

No More Bailouts:

A Blueprint for a Standing
Emergency Economic Resilience
and Stabilization Program

REPORT BY **ADAM J. LEVITIN, DR. LINDSAY OWENS, AND GANESH SITARAMAN**
JUNE 2020

THE
GREAT
DEMOCRACY
INITIATIVE

THE GREAT DEMOCRACY INITIATIVE

ABOUT THE GREAT DEMOCRACY INITIATIVE

The Great Democracy Initiative develops policy blueprints that offer solutions to the most pressing problems of our time. From taming the concentration of power in our economy to fundamentally reforming our broken government, GDI aims to generate policy ideas that confront the forces that have rigged our society in favor of the powerful and connected.

ABOUT THE AUTHORS

Adam J. Levitin is an Agnes N. Williams Research Professor and Professor of Law at Georgetown Law. He specializes in bankruptcy, commercial law, and financial regulation. His scholarship has won numerous awards, including the American Law Institute's Young Scholar's Medal, in recognition of his work's potential to influence improvements in law.

Dr. Lindsay Owens is a fellow at the Great Democracy Initiative where her writing and research centers on building a progressive economic agenda for housing, climate, labor, and healthcare. She previously served as Deputy Chief of Staff and Legislative Director to Representatives Pramila Jayapal and Keith Ellison and as Senior Economic Policy Advisor to Senator Elizabeth Warren.

Ganesh Sitaraman is a Co-founder of the Great Democracy Initiative where he previously served as its Director of Policy. He is a Chancellor's Faculty Fellow and Professor of Law at Vanderbilt University and longtime advisor to Elizabeth Warren.

ACKNOWLEDGEMENTS

The authors would like to thank William Bratton, Anna Gelpern, Ted Janger, Stephen Lubben, Lev Menand, and Bharat Ramamurti for comments, as well as Mitchell Mengden for research assistance and comments. Roosevelt staff Suzanne Kahn, Ariela Weinberger, Sonya Gurwitt, and Anna Smith all contributed to the project.

Table of Contents

Introduction	6
Emergency Economic Resilience and Stabilization: Some General Principles	8
A. Shielding the Economy from Systemic Externalities and Value Destruction	8
B. Maintaining Employment	9
C. Government Action is Essential During National Economic Emergencies	10
D. Assistance Should be Standardized to Avoid Favoritism and to Promote Operational Efficiency	10
E. Transparency and Oversight Are Essential for Legitimacy as well as Popular Understanding and Support	11
F. Assistance Should Be Provided Directly by the Government When Possible, Not Through Private Market Intermediaries	12
Part I: Large and Public Firms: Bailout and Bankruptcy Reforms	13
A. Limitations of Current Tools	13
B. The SEERS Large Business Program	16
Part II: Payment Systems Reforms	27
A. Expansion of Direct Express	28
B. FedAccounts	29
C. Emergency Economic Payments Form	30
Part III: The SEERS Small Business Program	32
Part IV: Automatic Stabilizers	37
A. The General Case	37
B. Rental and Mortgage Assistance	39
Conclusion	43

Executive Summary

Since the COVID-19 pandemic first landed our shores in late January, Congress has scrambled to pass five relief and recovery packages to deal with the health and economic fallout. The first included just \$8.3 billion in spending—an astonishingly small sum given the threat of the virus. The third bill included critical spending priorities for struggling families, but was paired with a no-strings-attached \$500 billion slush fund for corporate America. The fourth and fifth bills remedied problems with the third bill—Congress didn't appropriate enough money for its signature small business relief program, the Payroll Protection Program, and needed to top it up (fourth bill), and then needed to extend the loan repayment period (fifth bill) for the program because most businesses had yet to reopen and begin generating new revenue. Congress is likely to take up a sixth bill in late July, in part to deal with the imminent expiration of the temporary expanded unemployment insurance benefits passed in the third bill.

This ad hoc approach to crisis policymaking is inefficient at best and malpractice at worst. Delays have resulted in bankruptcies and closures for businesses large and small and countless hardships for the more than 40 million Americans who have filed jobless claims since March. There is a better way.

In this paper we propose a standing emergency economic resilience and stabilization program that will be deployed in the event of an economic emergency. The program has four central components:

1. An off-the-shelf, bankruptcy-based restructuring process for large or publicly-traded firms that involves a federal equity stake and a potential federal senior secured loan;
2. A program for smaller businesses to cover payroll and operating expenses to prevent mass layoffs and closures on Main Street;
3. A financial system infrastructure reform to enable direct government payments to consumers and businesses without reliance upon private intermediaries; and,
4. A system of automatic stabilizers to engage policy tools without repeated and recurrent congressional action, including a suite of programs to address housing insecurity for both renters and homeowners.

This emergency economic resilience program would blunt the foreseeable impacts common to all recessions—unemployment, income shocks, and liquidity constraints—so that Congress can focus its attention on the unique causes of the particular downturn. In the case of the most recent downturn, had such a program been in place, Congress would have been able to spend the lion’s share of the spring narrowly focused on testing production, building out a community health corps of contract tracers, and supporting the development of a vaccine, instead of scrambling to patch together an economic relief program.

Introduction

Twice in the past dozen years, Congress has had to undertake enormous bailouts to rescue the economy. These bailouts have been improvised on an ad hoc basis, scraping together existing authorities and creating new ones. The bailouts have also been a political lightning rod because of perceived and real unfairness and mismanagement.

We can and should be better prepared to respond to economic crises when they occur. The best way to prevent messy, ad hoc bailouts is to have a standing emergency economic resilience and stabilization program (“SEERS” or “standing program”) that will be deployed in the event of an economic emergency. The standing program we propose here has four central components to address common issues that arise in all national economic crises:

- An off-the-shelf, bankruptcy-based restructuring process for large or publicly traded firms that involves a federal equity stake and a potential federal senior secured loan;
- A program for smaller businesses to cover payroll and operating expenses to prevent mass layoffs and closures on Main Street;
- A financial system infrastructure reform to enable direct government payments to consumers and businesses without reliance upon private intermediaries; and
- A system of automatic stabilizers to engage policy tools without repeated and recurrent congressional action, including a suite of programs to address housing insecurity for both renters and homeowners.

An off-the-shelf SEERS program is, by design, is not tailored to the specifics of any particular crisis. That is a feature, not a bug. SEERS will be only a default authority—designed to address the impacts common to all economic downturns including layoffs, income disruptions, and liquidity constraints. Congress is free to deviate from this authority as the situation demands and can and should turn its attention to the unique triggers of each crisis, whether a pandemic or a subprime mortgage meltdown. There are, however, a variety of benefits to having a standing program to address emergency economic conditions that commonly arise in national economic crises.

First, having a standing program enables immediate action to stabilize the economy and move fiscal stimulus out the door as quickly as possible. The wheels of legislation do not move quickly, but time is often of the essence when mitigating damage to the economy

from exogenous shocks. Additionally, as the COVID-19 crisis has shown, a crisis can interfere with Congress's ability to convene and conduct business. Having a standing program that can be activated without significant legislative negotiations protects against these problems.

Second, having a standing program creates a baseline for congressional action. Congress may depart from the baseline of the standing program if it wishes, but the baseline will have an anchoring effect that will frame legislative negotiations and will also inform public understanding of congressional action. For example, Congress may wish to have less oversight, but members will likely be pressed to justify the reduction in oversight to the public. In contrast, if Congress were legislating on a blank slate, the diminution in oversight capacity would not be apparent (and as in the case of the CARES Act, might even require oversight advocates to use their political capital to secure an oversight body). Furthermore, if Congress wishes to deviate from the standing program, it need not do so entirely; having a standing program also means that Congress can adopt parts of it without having to reinvent the wheel.

Third, a standing program, rather than an improvised response, will mute concerns about favoritism and unfairness in bailouts because there will be pre-existing rules for government assistance that were made without knowledge of the specific identities of potential beneficiaries and without lobbying pressure from those potential beneficiaries.

Fourth, a standing program will ensure that there is adequate administrative and technical capacity in the federal government for rapidly providing support directly to businesses and consumers.

This standing program is a "no bailout" law because SEERS does not provide a "free ride" or no-strings-attached assistance.

Critically, the SEERS program is not a bailout authority, although some may be tempted to refer to it by that loaded terminology. If anything, this standing program is a "no bailout" law because SEERS does not provide a "free ride" or no-strings-attached assistance. Under SEERS, government assistance aims to stabilize the economy for the common good, but requires a "co-pay" from shareholders and financial creditors—those parties who are able to diversify their investments and adjust their pricing to risk prior to a crisis.

Emergency Economic Resilience And Stabilization: Some General Principles

In proposing this system for emergency economic resilience and stabilization, we start from a set of general principles: preventing systemic externalities, maintaining employment, limiting major influxes of government support for true emergencies, conditioning government assistance, ensuring a standardized process to prevent favoritism, pursuing direct government action rather than operating via intermediaries, and guaranteeing oversight and transparency.

A. SHIELDING THE ECONOMY FROM SYSTEMIC EXTERNALITIES AND VALUE DESTRUCTION

Every part of the economy is interconnected, and individual actions taken during an economic crisis have enormous systemic externalities. For example, the loss of a job is devastating for a household, but no individual job loss is of systemic importance. But when job loss happens on a large enough scale, there are systemic consequences from depressed consumer demand, which can turn into a downward spiral of further job loss and further depressed demand.

Likewise, no individual small business is of systemic importance, but the collective quantum of small businesses is. For example, when small businesses are located in close proximity, they create cross-traffic that benefits other small businesses and, through expanded choice and convenience, consumers. In this way, small businesses are not so different from a shopping mall with many proximately located businesses.

Liquidations, particularly in the midst of an economic crisis, can destroy value. Liquidations inherently destroy firm-specific knowledge and expertise. The situation is worse during an economic crisis, when asset values are depressed, so liquidation values will truly be fire sales, resulting in greater losses for creditors. In times of crisis, it can be difficult, if not impossible, to determine which firms would be viable but for the crisis and which are not viable in any conditions. Delaying the sorting of firms for viability until crisis conditions have abated may itself create value by avoiding unnecessary liquidations of otherwise viable firms.

The federal government is the only entity in a position to protect the national economy from these systemic externalities. Part of the federal government's stewardship of the economy is serving as an insurer of last resort for the economy, because it is able to handle risks that no individual consumer, business, or market can.¹

The federal government is the only entity in a position to protect the national economy from these systemic externalities.

B. MAINTAINING EMPLOYMENT

Part of protecting the economy from negative supply and demand shocks and the resulting systemic externalities means a focus on maintaining employment when possible. Not only does maintenance of employment avoid the downward spiral of depressed demand, but it is also critical in context of the United States given that health insurance is often provided through employers. Particularly in the face of a public health crisis, it is important to ensure that there are not interruptions in consumers' health insurance lest they avoid obtaining necessary treatment because of its cost.

There are also substantial inefficiencies involved in firing and hiring. Unemployed people need to file for unemployment insurance benefits, secure new health care, and search for a new job. As the COVID-19 crisis has shown, state unemployment insurance systems are simply not set up to process huge volumes of claims in short order. It will be cumbersome and inefficient for companies to rehire their entire labor forces, and will impede speedy recovery. Mass unemployment extinguishes productive matches between employers and employees, and many of these matches won't be recreated once they are lost. Additionally, employees may get rusty during periods of job loss, losing some skills that are honed through repetition and, in some cases, losing formal certifications that require a certain number of hours of work. Keeping people employed will often be more economically efficient, not to mention socially humane.

A focus on maintaining employment is also historically well-founded in economic crisis response. A centerpiece of New Deal economic recovery efforts was the Reconstruction Finance Corporation (RFC). The RFC was a federal government corporation modeled

¹ See DAVID A. MOSS, WHEN ALL ELSE FAILS: GOVERNMENT AS THE ULTIMATE RISK MANAGER (2002).

on the World War I-era War Finance Corporation. The RFC served as the New Deal's primary means of providing capital to both the banking system and the real economy. Preservation of employment was an express statutory goal of the RFC, which was authorized to engage in commercial and industrial lending "[f]or the purpose of maintaining and increasing employment of labor."² The RFC's industrial and commercial lending proved vital to mitigating the economic harms of the Great Depression.

C. GOVERNMENT ACTION IS ESSENTIAL DURING NATIONAL ECONOMIC EMERGENCIES

Another principle for designing a SEERS program is that it is only for use in the case of national economic emergencies, the sort of extreme situations against which private parties cannot realistically be expected to self-insure. As the insurer of last resort, the government holds the extreme tail risk in the national economy. This means that the SEERS program would be triggered only by a national economic emergency during which Congress activates the program, not a regional economic downturn or a problem in a single market. It also means that a SEERS program is different from a national investment authority or national development bank, such as exists in Brazil and Mexico, that would regularly channel federal funding into the economy outside of the regular appropriations process.

D. ASSISTANCE SHOULD BE STANDARDIZED TO AVOID FAVORITISM AND PROMOTE OPERATIONAL EFFICIENCY

Government can provide individual-level, firm-level, and market-level support. Individual-level support includes unemployment insurance, cash stimulus, and rental- and mortgage-assistance. Firm-level support means giving loans or grants to individual firms and providing equity investments in those firms. Market-level support is standing by as a ready buyer of assets, such as securities, from all comers. There should be a standardized process for these types of support, though a standardized baseline might not fit every situation perfectly. Congress can address particular concerns for certain sectors of the economy when activating the SEERS program. As a starting point, however, firms within sectors should not get special treatment because of their ability

² Reconstruction Finance Corporation Act, § 5d, as amended by an Act of June 19, 1934, § 5, 48 Stat. 1105, 1108-09.

to lobby Congress or their close connections with government officials. They should also not be able to arbitrage government programs against each other. This means that SEERS would require a narrowing of the Federal Reserve's lender-of-last-resort authority under section 13(3) of the Federal Reserve Act to provide anything less than market-level support by standing by as a secondary market purchaser, rather than making direct loans.

Additionally, the ad hoc approach Congress has historically taken with respect to economic downturns sets up a dynamic in which a "must pass" emergency vehicle paves the way for a lobbying blitz. Since providing some level of assistance to the unemployed or to failing businesses is seen as necessary, emergency legislation is difficult for members to vote against. That dynamic allows special interests to run wild, loading emergency packages up with favorable provisions, which even the most principled members of Congress will swallow to ensure financial assistance gets to the hardest hit families. One of the benefits of an off-the-shelf standing program that Congress simply needs to vote to "turn on" is that there will be less room for unproductive lobbying in which bad policy rides the coattails of essential action in an emergency.

E. TRANSPARENCY AND OVERSIGHT ARE ESSENTIAL FOR LEGITIMACY AS WELL AS FOR POPULAR UNDERSTANDING AND SUPPORT

The recent history of bailouts, particularly in the wake of the 2008 financial crash, has been a contributing factor in popular discontent toward emergency economic policies. Trust in government is at a low point in modern history, and the view that "the system is rigged" is pervasive. Any emergency economic program requires public buy-in and confidence. To some extent, creating a standing authority helps build legitimacy in crisis policies precisely because they were developed before the crisis. However, ongoing transparency and monitoring of how those policies are implemented are crucial to maintaining public support.

F. ASSISTANCE SHOULD BE PROVIDED DIRECTLY BY THE GOVERNMENT WHEN POSSIBLE, NOT THROUGH PRIVATE MARKET INTERMEDIARIES

Government assistance should be provided directly by the government whenever possible, rather than through private intermediaries. Direct assistance is important for several practical and political reasons. While intermediaries may have existing relationships and staffing that can be leveraged for distributing government assistance, their involvement also adds costs and administrative oversight problems.

As a practical matter, working through private intermediaries, such as financial institutions, can often introduce undesirable frictions in the provision of government aid. This occurred in 2009–2012 with mortgage relief programs intermediated by mortgage servicers, and in 2020 with the intermediation of small business relief through banks that made Paycheck Protection Program small business loans guaranteed by the Small Business Administration (SBA). Intermediaries may restrict relief because of concerns about False Claim Act liability or liability to investors (in the case of mortgage servicers). Intermediaries are also likely to steer limited relief resources to their own debtors and clients, leaving the most vulnerable beneficiaries—those who lack pre-existing relationships with market intermediaries—unable to obtain assistance, as happened in 2020 with Payroll Protection Program SBA loans. Furthermore, the use of private for-profit intermediaries can add an additional layer of expense to a program.

Finally, as a political matter, the use of intermediaries can confuse benefit recipients about the source of the benefits and thereby undermine public support for government programs in the short and long-term. Maintaining public support is critical, particularly in a crisis.

PART I

LARGE OR PUBLIC FIRMS: BAILOUTS AND BANKRUPTCY REFORMS

A. Limitations of Current Tools

Currently, the major federal emergency financing authority is section 13(3) of the Federal Reserve Act, which authorizes the Fed to serve as a “lender-of-last-resort.”³ The Fed’s section 13(3) power can only be utilized “in unusual and exigent circumstances;” requires an affirmative vote of five of the seven Fed governors, as well as prior approval of the Treasury Secretary; and can only be used to make loans based on “broad-based” eligibility criteria, which is defined by regulation as requiring at least five eligible institutions and forbidding assistance targeted to any individual firm.⁴ This means that section 13(3) can always be used to provide market-level assistance, but can only provide firm-level assistance if multiple firms are potentially eligible for the assistance. Additionally, the Fed is prohibited from lending to insolvent borrowers or from aiding failing financial companies.⁵ The Fed’s lending must also be consistent with “sound risk management

³ 12 U.S.C. § 343(3). The Small Business Administration (SBA) also has an emergency lending authority that is not restricted to small businesses. 15 U.S.C. § 636d. The SBA emergency lending authority does not come with the same statutory restrictions as the Fed’s 13(3) powers regarding borrower solvency, etc., but there is no standing appropriation backing this authority, and it requires a “major disaster,” which must be a “natural disaster.” 42 U.S.C. § 5122. The SBA emergency lending authority therefore requires both congressional action for an appropriation and presidential action for declaring a major disaster.

⁴ 12 U.S.C. § 343(3)(B)(iii); 12 C.F.R. § 201.4(d)(4). Additionally, since 2010, section 13(3) has required that “any emergency lending program or facility is for the purpose of providing liquidity to the financial system, and not to aid a failing financial company.” 12 U.S.C. § 343(3)(B)(i). Lev Menand argues that this provision precluded lending to non-financial businesses or municipalities, but was effectively repealed *sub silentio* by the CARES Act. See Lev Menand, *Unappropriated Dollars: The Fed’s Ad Hoc Lending Facilities and the Rules That Govern Them*, European Corp. Governance Instit. Law Working Paper No. 518/2020 (May 16, 2020). An alternative reading is that this provision never was in fact a limitation on direct lending to non-financial businesses and municipalities, but must instead be read in conjunction with the following clause, such that “providing liquidity to the financial system” is the opposite of “aiding a failing financial firm.” In other words, rather than restricting the types of entities to which the Fed can lend, this provision is merely another way of stating that section 13(3) is for broad liquidity provision, not recapitalization of individual firms. In either case, the language does not seem to currently stand as an obstacle to the Fed lending to non-financial businesses or consumers under section 13(3).

⁵ 12 U.S.C. § 343(3)(B)(ii); 12 C.F.R. § 201.4(d)(4)-(5).

practices,”⁶ and designed to protect taxpayers from losses, including a requirement that loans be fully secured or guaranteed by a solvent third-party (such as Treasury).⁷

No appropriation or congressional action is formally necessary for the Fed to utilize its section 13(3) powers. In practice, however, the requirement that loans be fully secured or guaranteed by a solvent third-party has meant that almost all uses of section 13(3) in response to the COVID-19 crisis have been undertaken together with an appropriated backstop from Treasury that is then leveraged by the Fed to facilitate lending at a much greater multiple than the backstop amount.⁸ In other words, section 13(3) has effectively become a discretionary fiscal program allowing the issuance of unappropriated dollars and subject to only weak congressional control.

The design of the section 13(3) program distinguishes between illiquid and insolvent firms and allows aid solely to illiquid firms—not insolvent ones. This distinction between illiquidity and insolvency is long-standing in thinking about central banking.⁹ The idea is that when markets are functioning, solvent firms can generally obtain liquidity by selling assets or borrowing against the assets. When markets are frozen, central banks should step in to support solvent firms with liquidity provision through lender-of-last-resort facilities, but insolvent firms should never be supported—that would be throwing good money after bad firms—as those insolvent firms would face difficulty borrowing even in functioning markets.

Section 13(3) has effectively become a discretionary fiscal program allowing the issuance of unappropriated dollars and subject to only weak congressional control.

The problem with the conceptually neat distinction between illiquidity and insolvency is that it does not reflect the messiness of the real world. First, illiquidity can rapidly beget insolvency, as demands on a firm’s liquidity can force the firm to sell assets in a depressed

⁶ 12 U.S.C. § 343(3)(B)(i).

⁷ *Id.*

⁸ The sole exception has been the Fed’s Primary Dealer Credit Facility, which lends against high quality collateral owned by the 24 primary dealers of Treasury securities.

⁹ See also RALPH GEORGE HAWTREY, *THE ART OF CENTRAL BANKING* 116 (1932); Thomas M. Humphrey, *Lender of Last Resort: The Concept in History*, 75 *FED. RES. BANK OF RICHMOND ECON. REV.* 8 (1989); WALTER BAGEHOT, *LOMBARD STREET: A DESCRIPTION OF THE MONEY MARKET* (1873).

market and commit to debt service obligations that it will ultimately be unable to repay. Second, insolvency itself is often indeterminate. Insolvency is a balance sheet concept—that assets are worth less than liabilities at a given moment in time. Operating firms, however, never have an actual moment at which all asset and liability values are locked in at their current market values. Most assets are not valued on a daily basis and valuations are often based on models, rather than on actual market prices. Third, the COVID-19 crisis has underscored the importance of uncertainty as a separate category of financial distress: cruise lines, movie theaters, and car rental companies, for example, might have had viable business models in the pre-COVID-19 economy, but there is simply too much uncertainty about the extent to which economic activity will return to pre-COVID-19 levels and when.

The government's balance sheet is a means of promoting economic health, not an end in and of itself.

Section 13(3) resolves problems with uncertainty about solvency with a presumption that firms are not solvent.¹⁰ While this is consistent with minimizing the Fed's direct losses in section 13(3) lending, it is inconsistent with the broader public policy purpose of section 13(3), namely to stabilize the economy and prevent avoidable externalities from economic distress.¹¹ Merely measuring losses based on the Fed's balance sheet is the wrong measure when considering emergency lending by the federal government. Instead, a more holistic measure of the economy must be considered—what are the effects on GDP and its distribution? If emergency lending helps preserve \$1 trillion of value for the economy, it is beside the point that \$100 billion of credit losses were incurred by the Fed to do so, because the alternative to the emergency lending would be no credit losses but \$1 trillion in economy-wide loss.¹² The government's balance sheet is a means of promoting economic health, not an end in and of itself.

The goal, then, of the SEERS program is to limit deadweight losses in the economy by preserving firms as going concerns for the duration of a crisis. It may well be that after a crisis subsides some firms supported by the SEERS program will prove non-viable and

¹⁰ The use of section 13(3) with an appropriated Treasury backstop merely shifts the risk of loss to Treasury.

¹¹ While it might be argued that section 13(3) is meant to be a tool to prevent monetary breakdowns from financial system distress, this only underscores that it is too narrow in scope, as not all economic crises are monetary in nature.

¹² To be sure, the Fed's losses are real, as the Fed issues unappropriated dollars and any profit at the end of the year for the Fed is swept into Treasury.

will have to liquidate. But any decision about firm viability cannot be made responsibly during a national economic crisis because there is too much uncertainty about the duration and depth of the crisis. During a crisis, temporarily reduced demand for goods and services may lead to the liquidation of otherwise viable firms. The liquidation of firms that may in fact be viable outside of crisis conditions is not only destructive of going-concern value, but also creates substantial negative externalities on the economy as a whole. The purpose of the SEERS program is to prevent such precipitous and destructive liquidations and thereby contain the damage to the economy.

B. The SEERS Large Business Program

The SEERS Large Business program would feature a combination of equity investment and secured lending by the Federal Reserve System in the context of a special bankruptcy procedure. The SEERS program would supplement the Fed’s section 13(3) liquidity provision power. Whereas section 13(3) would continue to be available for liquidity provision to solvent firms, the SEERS program would be used to address situations involving uncertainty about solvency that prevent firms from qualifying for assistance under section 13(3) without the need for ad hoc backstopping by Treasury. Table 1 summarizes the interaction of the SEERS program and section 13(3) assistance. (It is worth noting that the SEERS Large Business program could also be designed to operate through the Treasury, or through a national investment authority or RFC-style entity. We proceed here with its design through the Fed, given the Fed’s expansive role in the 2008 and 2020 economic crises.)

TABLE 1
Paths to Assistance

	Liquid	Illiquid
Solvent	No assistance needed.	Fed section 13(3) assistance.
Uncertain Solvency	SEERS	SEERS
Insolvent	SEERS	SEERS

The SEERS program would be available only for US firms that meet one of several alternative qualifying characteristics that define them as “large” firms, rather than as smaller firms for which alternative treatment is appropriate. These include firms that have publicly traded equity or had publicly traded equity in the past three years, firms that have revenues of over a specified amount the previous reporting year, or firms that have over a certain amount in financial debt on a consolidated basis. An act of Congress would trigger use of the SEERS program. Following such a declaration, the Federal Reserve System could immediately offer assistance to qualifying businesses under the terms of the SEERS Large Business program.

The SEERS Large Business Program would give firms three choices. A firm in distress could: (1) attempt to find new market financing; (2) file for a regular Chapter 11 bankruptcy; or (3) avail itself of the SEERS Large Business program’s provisions. The voluntary nature of the SEERS process raises a concern that a firm might delay seeking assistance until it is too late and the firm has already engaged in substantial layoffs in an attempt to stabilize itself. To address this problem, the SEERS Large Business Program would absolve the firm’s board for the good-faith decision to seek SEERS assistance. It would also create a limited (and non-indemnifiable) springing federal cause of action against corporate directors for “deepening insolvency” (a tort recognized by some states) when a national economic emergency has been declared. The combination of the exculpation for filing and liability for wrongly betting on a turnaround without assistance would strongly incentivize corporate directors to either file for a regular Chapter 11 or seek SEERS assistance in a national economic emergency.

If a firm were to opt for SEERS assistance, the Fed would have very limited discretion about whether to provide it. If the firm met the limited statutory eligibility requirements—being a US firm; having publicly traded equity or recently publicly traded equity, or sufficient revenue or financial debt; having a business model that did not preclude viability; and acceptance of the terms of SEERS assistance—the Fed would be required to provide SEERS assistance. The Fed’s only discretion would be about whether the firm did not have a viable business model (e.g., a manufacturer of punch cards or mimeographs) even in a healthy economy.

SEERS assistance would come in the form of a standardized package. The SEERS assistance package would come in two stages: (1) a capital injection in the form of preferred stock, conditioned upon the cancellation of existing common equity interests and dollar-matched conversion of unsecured debt to new common equity interests; and (2) a senior secured loan, if the firm did not have enough unsecured financial debt to convert for a sufficient recapitalization.

1 SEERS STAGE 1 SUPPORT: CAPITAL INJECTIONS MATCHED TO UNSECURED FINANCIAL DEBT WRITE-DOWNS

SEERS Stage 1 support would be provided as part of a special bankruptcy procedure (“Chapter E”) that would wipe out existing shareholders and inject new capital from the Federal Reserve System in exchange for preferred stock matched to an involuntary dollar-for-dollar conversion of unsecured financial debt (referred to here as “bonds”) to common stock. The conversion would happen in reverse order of priority, meaning that the most junior bonds be fully converted to common stock before any more senior bonds were converted.¹³ This order of conversion adheres to bankruptcy’s “absolute priority rule,” which requires junior creditors to be entirely wiped out before senior creditors incur any losses.¹⁴

Thus, if a qualified firm needed \$1 billion of assistance and had \$600 million in bonds outstanding, it could file for Chapter E and get a \$500 million capital injection in the form of a preferred stock investment from the Federal Reserve. However, all of its old common stock would be cancelled, and it would be required to convert \$500 million of the bonds to new common stock on a prorated basis among the bondholders. The firm would thus get \$500 million in immediate liquidity through the capital injection, and it would also have \$500 million less in debt to service, such that its liquidity needs would be lower. The firm would also be \$1 billion more solvent than before. If the firm needed \$1 billion of assistance, but had less than \$500 million in bonds, it would need to supplement the conversion of its bonds with SEERS Stage 2 assistance, as described below.

¹³ An alternative and more aggressive version of the approach we advocate here would be for the Fed’s capital injection to be in the form of common equity, and for bondholders to be wiped out instead of converted into common equity. For example, during the Great Recession, Treasury took a minority interest in the common stock of Chrysler and a majority interest in the common stock of General Motors as part of their restructurings in bankruptcy. The federal government, however, has otherwise generally refrained from common stock investments in private firms. The common equity approach both changes the potential exit strategy and adds governance issues. The exit strategy for a common equity investment would be a public offering by the Fed of the equity within three years of the end of the economic emergency. The governance issues are thornier, as the Fed would have to fill the firms’ boards, select the firms’ officers and their compensation, and generally manage the firms. All of this would require extensive discretion, such that it could not be readily legislated. It would also inevitably raise conflicts, such as the interests of competing firms in the Fed’s “portfolio” and how they would relate to firms not owned by the Fed.

An intermediary approach would have the Fed make a preferred stock investment, but receive warrants for the purchase of the common stock that could be exercised after the end of the economic emergency. The Fed would not need to exercise these warrants itself, but could instead sell them and thereby avoid becoming a common shareholder.

¹⁴ 11 U.S.C. § 1129(b)(2)(B)(ii). The absolute priority rule only applies in Chapter 11 “cramdown” plans, that is, plans that are not accepted by the requisite majorities of all impaired classes of creditors and equity holders. A complication arises in knowing which obligations are in fact unsecured, because bankruptcy law treats undersecured deficiencies as unsecured obligations. 11 U.S.C. § 506. A potential solution to this problem is to accept the Fed’s valuation of collateral backing any secured obligation in the first instance, but allowing it to be challenged by either the secured creditor (claiming a higher valuation) or an unsecured creditor (claiming a lower valuation). If the secured creditor prevailed, the effect would simply be to raise the haircut percentage on unsecured creditors or to force a move to SEERS Stage 2. If the unsecured creditor prevailed, the effect would be to lower the haircut percentage on unsecured creditors (while expanding the amount of unsecured claims).

Under this regime, the assisted firm's equity holders would take a complete loss, while its bondholders would incur a loss in the form of a conversion from debt to equity. The extent of this loss would depend on how much assistance the firm needed. The firm's secured lenders would be unimpaired under SEERS Stage 1 assistance.

Critically, all obligations to other creditors—employees, retirees, vendors, tort creditors, and tax authorities—would remain unimpaired by SEERS assistance. Only so-called “adjusting” creditors—those who can price for risk and diversify their holdings—would be subject to a write-down. Tort creditors and tax authorities cannot adjust their pricing depending on the risk of a firm. While employees can adjust their rates to some degree to account for employer risk, they cannot readily diversify their exposure to a firm—an employee typically works only one or two jobs. The same is true for tort creditors, who are the unwilling creditors of typically just one firm, while retirees lack the ability to diversify their exposure altogether. While vendors may be diversified, they often lack the market power to engage in risk-based pricing. Moreover, vendors are themselves employers who should be protected when possible under the goal of preserving employment. Protecting non-adjusting and inherently undiversified creditors is essential to mitigating the spread of economic harm.

Protecting non-adjusting and inherently undiversified creditors is essential to mitigating the spread of economic harm.

The Fed's preferred stock investment would have a fixed annual dividend and would be callable by the debtor beginning one year after the end of the declared national economic emergency. The preferred stock would be cumulative preferred, meaning that it would be owed a periodic dividend, which would accrue if not paid (giving the firm liquidity flexibility during the crisis). The dividend rate would be required to be 100 basis points higher than the rate the firm would pay on such stock in non-emergency market conditions. The purpose of this premium is to incentivize the firm to exercise its call option to redeem the preferred stock after the emergency had subsided; if the rate were lower, the firm might be content keeping the low-cost capital. We discuss the issue of voting rights for the preferred stock below.

Under Stage 1 of SEERS assistance, the Fed would serve not just as lender-of-last-resort through its 13(3) liquidity facility power, but also as investor-of-last-resort. Firms that

can raise capital in the markets otherwise would be encouraged to do so, and corporate boards would be unlikely to rush to wipe out the equity holders who elected them, such that firms would likely exhaust market options before turning to the government for help.

There is good historical precedent for the use of preferred stock investments as a form of investor-of-last-resort assistance. Between 1933 and 1935, during the New Deal, the Reconstruction Finance Corporation provided voting preferred stock investments to 6,800 banks.¹⁵ Similarly, in 2008, Treasury invested \$250 billion in non-voting preferred stock in banks as well as \$100 billion in non-voting preferred stock in both Fannie Mae and Freddie Mac.

Under the SEERS program, federal assistance aims to maintain the going concern value of the firm, not bail out shareholders or financial creditors who are conventionally held responsible for risk. The SEERS Stage I capital injection in the form of preferred stock coupled with a wipeout of shareholders and conversion of bond debt to common stock would provide a baseline for federal assistance. Any Congress that wishes to deviate from this baseline will need to explain why it is bailing out shareholders and creditors.

2 SEERS STAGE 2 SUPPORT: SECURED PRIMING LIEN LOAN

If a firm needed more assistance than could be provided under SEERS Stage 1 because of the limit imposed by matching the dollar matching of preferred stock investment to the conversion of unsecured financial debt to common stock, SEERS Stage 2 assistance would then apply. Stage 2 assistance would take the form of a loan secured by all of the firm's assets. The secured loan would "prime" (have priority over) all existing secured obligations, meaning that in a liquidation, the Stage 2 loan would be repaid from collateral proceeds before pre-existing secured obligations.¹⁶ Such a priming loan would function like certain state property tax liens, homeowners association liens, or Property Assessed Clean Energy (PACE) mortgage loans that prime other secured obligations by statute. The priming loan would have a maturity of three years after the end of the declared economic emergency, but would be pre-payable starting one year after the end of the declared economic emergency.

¹⁵ JAMES S. OLSON, *SAVING CAPITALISM: THE RECONSTRUCTION FINANCE CORPORATION AND THE NEW DEAL, 1933-1940* 82 (1988).

¹⁶ Bankruptcy law already authorizes new financing to prime existing secured obligations. 11 U.S.C. § 364(d). Such priming loans are rarely made by new third-party lenders, however, because of the requirement that existing secured lenders be "adequately protected" against the loss of collateral value. 11 U.S.C. § 364(d)(1)(B). Here, however, that would not be necessary because there would be a contingent statutorily authorized priming obligation—all other secured obligations would be created subject to the SEERS contingency. State priming lien statutes have no equivalent requirement of adequate protection.

Thus, if a firm needed \$1 billion of total assistance but had only \$400 million in unsecured financial debt, it would be required to wipe out all of its existing equity and convert the \$400 million of unsecured financial debt to common stock. This would result in a matching \$400 million preferred stock injection. Thus, under SEERS Stage 1, the firm would have received a total of \$800 million of assistance. The other \$200 million of assistance needed would have to come in the form of a secured priming loan. The firm would thus obtain a total of \$600 million in new liquidity (a \$400 million capital injection plus a \$200 million priming loan) plus reduced debt service, so it would be \$800 million more solvent than before (\$400 million capital injection, plus \$400 million debt-to-equity conversion, plus \$200 million in priming loan proceeds, minus the \$200 million in priming loan liability). The firm's capital structure would look like a sandwich, with the Fed standing at the top and the bottom.

A firm could get repeated infusions from the SEERS program, subject to a maximum support limit of new secured debt not exceeding 75 percent of the pre-crisis valuation of the firm's assets.

3 SEERS GOVERNANCE

Because the Fed would own the preferred stock of firms that receive SEERS assistance, it is necessary to address governance. Three issues arise with governance. First, how can the Fed be sure that its own position as preferred shareholder or secured lender will be adequately protected? Second, how can the Fed ensure that public policy interests are adequately protected at assisted firms? And third, how will the Fed fairly manage a portfolio of firms that may well be competitors both of each other and of entirely private companies?

The answer to the first two issues is to be found in contract, namely in the preferred stock purchase agreement that the Fed would enter into with the assisted firm. Preferred stock purchase agreements frequently give preferred stock investors substantial governance rights, even if they might lack representation on the board. The preferred stock purchase agreements could be required by statute to contain certain covenants that would protect the Fed's investment, including:

- Giving the Fed a veto over all major corporate transactions (acquisitions, asset sales, bankruptcy filing, mergers, new borrowing, etc.) while the preferred stock or loan is outstanding. Such transactions would be rare, but the Fed's discretion could be cabined by requiring such veto power to be exercised to promote overall employment and stability in the economy, without regard to the Fed's own profits or losses;

- Prohibiting stock buybacks of the common stock while the preferred stock or loan is outstanding;
- Prohibiting payment of dividends to the common stock while the preferred stock or loan is outstanding; and
- Requiring the assisted firm to file ongoing financial disclosures with the Securities and Exchange Commission while the preferred stock or loan is outstanding.

The Fed's position could be further protected by having the preferred stock purchase agreement provide the Fed with springing rights to board seats if certain extraordinary events occur or performance goals or conditions are not met, as is common in venture capital investment agreements. Likewise, the preferred stock agreement could provide the Fed with a right to attend (but not vote at) all board meetings, so that the Fed could stay fully apprised of the goings on at the firm.

Other covenants could protect public policy interests, such as:

- Requiring the firm to maintain existing employment levels (other than for-cause dismissals), payrolls levels (excluding senior management positions), and hours of employees;
- Requiring the rehiring of all employees involuntarily furloughed or laid off (except for cause) after the beginning of the declared economic emergency;
- Requiring the firm to restore compensation levels (other than for senior management) to those at the beginning of the declared economic emergency;
- Prohibiting offshoring or outsourcing of jobs;
- Imposing executive compensation limits, including on golden parachutes (reflecting the spirit of economy and anti-sumptuary assumption of federal assistance);
- Requiring the firm to pay employees a minimum wage of at least \$15/hour (inflation indexed);
- Requiring the firm to provide employees with sick leave and family leave days, including parental leave;
- Prohibiting amendments to retiree benefits;
- Requiring maintenance of labor neutrality;
- Prohibiting abrogation of collective bargaining agreements, unless also agreed to by the CBA unit; and
- Prohibiting all political spending.

The complications from managing a portfolio of investments in multiple assisted firms, including firms that are competitors with each other or with private, unassisted companies, are not entirely resolvable through investment contract terms. Nevertheless, the ability to protect the Fed's investment and public policy interests through contract, particularly with standardized contract terms set without reference to the particular counter-party, rather than through representation (other than springing representation) on the assisted firms' boards means that the Fed can largely avoid entangling itself in active management of competing firms and can avoid placing a finger on the competitive scale against unassisted firms. It also enables the Fed to avoid having to navigate conflicts, such as when the goal of maximizing firm value might encourage political spending to reduce regulation (or increase it on competitors), thereby forcing the Fed to either forgo value maximization or engage in political advocacy unrelated to its own policy portfolio. Preferred stock allows the Fed to ride along with the daily governance of the firm by a board that has been chosen by the common stock (the converted bondholders), and thus avoid entangling itself in supervising the daily operations of an industrial or commercial firm in which it has no particular expertise.

4 SEERS EXIT STRATEGY

Following the crisis, firms that availed themselves of SEERS would have preferred stock owned by the Fed and potentially a secured loan owed to the Fed. As discussed above, the above-market dividend rate on the preferred stock, plus the covenants accompanying it, would incentivize the firm to redeem the preferred stock once redemption was allowed, starting one year after the end of the declared economic emergency. The Fed would also be free to sell the preferred stock beginning at the same time. Any secured loan would have a maturity date of three years after the declared economic emergency, but would be pre-payable starting one year after the end of the declared economic emergency, enabling the firm to have some flexibility regarding the timing of when to pay it off and avoiding a simultaneous rush of firms to refinance out Fed loans.

5 PROFITS AND LOSSES

The Fed is currently required to transfer all surplus funds to Treasury on an annual basis.¹⁷ This would continue with the SEERS program. To the extent that the Fed made a profit from dividends in a particular year, this would increase the annual transfer to Treasury, while any loss would be covered by an offset from the Fed's other revenue sources. If the Fed were to run an overall operating loss, it could always cover its losses through issuing Federal Reserve Notes. Because SEERS would likely be used by multiple firms simultaneously, the Fed would be protected to some degree through portfolio diversification: losses on any particular firm could be offset by profits from other firms.

6 SEERS OVERSIGHT

Effective oversight of the use of SEERS funds is critical for maintaining public confidence in the program. To this end, the SEERS should have a set of oversight mechanisms that would remain in place as long as SEERS investments are outstanding.

First, it should have an Inspector General. To prevent a vacancy in this position, there should be a strict timeline for appointment of an Inspector General once SEERS is triggered, including an expedited confirmation process in the Senate and an automatic appointment fallback (such as the appointment of the Fed's Inspector General as acting SEERS Inspector General). The SEERS Inspector General should be removable only for cause and should be funded through the SEERS itself, so no additional appropriations would be necessary.

Second, the SEERS program should be subject to a congressionally appointed Oversight Panel. While the Oversight Panel should have a bipartisan structure, current federal elected or appointed officials should not be eligible to serve on it. Appointments should be required to occur by a fixed deadline, and the Oversight Panel and its staff should also be funded through the SEERS. The Oversight Panel would be authorized to commence work without a separate authorizing resolution, should have the power to administer oaths and issue subpoenas, and should be required to publish monthly reports on the use of SEERS funds. The Oversight Panel would also be tasked with issuing a special public report to Congress about the causes of the economic crisis that necessitated the use of the SEERS within one year of its activation, and to issue a final public report to Congress evaluating the use of the SEERS within six months of the repayment of the final SEERS investments.

¹⁷ 12 U.S.C. § 289(a)(3)(B).

Third, the SEERS program should require the House and Senate to appoint a joint select committee to provide oversight. The joint select committee should have subpoena power by statute and an appointments deadline. This three-part oversight structure would enable each of the oversight mechanisms to compensate for the others' limitations in terms of powers and politicization, and would also create a check on lax oversight, as the most vigorous oversight entity would create a benchmark for the other oversight entities.

Finally, the Fed should be required to issue weekly public reports identifying which firms have received what funding through the SEERS program, as well as release all transactional documents for the SEERS in real time. Additionally, the Fed Chair should be required to testify, regarding the program, at least once every six months before the joint select committee, the House Financial Services Committee, the House Judiciary Committee, the Senate Banking Committee, and the Senate Judiciary Committee.

7 THE BANKRUPTCY MODEL

The basic moves of SEERS Stage 1 support are all standard pieces of the existing bankruptcy toolkit. First, the use of bankruptcy to deal solely with financial debts—leaving obligations to employees, retirees, vendors, tort creditors, and tax authorities untouched—is standard in “pre-packaged” bankruptcy plans in the US and in Schemes of Adjustment in England and Wales. The National Bankruptcy Conference, an assembly of some of the country’s leading bankruptcy experts, has also proposed a “Chapter 16” procedure to formalize a financial-debt-only restructuring in the US.¹⁸

Second, the wipeout of existing shareholders is expressly authorized by bankruptcy law¹⁹ and is a common occurrence in Chapter 11 bankruptcy. Third, the conversion of debt to equity is also an expressly authorized and common feature of Chapter 11 bankruptcy.²⁰ Bondholders routinely end up owning the equity of debtor firms as a result of the Chapter 11 process. Finally, the issuance of new securities by the debtor in exchange for a contribution of “new value” from outside parties is a well-established feature of

¹⁸ National Bankruptcy Conference, Proposal for a New Chapter for Restructuring Bond and Credit Agreement Debt (Chapter 16) (2014), at <http://nbcconf.org/wp-content/uploads/2015/07/Proposed-Amendments-to-Bankruptcy-Code-to-Facilitate-Restructuring-of-Bond-and-Credit-Agreement-Debt.pdf>. See also Jonathan S. Henes, *Congress Should Codify the One-Day Bankruptcy*, WALL. ST. J., May 11, 2020, at <https://www.wsj.com/articles/viewpoint-congress-should-codify-the-one-day-bankruptcy-11589191200?>

¹⁹ 11 U.S.C. § 1141(d)(1)(B).

²⁰ 11 U.S.C. § 1123(a)(5)(J).

Chapter 11 bankruptcy.²¹ The SEERS capital injection in exchange for preferred stock is just such a new value contribution.

A mandatory debt to equity conversion also helps address the problem of who will own the assisted firm after its pre-bankruptcy shareholders are wiped out. A general program of direct federal government ownership of the common stock of numerous industrial and commercial firms would be unprecedented, and would raise substantial issues about day-to-day governance, as discussed above.

²¹ The right to contribute the new value must be subject to some sort of a market test, *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle Street P'ship*, 526 U.S. 434 (1999), but the fact that the firm has chosen to take the SEERS program instead of going to the market is itself prima facie evidence that no market funding is available.

PART II

PAYMENT SYSTEM REFORMS

One of the recurring challenges in an economic crisis is getting money to individuals and businesses swiftly and easily. The Federal Reserve is able to quickly disburse funds to financial institutions because these institutions already have accounts at the Fed, so moving funds is simply a matter of adjusting the Fed's internal ledger. For non-bank financial firms, Main Street firms, and individuals, however, the process is more difficult because there is no direct connection between the fiscal system and individuals and firms. Simply put, the federal government does not have a payments "address" for all consumers and businesses that it can use to disburse funds. In some cases, this is because Treasury lacks up-to-date information, while in other cases it is because individuals do not have accounts at institutions where funds can be deposited. These problems were manifest in the COVID-19 response, as the direct stimulus payments to individuals processed by the Treasury Department took weeks to disburse and even then, problems plagued the distribution.²²

Whether the economic crisis is like the Great Recession and requires a Keynesian stimulus, or whether it is like the pandemic economic crisis and requires immediate payments to keep people and small businesses afloat in order to mitigate economic harm, the government needs a single, simple, and swift way to get people and businesses money. Here we outline two options for such a system, either or both of which could be adopted as a part of the SEERS program.

²² See, e.g., Tony Rom, "Federal Officials Scramble to Ensure Tech Glitches, Bureaucracy Don't Delay \$1,200 Coronavirus Checks," *Washington Post*, 1 April 2020 (<https://www.washingtonpost.com/business/2020/04/01/treasury-coronavirus-irs-1200-check/>).

A. Expansion of Direct Express

One option would be to expand the existing Direct Express benefits distribution program, run by the Treasury Department.²³ Direct Express is the system through which the federal government disburses Social Security and welfare benefits. Direct Express functions as a superstructure built on top of the existing banking system. Direct Express uses the automated clearing house (ACH) system to make direct deposits of federal benefits every month in the deposit accounts of those beneficiaries who have them. For beneficiaries without deposit accounts, Direct Express contracts with a bank (currently Comerica Bank) to provide beneficiaries with debit cards onto which payments are loaded every month. These debit cards function as ersatz bank accounts for the beneficiaries. The terms of use of the debit cards are set by contract between Treasury and the bank that provides them; the current contract prohibits fees for almost all services,²⁴ so the primary revenue to Treasury's bank partner is the float from the zero-interest deposits.

The Direct Express system could be expanded by onboarding all banked consumers and businesses, and providing all unbanked consumers with a Direct Express debit card. Onboarding all consumers and businesses means that Treasury would have an "address" at which to deposit funds via Direct Express in case of an emergency. That "address" might be the consumer's or business' pre-existing bank account, or it might be the account created for the consumer or business under the Direct Express program with whichever bank holds the Direct Express contract.

An additional benefit of expanding the Direct Express system is that it could be used to address the problem of unbanked consumers. A Direct Express debit card would effectively give unbanked consumers entry into the banking system. The current Direct Express debit cards have limited functionality—they can be used to make debit card payments, but do not accept payments other than from Treasury and cannot be used for online payments. However, that functionality can be expanded to allow all Direct Express debit card holders to deposit their own funds (through in-person deposits

²³ Robert Hockett has proposed using Treasury Direct, the Treasury's bond purchase and redemption portal, as a basis for providing "Treasury Direct Accounts" to all consumers and businesses. See Robert Hockett, *The Treasury Dollar: An Immediate Funding and Digital Banking Plan for Pandemic Relief and Beyond*, March 14, 2020, at <https://ssrn.com/abstract=3567829>. Hockett would facilitate operation of Treasury Direct Accounts through the creation of a separate, parallel currency redeemable at par for Federal Reserve Notes (i.e., "dollars"). The Treasury Direct system on which Hockett would build should not be confused with Direct Express, which is a separate benefits distribution system.

²⁴ Frequently Asked Questions, U.S. Direct Express, available at <https://www.usdirectexpress.com/faq.html>.

at ATMs or participating retail establishments such as post offices, or through direct deposit using the ACH system) into the Direct Express debit card account. The Direct Express debit card's functionality could also be expanded so that it could be used for making online ACH payments just as one can do from a regular bank account, although such an expansion would likely require congressional appropriations or a special surcharge on bank charters. By expanding Direct Express functionality to allow for deposits and ACH payments, unbanked consumers would become functionally banked.

B. FedAccounts

A second approach would be for individuals and non-financial institutions to be able to hold an account at the Federal Reserve, just as financial institutions currently do.²⁵ FedAccounts would have no fees or overdrafts, and it would have instant payments. Individuals would also be able to transact directly from those accounts, akin to a normal bank account. FedAccounts would operate through FedWire, the Fed's existing real-time wire transfer system, and individuals would have debit cards or operate through an online interface. Congress could also set up an in-person interface at post offices, grocery stores, and other retail establishments around the country. Rep. Maxine Waters (D-CA) and Sen. Sherrod Brown (D-OH) endorsed a version of this approach during COVID-19 policy debates.

As with Direct Express, FedAccounts present not just a solution to the problem of quickly disbursing government aid directly to consumers and businesses, but also a potential solution to the problem of unbanked consumers.

As with Direct Express, FedAccounts present not just a solution to the problem of quickly disbursing government aid directly to consumers and businesses, but also a potential solution to the problem of unbanked consumers. A FedAccount would enable unbanked

²⁵ Morgan Ricks, John Crawford & Lev Menand, *Central Banking for All: A Public Option for Bank Accounts*, Great Democracy Initiative (June 2018); Morgan Ricks, John Crawford & Lev Menand, *FedAccounts: Digital Dollars*, GEO. WASH. L. REV. (forthcoming 2020).

consumers to have access to the financial system, as they could receive direct deposits or make payments from a bank account where credit or debit card payments are not accepted. FedAccounts would not require appropriations, but would instead be funded through cross-subsidization from the Fed's other operations.

There are benefits and drawbacks to both of these approaches. Direct Express currently works well for a targeted group of individuals, but it would need to be expanded by onboarding more consumers and businesses, and the functionality of Direct Express debit card accounts would need to be expanded to make them closer to regular deposit accounts. FedAccounts effectively exist for large financial institutions, but the Fed does not have consumer or business accounts and would need to develop that functionality.

Both systems might work well in a crisis, and both offer benefits during non-crisis times. Both could help address the problem of unbanked consumers, and both offer a public option for financial access. Both public options might encourage greater competition and more consumer-friendly terms, such as lower fees. Because FedAccounts would function as a public option for payments, it would also create competitive pressure to reduce the dead-weight economic loss from interchange (swipe) fees,²⁶ and blunt some of the impetus for privatization of currency and payments by non-bank entities, such as Facebook's Libra association. FedAccounts does raise the complication of disintermediation from the existing banking system absent a mechanism to reinvest funds in FedAccounts in the banking system.

C. Emergency Economic Payments Form

Either approach would, however, require individuals and institutions to sign up for an account. To gain users to either system, the Internal Revenue Service (IRS) should require a new Emergency Economic Payments Form that individuals and institutions would have to fill out yearly in order to get access to emergency payments under SEERS. This form would require individuals and institutions to choose the method they prefer for emergency payments (private bank account, Direct Express, or FedAccount), and

²⁶ See, e.g., Adam J. Levitin, *Public-Private Competition in Payments: The Role of the Federal Reserve*, Georgetown Law & Economics Research Paper No. 1420061 (June 23, 2009); Peter Conti-Brown & David Wishnick, *Private Markets, Public Options, and the Payment System*, YALE J. ON REG. (forthcoming 2020).

to include tax information that might be essential in a crisis as well as any information necessary to implement the payroll support program for small businesses under the SEERS program described in the next section (e.g., total income, revenues, payroll expenses, number of employees, etc.). Taxpayers would also be allowed to pay their taxes and receive any refunds through this same account, if they choose.

The information on the Emergency Economic Payments Form would serve as the foundation for economic relief payments for consumers and small businesses. First-time filers (both individuals and businesses) would be required to file this form alongside annual returns, and returning filers would be required to update the form if any payment or location information had changed since the party last filed. Businesses would also be required to update this form along with their quarterly payroll tax returns (IRS Form 941) when they report employee payroll tax withholding, and to designate whether they qualify as a small business according to the Small Business Administration's size and revenue standards so that the SEERS small business program funds can be automatically disbursed. With the implementation of the Emergency Economic Payments Form, cash assistance, grants, and loans for individuals and businesses would be vastly simplified, allowing the government to move money out the door quickly. Speedy disbursement of funds would help stave off some job losses and also dampen the depths of any downturn. Quick disbursement of funds is also a necessary precondition to using cash assistance as an automatic stabilizer, a proposal we discuss further in Part IV.

PART III

SMALL BUSINESS REFORMS

Shortly after the pandemic hit, Denmark implemented a so-called “freeze” of the economy by providing businesses who had sent workers home and were experiencing revenue drops due to pandemic-induced shutdowns with direct government support to cover the cost of payroll and other essential business expenses, such as rent.²⁷ Denmark is not alone—the United Kingdom, the Netherlands, and South Korea implemented similar schemes. Countries like Germany already had systems in place whereby the government could step in and directly subsidize employers’ payrolls to minimize furloughs and layoffs and to allow for and encourage work sharing.

Because the US does not have a comprehensive system for subsidizing employers’ payrolls to keep workers employed during downturns, its unemployment rate is much higher than that of its European peers. While Germany’s unemployment rate has hovered around 4 percent during the pandemic, the US’s has reached nearly 15 percent. This level of mass unemployment is an unnecessary result of the US’s policy choices to date, and has a number of consequences for workers and the economy: State unemployment offices have been overburdened, leading to long wait times and delays in receipt of benefits; workers who become unemployed typically lose employer-sponsored benefits, leading to high rates of uninsured Americans and strains on state budgets as more individuals become eligible for Medicaid; and millions of productive labor market matches are extinguished, leading to permanent losses in productivity. Implementing a clean way for small businesses to keep workers on payroll, connected to health care and other employer-sponsored benefits, and out of the unemployment line is critical to the nation’s ability to recover from downturns quickly.

The design features of programs to subsidize payroll vary, but they typically combine two key elements. First, they subsidize some percentage of workers’ wages (90 percent of hourly workers and 75 percent of salaried workers in the case of Denmark, and up to 87 percent in the case of Germany). Second, some programs also propose subsidizing

²⁷ Peter S. Goodman, *The Nordic Way to Economic Rescue*, N.Y. TIMES, Mar. 28, 2020, at <https://www.nytimes.com/2020/03/28/business/nordic-way-economic-rescue-virus.html>.

a percentage of operating expenses for businesses, such as rent. In Denmark, small businesses expecting to lose 40 percent of revenue can get up to 80 percent of their rent covered by the government. For businesses that are completely shuttered, such as restaurants, the government provides up to 100 percent of those expenses. Larger businesses get loans instead of grants for these expenses.

In the United States, members of the House and Senate on both sides of the aisle put forward proposals similar to the Denmark model. Two Republican Senators, Josh Hawley (R-MO) and Cory Gardner (R-CO), proposed a Rehire America Act that would provide 80 percent of salaries (capped at \$50,000) for current employees and 120 percent for rehired employees to encourage rehiring.²⁸ It would also provide grants to help cover rent and other expenses, allowing businesses to keep the lights on. Senators Bernie Sanders (D-VT), Mark Warner (D-VA), Richard Blumenthal (D-CT), and Doug Jones (D-AL), as well as Rep. Pramila Jayapal (D-WA), also put forward Denmark-like proposals. Congress passed a “pilot” version of the Denmark program in the CARES Act legislation of March of 2020, providing airlines with funds to cover the salary and benefits of the aviation workforce in exchange for agreeing to forgo involuntary layoffs through September 30, 2020. Airlines were also eligible for loans to cover non-payroll expenses such as fleet maintenance.

Though many policymakers in the US now support a Denmark-style approach, a number were initially uncomfortable with the idea of subsidizing businesses—even if the money was earmarked for payroll. This initial hesitance to support a “bailout” of business was surely a remnant of the Great Recession. However, the economic consequences of the pandemic are different than in previous crises in one key way: Most businesses who are shuttered or partially shuttered did not cause the pandemic. Rather, demand rapidly dried up as consumers worried about contracting the virus, businesses voluntarily shuttered to protect their employees from the virus, and shelter-in-place orders across the United States imposed by state and local governments to bend the curve and slow the spread of coronavirus resulted in the closure of many non-essential businesses. Businesses deemed essential were allowed to remain open, but the determination of which businesses qualified as essential varied by locality and was more or less independent of the economic crisis itself.

²⁸ Press Release, Sen. Cory Gardner, *Gardner, Hawley Partner on Coronavirus Economic Recovery Plan to Put Workers First*, May 14, 2020, at <https://www.gardner.senate.gov/newsroom/press-releases/gardner-hawley-partner-on-coronavirus-economic-recovery-plan-to-put-workers-first>.

In order to prevent mass layoffs and closures on Main Street, the SEERS program includes a small business payroll support and operations program. The “North Star” for the design of a small business program should be to get money out the door as quickly as possible. In an economic downturn, the risk of doing too little far outweighs the risk of doing too much. If the Treasury sends too much money to small businesses, or sends money to small businesses who don’t need it, they can collect overpayments on the back end. The easiest way to alleviate concerns about bailouts is to limit payroll subsidies to small businesses, which is exactly the approach the SEERS program takes. The SEERS small business program would consist of two components:

- First, eligible small businesses would receive support for payroll for any worker on payroll during the 30 days preceding Congress’s decision to activate the SEERS program, up to an annual salary cap (or wage equivalent in the case of contractors or hourly workers) of \$100,000.
- Second, eligible small businesses would get an additional 30 percent for operating expenses such as rent, employer-sponsored benefits like health care, and other ongoing obligations to creditors in order to help them keep the lights on.

Businesses would be eligible for the program if they experienced significant drops in revenue. Companies with revenue declines totaling at least 10 percent will be eligible for the program; companies with revenue declines of at least 20 percent will receive full payroll support up to the salary cap, plus an additional 30 percent for operating expenses; and companies with revenue declines between 10 and 20 percent will receive full payroll support, but will have the operating expenses discounted by the percentage difference between 10 and 20 percent. For example, a business with a 15 percent revenue decline will receive full payroll support and 25 percent support ($20-15=5$, $30-5=25$) for operating expenses.

The “North Star” for the design of a small business program should be to get money out the door as quickly as possible.

Revenue declines will be calculated by comparing expected quarterly revenue for the quarter in which the bill is enacted to the same quarter in the previous calendar year. Businesses not in operation for a full year can compare gross receipts to the earliest quarter of revenue for which they have submitted quarterly payroll and employment tax information to the IRS.

Eligibility for the SEERS small business program would be determined based on the Small Business Administration's size standards for companies, which are based on annual receipts and number of employees.²⁹ Any business that is considered a small business under the SBA's regulations will qualify for the payroll support program, and businesses would certify that they meet the size threshold on their Emergency Payment Form to facilitate speedy disbursement of funds. Sole proprietors and independent contractors will also be eligible, as will qualified non-profits. To ensure that there is no gap in coverage between the small business program and the Federal Reserve lending program described earlier in the paper, businesses who exceed SBA size standards but cannot use the expanded 13(3) program can petition Treasury for inclusion in the small business program. Finally, as a condition of receiving any small business payroll or operating funds, all applicants would have to agree to forgo pay increases (bonus or otherwise) for owners or senior management and to labor neutrality and non-interference in any existing collective bargaining agreement.

The passage of the SEERS program will immediately authorize the small business support program for one year, and Treasury will disburse six months of funds to eligible businesses within 10 days of the date of enactment. The second installment should be paid six months after the date of enactment. Treasury will disburse funds to the address on a qualifying business's Emergency Payments Form in the amount of qualified payroll submitted by the employer to the IRS on their quarterly tax return (Form 941) for the most recent quarter preceding the enactment of the SEERS Act, plus 30 percent for operating expenses.

The program should automatically renew on a six-month basis, so long as the Bureau of Economic Analysis's nominal personal consumption expenditures (PCE) estimates show three consecutive months that are 95 percent as high as the three-month average in the three months preceding the enactment of the SEERS program. Although the automatic stabilizers discussed below are pegged to the unemployment rate, this payroll support program interacts with the unemployment rate and is designed to keep the rate "artificially" low. It therefore needs to be tied to an unrelated economic indicator. The SEERS program will also authorize the small business program to extend for one additional six-month period after consumer demand has returned, but convert the grants to zero-interest loans so that businesses have a bit of cushion and security to ensure that the economic recovery is robust.

²⁹ 13 C.F.R. Pt. 121.

To ensure that certifying revenue losses does not slow the process of disbursing funds under the SEERS small business program, the IRS will create an online business portal populated with the payment information from the Emergency Payment Form. Businesses will simply need to certify via an online signature that they meet the revenue standard for the program, and funds will be disbursed. The IRS will review this revenue information on the following year's tax return and claw back any SEERS small business program overpayments that arise at that time.

AUTOMATIC STABILIZERS

A. The General Case

Although we can't predict what will cause the next downturn, or how long it will last, we do know that economic downturns result in job losses and income disruptions that make it difficult to afford the costs of necessities like food and housing. We don't need to wait to see exactly what shape a recession takes to start alleviating that hardship. We can make policy that does so automatically, regardless of whether the next downturn looks anything like the last one. Automatic stabilizers are one of the best tools policymakers can deploy now to ensure that our response to an economic downturn is properly calibrated to the scope of the crisis, whatever the next crisis may bring.³⁰

Economic downturns result in job losses and income disruptions that make it difficult to afford the costs of necessities like food and housing. We don't need to wait to see exactly what shape a recession takes to start alleviating that hardship.

An automatic stabilizer is any program that expands during an economic contraction and contracts during an economic expansion without requiring any intervention by Congress, either because it is available to anyone who qualifies or because it expands in lockstep with an economic indicator. Many safety net programs already function as automatic stabilizers since they are available to anyone who drops below a certain income threshold (like supplemental nutrition assistance) or experiences a qualifying event (like unemployment). This automatic assistance is critical to families' ability to weather an economic downturn, and is also an important part of the fiscal stimulus that keeps our economy from sinking deeper during downturns.

³⁰ HEATHER BOUSHEY, RYAN NUNN, AND JAY SHAMBAUGH. RECESSION READY: FISCAL POLICIES TO STABILIZE THE AMERICAN ECONOMY. (2019).

Although many existing automatic stabilizers are working well, there is ample room for improvement. For example, the generosity (i.e., size) of unemployment benefits is not currently tied to any macroeconomic indicator, and although families who fall below a certain income threshold are eligible for programs like Section 8 housing vouchers, which subsidize rent, the underfunding of rental assistance programs (and the fact that they are subject to annual appropriations and are therefore discretionary rather than mandatory spending programs) precludes them from functioning as stabilizers.

In order to ensure that we are on the best footing to weather a crisis, the SEERS program would set in motion automatic stabilizers for a wide swath of safety net programs, starting with the size of unemployment insurance benefits and supplemental nutrition assistance program (SNAP) benefits, and including expanded Temporary Assistance for Needy Families (TANF), broader cash assistance, rental assistance, funding for state and local governments, and a countercyclical federal match to compensate for shrinking state and local tax bases and budgets for programs including SNAP, Medicaid, TANF, and CHIP, at a minimum.³¹

The policy rationale for implementing automatic stabilizers is strong—there is no reason for policymakers to extend benefits at arbitrary intervals during recessions as they’ve done during this and past downturns. They can let economic indicators, like the unemployment rate, do the guesswork for them. It also takes time to get a bill through both chambers of Congress, and beneficiaries frequently fall through the cracks while they wait. Implementing automatic stabilizers would bypass congressional logjam and quickly get relief to families who need it most, thereby helping mitigate economic harm. Delayed assistance exacerbates the damage in crises.

The political rationale for automatic stabilizers is even stronger. Taking expansions of the safety net out of the equation when negotiating relief and recovery packages raises the floor for negotiations and allows Democrats to spend their political capital on policies that will build resilience for the long term rather than on fighting just to stop the bleeding. In the case of the current crisis, automatic stabilizers for unemployment insurance benefit increases and funding for states would have meant that Congress could have focused all of its attention on the health crisis by standing up a national testing board and supporting the development of a vaccine. Automatic stabilizers

³¹ Indivar Dutta-Gupta. IMPROVING TANF’S COUNTERCYCLICALITY THROUGH INCREASED BASIC ASSISTANCE AND SUBSIDIZED JOBS. IN HEATHER BOUSHEY, RYAN NUNN, AND JAY SHAMBAUGH. RECESSION READY: FISCAL POLICIES TO STABILIZE THE AMERICAN ECONOMY. (2019).

would ensure that fiscal stimulus is flowing and that the safety net is functioning as efficiently as possible during a crisis, and would help us make the most of scarce political and human capital.

B. Rental and Mortgage Assistance

More than 40 million Americans are now unemployed, and one of the most immediate problems they face is how to continue covering the cost of their single greatest monthly expense—rent or mortgage payments. According to recent estimates, up to 28 million renters (22.5 percent of all US households) are at risk of eviction or foreclosure because of the coronavirus.³² Housing instability, eviction, and homelessness are incredibly costly to individuals, families, and communities, and are linked to depression and other mental health problems, emergency room visits, long-term residential instability, lower earnings, and negative outcomes for children.³³ Homelessness is particularly problematic in a pandemic because it is impossible to quarantine if one does not have shelter.

Implementing automatic stabilizers for cash assistance and providing large and small businesses with financial relief through a payroll support program and bankruptcy reform will greatly decrease the housing insecurity households typically face during economic downturns. However, some families will still slip through the cracks of the safety net and will need rental assistance. Additionally, some economic downturns, like the Great Recession, result in dramatic declines in home prices, raising the prospect of a large number of defaults and foreclosures. The deleterious impacts of homelessness and eviction warrant a particularly aggressive response. SEERS implements four simple housing policies to keep Americans in their homes during economic downturns.

First, the SEERS program would trigger a cramdown provision. Congress and the Administration failed to meet the moment during the housing crisis of the Great Recession. Millions of families lost their homes, children were uprooted from their schools and communities, and many people are still dealing with the long-term implications of foreclosures to their credit and their livelihoods. The primary response to

³² Renae Merle, *Democrats have proposed \$100 billion for struggling renters. It may not be enough*, WASH. POST, May 13, 2020, at <https://www.washingtonpost.com/business/2020/05/13/rental-assistance-coronavirus/>.

³³ Robert Collinson & Davin Reed, *The Effects of Evictions on Low Income Households*, Dec. 2018, at https://www.law.nyu.edu/sites/default/files/upload_documents/evictions_collinson_reed.pdf.

the housing crisis in 2008 was a failed program called the Home Affordable Modification Program (HAMP), which relied on third-party intermediaries—banks—to voluntarily write down and modify mortgages. There is a better way.

Under current law, consumers cannot use bankruptcy to modify mortgage debt on their residences (although they can for investment properties). This means that consumers—unlike businesses—cannot modify interest rates, amortization schedules, or loan maturity dates in bankruptcy. It means that they cannot cure and reinstate a default on their mortgage loan absent entering into an onerous 3-5 year repayment plan for all of their debts. And it also means that consumers cannot “cram down” the mortgage principal on an underwater mortgage to bring it in line with collateral property’s market value, even though that is all the lender would recover in a foreclosure. Instead, the only mechanism that exists for clearing the mortgage market is foreclosure. Foreclosure sales add unnecessary transaction costs, and sales prices are inevitably depressed because buyers have no right to inspect the property before they bid, resulting in an overcorrection in the mortgage market.³⁴

The lack of a legal mechanism for dealing with negative equity matters not just to the homeowner, but to society. Negative equity is one half of the “double trigger” that results in foreclosure; a borrower with negative equity and impaired income because of the four “Ds”—death, disability, dismissal, or divorce—is likely to default on a mortgage and lose the home in foreclosure.³⁵ Foreclosures have enormous negative externalities on neighboring property values, and empty properties result in both greater costs for municipal governments and public health problems.³⁶ Moreover, borrowers cannot refinance underwater mortgages, so negative equity impedes monetary policy transmission through the mortgage market, one of the main transmission channels.³⁷

The SEERS program should amend the Bankruptcy Code to allow debtors to cram down and otherwise modify their mortgages under bankruptcy law. Congress tried and failed

³⁴ ADAM J. LEVITIN & SUSAN M. WACHTER, THE GREAT AMERICAN HOUSING BUBBLE: WHAT WENT WRONG AND HOW WE CAN PROTECT OURSELVES IN THE FUTURE 126 (2020).

³⁵ *Id.* at 183.

³⁶ *Id.* at 127.

³⁷ The Home Affordable Refinance Program (HARP) allowed homeowners with negative equity to refinance loans owned or guaranteed by Fannie Mae and Freddie Mac in the wake of the 2008 financial crisis. HARP was successful at reducing the number of mortgage defaults, but this was because Treasury effectively picked up the cost of the refinancings (the lower interest rates on refinancing were effectively losses of future income for Fannie and Freddie, although offset by lower defaults) through its capital support of Fannie and Freddie. Allowing mortgage modification in bankruptcy would enable refinancing of underwater mortgages, irrespective of whether they are owned or guaranteed by a government-sponsored enterprise, and without the federal government picking up the tab for a risk private lenders assume when they lend at high loan-to-value ratios.

to implement this provision during the housing crash of the Great Recession, and homeowners and the economy as a whole paid the price.³⁸ Because forgiving mortgage debt doubles as a fiscal stimulus (because families with a large debt overhang depress spending), a cramdown bill would also have helped kick-start the recovery.

Second, SEERS would authorize disaster Section 8 vouchers to immediately increase the stock of housing choice vouchers and help families pay their rent, slow the uptick in severely rent-burdened households (those who pay more than 50 percent of their income on rent) that typically results during a recession, and prevent evictions which have serious economic, psychological, and physical impacts on families (especially during a pandemic). In the aftermath of 9/11, Congress authorized the use of FEMA emergency funds (via the Stafford Act) to provide rental and mortgage assistance to families living in New York who were facing economic hardship as a result of the terrorist attacks. Economic disasters, like natural disasters, should trigger immediate release of emergency rental assistance.³⁹ The release of these additional vouchers could be triggered by either the passage of SEERS or tied to the unemployment rate to function as an automatic stabilizer. These vouchers would be available for one year or until the date at which the unemployment rate returns to pre-crisis levels—whichever is greater.

Economic disasters, like natural disasters, should trigger immediate release of emergency rental assistance.

Third, Congress should tie Department of Housing and Urban Development Economic Solutions Grants (ESG) funding to the unemployment rate, creating an automatic stabilizer for homelessness. ESG funds are currently allocated via the Community Development Grant Program, which is subject to Congress's annual appropriations process. Homelessness is always an issue, but it is particularly problematic in a pandemic. This program provides immediate funding for street outreach, homelessness prevention (including rental assistance and assistance for utilities for existing renters at

³⁸ Allowing cramdown would have little, if any, impact on mortgage interest rates. See Joshua Goodman & Adam J. Levitin, *Bankruptcy Law and the Cost of Credit: The Impact of Cramdown on Mortgage Interest Rates*, 57 J. L. & ECON. 139 (2014); Wenli Li, Ishani Tewari & Michelle J. White, *Using Bankruptcy to Reduce Foreclosures: Does Strip-Down of Mortgages Affect the Mortgage Market?* 55 J. FIN. SERV. RESEARCH 59 (2019).

³⁹ Section 8 is currently oversubscribed, only providing 25 percent of eligible homeowners with assistance. Disaster section 8 would be available to anyone with need during a crisis, and federal funds would be provided to local housing authorities to cover the full costs.

risk of becoming homeless), and rapid re-housing to help individuals living in shelters and other forms of temporary housing find and afford stable housing.

Fourth, the SEERS program would authorize a six-month national eviction and foreclosure moratorium for all mortgages and rental units. Although the other programs authorized by SEERS make rental instability less likely, the costs of evictions and foreclosures are high and should be prevented. Further, a national standard is preferable to the current patchwork of state and local moratoria. Implementing a national moratorium at the start of a crisis also gives families a little time and cushion to begin receiving the cash assistance and unemployment benefits they need to keep paying rent without fear of losing their homes.

It's time for a comprehensive approach to housing insecurity that is flexible enough to work in any downturn. The most flexible approach is to unlock emergency Section 8 vouchers and amend bankruptcy laws so debtors write down and modify distressed mortgages. Housing instability, eviction, and homelessness are incredibly costly to individuals and families, and have substantial effects on the mental and physical health of those impacted.⁴⁰ They also have substantial negative spillover effects on communities, harming neighboring property values and raising costs for local governments. Responses to preventing additional housing insecurity during downturns should therefore be aggressive, airing on the side of doing too much rather than too little. The SEERS suite of housing programs meets this challenge.

⁴⁰ Collinson & Reed, *supra* note 31.

CONCLUSION

The SEERS program is an integrated system for mitigating the effects of economic emergencies. The different components of the program—assistance for small and large businesses, payments systems and infrastructure, and automatic stabilizers—will enable the United States to get essential support to businesses and individuals swiftly and effectively, reduce favoritism, enhance transparency and fairness, and prevent downturns from getting worse.

Still, skeptics of the SEERS program are likely to raise a variety of counterarguments, some of which we anticipate and address here. First, some will argue that a standing program for Emergency Economic Resilience and Stabilization will normalize bailouts, thereby exacerbating the moral hazard problem and ultimately resulting in more bailouts. This criticism, however, misinterprets the design of the standing program. The standing program does not encourage or normalize bailouts. It creates a process—one that has significant costs for risk-takers—to address liquidity and insolvency in a major economic crisis. Because this process makes clear to actors in the private sector precisely what they should expect in a crisis, it should actually reduce the moral hazard problem and the need for bailouts. Private sector actors will know that they will not get a no-strings-attached bailout. Rather, they'll have to go through a bankruptcy process in order to get government assistance. This should have a disciplining effect on their behavior *ex ante*.

The different components of the program—assistance for small and large businesses, payments systems and infrastructure, and automatic stabilizers—will enable the United States to get essential support to businesses and individuals swiftly and effectively, reduce favoritism, enhance transparency and fairness, and prevent downturns from getting worse.

Other skeptics might argue that in any crisis moment, Congress will abandon the standing program, and draft a bespoke emergency response precisely because the standing authority will not be appropriately designed to address the conditions of the crisis at hand. While we acknowledge that no standing program is likely to perfectly

meet the conditions of every single crisis, there are many features of economic downturns that are foreseeable and common to all downturns. Having a pre-existing authority remains essential. Emergency response and disaster management professionals do not “wing it” every time there is a forest fire or a hurricane.⁴¹ Preparedness works, even if advance preparations may need some ultimate tailoring to the particular conditions presented.

The SEERS program creates a system for Congress to rely upon in a crisis, and to tailor, as needed, to the situation. Importantly, any divergences will need to be justified in the midst of the crisis, which will reduce the possibility of lobbyists or others using the emergency for unrelated ends.

The SEERS program offers a way out of a system of frequent bailouts that repeatedly benefit large companies, have few strings attached, and create public resentment and anger. In an economic emergency, SEERS will mean greater resilience and stability.

⁴¹ David A. Super, *Against Flexibility*, 96 CORNELL L. REV. 1375 (2011).

**THE
GREAT
DEMOCRACY
INITIATIVE**