per outstanding share is arrived at. Multiplying $8.31 by 30 (the number of Dow companies) results in a figure of $249, which indicates a "Prop Amount," or the collective dollar amount needed

73 See, e.g., Goldman Sachs Bribed Senate to Pass Bailout Bill, YouTube http://www.youtube.com/watch?v=Ek7zc0JxbM (last visited Sept. 14, 2010).
75 See supra fn. 42 and accompanying text.
77 Id.
78 Id.
to prop up the Dow on any day. In our Analysis, as long as the diminishing total share price does not deviate from the Price Sum by more than the Prop Amount, the market is thus sustained.

The ensuing day-by-day subtractions disclose that, using the average from December 31, 2007 as both a baseline and goal, one trillion dollars allotted between each listed company on the Dow Jones Industrial Average would last (i.e., support existing levels) for approximately nine months.

Stated otherwise, “adding” $8.31 per company share throughout 2008 discloses that by September 9, 2008, the trillion dollars would be spent. Thus, at a cost of less than that expended on attempts to sustain a seemingly random roster of market titans, the entire DJIA could have been supported for most of a year.

Such a nine-month grace period would literally afford market participants breathing space to limit losses, adjust portfolios, and diversify holdings. In today’s market – where milliseconds count and the SEC has been forced to confront “flash trading” by market professionals – nine months can literally be a lifetime in the health of an investment or fund. Such time would allow pension guaranty funds and institutional investors the breathing room to re-calculate and adjust portfolios; going forward, stock market investment would remain an option, as opposed to a cruel lesson, for providers of massive amounts of liquidity.

B. A Counter-Analysis. . .

For those who would ask why the money should be directed at NYSE companies, it bears noting that 27 of the 30 DJIA companies are listed on the storied exchange. For better or for worse, the DJIA is the benchmark upon which so much is geared in our economy. Authorities from the President to the judiciary cite to it; businesses depend on it, and even employment contracts are geared to it. Most importantly, since we know that the market en masse tends to follow the “blue chip” stocks; the


question is simply why that finite list was made even shorter by the Government through TARP.

Additionally, those seeking to cast the DJIA as merely a derivative index greatly underestimate its value. Simply put, its performance is the news. To the extent that need be reiterated, it bears noting that the storied index—on a monthly bases—actually only correlates with unemployment figures and the consumer confidence index about half of the time. Thus, the case for the DJIA as a shadow finishes second to the case for the DJIA as the fire itself.

An added bonus to the Bail-In is the ease with which the money can be monitored. Specialist trading is subject to moment by moment surveillance during the trading day, permitting NYSE regulators to penalize non-performing market makers for the past four decades. Similarly, specialists and market makers not trading per Government design could be easily prodded into action.

For those who ask why so much money need be spent, the figure of $1 trillion actually represents at least a 30% decrease from the costs of the Bailouts. Further, while proponents of the Bailout point to the facts that some noteworthy sums were repaid to the government, substantial sums were also spent on bonuses, promotional events, advertising, etc. Besides, one of the biggest causes remains lobbyists, which received over $344 million from financial services in the first three quarters of 2009 alone. The beauty of spreading Bailouts up and down Wall Street is that it would free up that weighty lobbying cash for more salutary efforts.


85 See supra n. 4 and accompanying text.

CONCLUSION

In February 2010, the President of the Hispanic Chamber of Commerce scolded the White House for forgetting small businesses and concentrating economic relief efforts on banks "too-big-to-fail." But he was not alone in publicly questioning a repair strategy that all too many Americans believe bordered on good old crony capitalism.

Further, the refrain of "it could have been worse" can easily be supplanted with "it could have gone better." One possible alternative was to spread the exorbitant amount of government money in play up and down Wall Street and Main Street, instead of relying on Washington's representations that it knew best where a handful of weighty relief caches needed to be dropped. Surely, in view of the fact that it took two attempts to pass the initial Bailout, the alternative proposed herein should have at least been discussed.


APPENDIX A:
The Companies of the Dow Jones Industrial Average as of February 19, 2008

- 3M Co.
- Alcoa Inc.
- American Express Company
- American International Group
- AT&T Inc.
- Bank of America Corporation
- Boeing Co.
- Caterpillar Inc.
- Chevron Corp.
- Citigroup Incorporated
- Coca-Cola Company
- E.I. du Pont de Nemours and Company
- Exxon Mobil Corp.
- General Electric Company
- General Motors Corp.
- Hewlett-Packard Co.
- Home Depot Inc.
- Intel Corporation
- International Business Machines
- Johnson & Johnson
- McDonald’s Corporation
- Merck & Co. Inc.
- Microsoft Corporation
- Pfizer Inc.
- The Procter & Gamble Company
- United Technologies Corporation
- Verizon Communications
- Wal-Mart Stores, Inc.
- Walt Disney Company

Source: djindexes.com

NOTE: Three of these 30 companies (each recipients of over $40 billion in Bailout funds) have since been replaced on the DJIA roster. See http://projects.propublica.org/bailout/list/index.