AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

CONGRESSIONAL OVERSIGHT PANEL

OCTOBER OVERSIGHT REPORT *

EXAMINING TREASURY'S USE OF FINANCIAL CRISIS CONTRACTING AUTHORITY

OCTOBER 14, 2010.—Ordered to be printed

* Submitted under Section 125(b)(1) of Title 1 of the Emergency Economic Stabilization Act of 2008, Pub. L. No. 110–343

CONGRESSIONAL OVERSIGHT PANEL OCTOBER OVERSIGHT REPORT

CONGRESSIONAL OVERSIGHT PANEL

OCTOBER OVERSIGHT REPORT *

EXAMINING TREASURY'S USE OF FINANCIAL CRISIS CONTRACTING AUTHORITY

OCTOBER 14, 2010.—Ordered to be printed

* Submitted under Section 125(b)(1) of Title 1 of the Emergency Economic Stabilization Act of 2008, Pub. L. No. 110–343

U.S. GOVERNMENT PRINTING OFFICE

61–540 WASHINGTON : 2010

For sale by the Superintendent of Documents, U.S. Government Printing Office,
http://bookstore.gpo.gov. For more information, contact the GPO Customer Contact Center,
U.S. Government Printing Office. Phone 202–512–1800, or 866–512–1800 (toll-free). E-mail, gpo@custhelp.com.

CONGRESSIONAL OVERSIGHT PANEL

PANEL MEMBERS

SEN. TED KAUFMAN, *Chair*

RICHARD H. NEIMAN

DAMON SILVERS

J. MARK MCWATTERS

KENNETH TROSKE

CONTENTS

	Page
Executive Summary	1
Section One:	
A. Background	4
B. Provisions that Govern TARP Contracts and Agreements	6
1. EESA	6
2. Federal Acquisition Regulation	8
3. Interim Final Rule on TARP Conflicts of Interest	8
4. Treasury's Internal Policies	11
5. Recommendations by Oversight Bodies	11
C. How Treasury Decided What Functions to Outsource	13
1. In-house vs. Outsourcing Determinations	13
2. Distinctions Between Financial Agency and Contracting Arrangements	14
3. Additional Factors Affecting Initial Determinations	15
4. Unique Backdrop Weighed Heavily on Determinations	17
D. Description of Contracts and Agreements	17
1. Procurement Contracts	19
2. Financial Agency Agreements	25
E. Evaluation of Treasury's Contracting and Agreement Procedures and Process	28
1. Compliance with Legal Obligations	29
2. Compliance with Treasury's Internal Controls	31
3. Evaluation of How Treasury Selects Contractors and Agents	32
4. Evaluation of Treasury's Post-Award Management of Contracts and Agreements	33
F. Evaluation of Small Business Arrangements	39
G. Evaluation of Transparency and Accountability	43
1. Transparency	43
2. Accountability	46
H. Discussion of Conflicts of Interest	48
1. Treasury Gives Preferential Treatment to a Retained Entity	49
2. Retained Entity Serves Its Own Interest and Not the Public Interest	52
3. Retained Entity Serves its Clients' Interest and Not the Public Interest	53
4. Retained Entity Uses Nonpublic Information to Benefit Itself or its Clients	54
5. Does the IFR Alleviate Conflicts of Interest?	55
I. Activities of Other Oversight Bodies	56
J. Conclusion and Recommendations	57
Annex I: Fannie Mae and Freddie Mac: A Case Study	60
A. Role of Fannie Mae in HAMP	62
B. Role of Freddie Mac in HAMP	62
C. Analysis of Treasury's Selection of Fannie Mae and Freddie Mac	62
D. Discussion of Conflicts of Interest	66

Page

Annex I—Continued
E. Evaluation of Small Business Contracting 70
F. Evaluation of Treasury's Monitoring 71
G. Performance Assessment Made Challenging by Insufficient Reporting . 74
H. Evaluation of Transparency 74
I. Conclusion 76
Annex II: Tables 78
Section Two: TARP Updates Since Last Report 95
Section Three: Oversight Activities 121
Section Four: About the Congressional Oversight Panel 122

OCTOBER OVERSIGHT REPORT

OCTOBER 14, 2010.—Ordered to be printed

EXECUTIVE SUMMARY*

The Troubled Asset Relief Program (TARP) is a public program in design and purpose: created by Congress, paid for by taxpayers, and intended to stabilize the American economy. Yet private companies today perform many of the TARP's most critical functions, operating under 96 different contracts and agreements worth a total of $436.7 million. These private businesses do not take an oath of office, nor do they stand for election. They may have conflicts of interests, are not directly responsible to the public, and are not subject to the same disclosure requirements as government actors. As such, it is critical that Treasury scrupulously oversee its contractors and agents.

The TARP employs private agents through two means: procurement contracts, which are utilized across the federal government and are governed by the Federal Acquisition Regulations (FAR), and financial agency agreements, which are used only by Treasury and which allow businesses to perform inherently governmental functions on behalf of the United States. Under the law authorizing the TARP, Treasury has extraordinary discretion in using both instruments. For example, the law explicitly allowed Treasury to waive any provision of the FAR, and it arguably allowed Treasury to hire financial agents for a broader range of duties than previously permitted. Such broad authority helped Treasury to establish the TARP in great haste during a moment of crisis, but this expansive discretion must necessarily be accompanied by strict oversight.

In general, Treasury has taken significant steps to ensure that it has used private contractors appropriately, and indeed some ex-

*The Panel adopted this report with a 5–0 vote on October 13, 2010.

perts have praised Treasury for going above and beyond the usual standards for government contracting. Treasury provided for competitive bidding for most of its contracts, and it has established several layers of controls to monitor contractor performance and to prevent conflicts of interest. Further, despite the pressing needs of the financial crisis, Treasury complied with the FAR, although it could have waived its provisions.

This praise must be viewed in context, however. The government contracting process is notoriously nontransparent, and although Treasury appears to have performed well on a comparative basis, significant transparency concerns remain. For example, contractors and agents are immune to requests under the Freedom of Information Act. Contractors may hire subcontractors, and those subcontracts are not disclosed to the public. Important aspects of a contractor's work may be buried in work orders that are never published in any form. Further, Treasury publishes no information on the performance of contractors during the life of the contract. In short, as work moves farther and farther from Treasury's direct control, it becomes less and less transparent and thus impedes accountability.

The contracting process has also created confusion about the role of small businesses in administering the TARP. In one case, Treasury awarded a contract to a "small disadvantaged business," which in turn delegated roughly 80 percent of the contract to a "large business." Thus, although on the surface it appears that the contract is being performed by a small business, in actuality a large business is essentially responsible for performance. Additionally, the Panel is concerned by the lack of outreach by Treasury to find qualified minority-owned businesses to participate in the TARP. Although several minority-owned businesses have received TARP financial agency agreements, only one prime TARP contract has been awarded to a minority-owned business.

The largest TARP financial agency agreements were those with Fannie Mae and Freddie Mac to provide administration and compliance services for Treasury's foreclosure mitigation programs. As described in detail in the case study accompanying this report, these agreements raise significant concerns. Both Fannie Mae and Freddie Mac have a history of profound corporate mismanagement, and both companies would have collapsed in 2008 were it not for government intervention. Further, both companies have fallen short in aspects of their performance, as Fannie Mae recently made a significant data error in reporting on mortgage redefaults and Freddie Mac has had difficulty meeting its assigned deadlines.

The largest TARP contracts have gone to law firms, investment management firms, and audit firms. The nature of these firms' relationship to the financial system inevitably gives rise to a wide range of potential conflict issues, including the potential for conflicts of interest with these firms' other clients, self-interested behavior in the management of TARP contracts, and the misappropriation of sensitive market information. Treasury has taken these concerns seriously and performs regular reviews to prevent or mitigate any potential conflicts of interest, but the process relies primarily on contractors and agents to self-disclose their potential conflicts. As a result, the public has only limited assurance that all potential conflicts have been disclosed and addressed. Treasury

should develop an independent mechanism for monitoring conflicts that makes it less reliant on contractors and agents for information.

Concerns about private contracting are of particular significance given the scale of the involvement of contractors and agents in the TARP. Fannie Mae alone currently has 600 employees working to fulfill its TARP commitments. By comparison, Treasury has only 220 staffers working on all TARP programs combined. In other words, the vast majority of people working on the TARP today receive their paychecks from private companies, not the federal government. Although Treasury deserves credit for its efforts toward improving the contracting process, given the extensive involvement of private actors in a program of critical public significance, further improvements can and should be made.

SECTION ONE:

A. Background

Treasury's use of its contracting authority in the execution of its duties under the Troubled Asset Relief Program (TARP) has not caught the public's imagination to the same degree as some other TARP-related topics. But Treasury has expended significant amounts of money on obtaining important services from nongovernmental entities, and, in doing so, has raised important questions with respect to the extent to which such services should be outsourced and the best way to monitor non-governmental entities' performance of those services. These questions are not unique to Treasury and the TARP, and indeed some experts praise Treasury's performance in comparison to other government actors. While Treasury should be pleased with the praise it has received for its efforts, further improvements can and should be made in TARP contracting practices.

The Emergency Economic Stability Act of 2008 (EESA) authorizes Treasury to enter into financial agency agreements and procurement contracts in order to fulfill its duties under EESA.[1] Financial agency agreements allow Treasury to retain private companies to perform "inherently governmental" functions, while contracts are used to procure all other outside services Treasury requires to implement EESA.[2] This report examines Treasury's use of financial agency agreements and contracts to obtain services that Treasury cannot, or has chosen not to, perform itself. It evaluates the process by which Treasury decides to obtain services from others, the procedures Treasury has in place to fulfill its oversight responsibilities, and whether Treasury has the infrastructure to oversee its agreements and contracts properly. Additionally, this report considers in more detail the agreements with Fannie Mae and Freddie Mac for the Home Affordable Modification Program (HAMP), in light of the significant dollar amounts of those agreements and their centrality to that program, which the Panel has examined in several previous reports.[3]

Other TARP oversight bodies are auditing performance under agreements and contracts entered into by Treasury, and this report does not duplicate that audit work.[4] The Special Inspector General for the Troubled Asset Relief Program (SIGTARP) is also currently conducting an audit of professional services contract prices and re-

---

[1] 12 U.S.C. § 5211(c).

[2] The adoption of EESA introduced an element of legal uncertainty as to whether financial agency agreements must be used only for "inherently governmental" functions or if they can be used for a broader range of duties as well. For a more complete discussion of this uncertainty, see Sections B.1.b and E.1.b, *infra.*

[3] *See* Congressional Oversight Panel, *March Oversight Report: Foreclosure Crisis: Working Toward a Solution* (Mar. 3, 2009) (online at cop.senate.gov/documents/cop-030609-report.pdf) (hereinafter "March 2009 Oversight Report"); Congressional Oversight Panel, *October Oversight Report: An Assessment of Foreclosure Mitigation Efforts After Six Months* (Oct. 9, 2009) (online at cop.senate.gov/documents/cop-100909-report.pdf) (hereinafter "October 2009 Oversight Report"); Congressional Oversight Panel, *April Oversight Report: Evaluating Progress on TARP Foreclosure Mitigation Programs* (Apr. 14, 2010) (online at cop.senate.gov/documents/cop-041410-report.pdf) (hereinafter "April 2010 Oversight Report").

[4] The Government Accountability Office (GAO) will release a two-year report on TARP in early November, which will include a section on contracting; for a more detailed discussion of SIGTARP's activities, see Section I, *infra.*

cently completed a detailed examination of the Public-Private Investment Program (PPIP).[5]

In light of the pressing urgency of the financial crisis in the fall of 2008, EESA allowed the Secretary of the Treasury to waive any provision of the Federal Acquisition Regulations (FAR), which normally would govern Treasury's exercise of its contracting authority, and also arguably expanded Treasury's authority to designate financial agents.[6] There is some legal uncertainty as to whether EESA broadened Treasury's authority to execute financial agency agreements, discussed in more detail below.[7] As of September 30, 2010, Treasury had used its authority to enter into 15 financial agency agreements and 81 contracts, together worth $436.7 million in terms of obligated value.

These agreements and contracts range from the mundane purchasing of office chairs, to hiring asset managers to oversee Treasury's TARP investments, to the wholesale delegation of the administration of multi-billion dollar programs to outside entities.[8] Duties under the agreements and contracts are performed by private actors, who may be subject to conflicts of interests, who are not directly responsible to the public, and whose actions are not subject to the same disclosure requirements as government actors. Without the traditional accountability mechanisms available to the public for government actions, it is critical that Treasury scrupulously oversee its contractors and agents.

This report examines Treasury's use of the two instruments discussed earlier: financial agency agreements and procurement contracts (which the report refers to collectively as "arrangements").

- Financial agency agreements allow private companies to perform inherently governmental functions.[9] These agreements, permitted to Treasury since the National Bank Acts of 1863 and 1864, create an agency relationship between Treasury and a private company. The company acts on behalf of Treasury and is a fiduciary of the United States.[10] For example, the agreement between Treasury and AllianceBernstein L.P. to manage TARP investments is a financial agency agreement.[11]
- Procurement contracts are the standard instrument by which government agencies obtain goods and services from private companies. They are governed by the FAR. Although contracts

[5] Office of the Special Inspector General for the Troubled Asset Relief Program, *Selecting Fund Managers for the Legacy Securities Public-Private Investment Program* (Oct. 7, 2010) (online at www.sigtarp.gov/reports/audit/2010/Selecting%20Fund%20Managers%20for%20the%20Legacy%20Securities%20Public-Private%20Investment%20Program%2009_07_10.pdf) (hereinafter "SIGTARP Report on PPIP"). PPIP arrangements are, strictly speaking, recipient funding under a TARP program. Agreements and contracts involve the expenditure of money in return for services, whereas recipient funding is an investment from which Treasury expects a return.

[6] 12 U.S.C. § 5211(c); 12 U.S.C. § 5217(a).

[7] For a more complete discussion of this uncertainty, see Sections B.1.b and E.1.b, *infra.*

[8] *See* U.S. Department of the Treasury, *Listing of Procurement Contracts and Agreements Under EESA* (online at www.financialstability.gov/impact/contractDetail2.html) (accessed Oct. 12, 2010) (hereinafter "List of Procurement Contracts and Agreements Under EESA").

[9] *But see* discussion of whether such agreements must necessarily be for "inherently governmental" functions at Section E.1.b, *infra.*

[10] U.S. Department of the Treasury, *Procurement Contracts and Agreements* (Jan. 29, 2010) (online at www.financialstability.gov/impact/procurement-contracts-agreements.html) (hereinafter "Treasury Procurement Contracts and Agreements").

[11] *See* Annex II, contract number TOFA–09–FAA–0005; General Services Administration, Department of Defense, and the National Aeronautics and Space Administration, *Federal Acquisition Regulation,* at Subpart 7.503 (Mar. 2005) (online at www.acquisition.gov/Far/current/pdf/FAR.pdf) (hereinafter "Federal Acquisition Regulation").

may be used to obtain virtually any type of good or service, government agencies cannot allow contractors to perform functions that are "inherently governmental."[12] For example, the agreement for legal services between Treasury and Cadwalader Wickersham & Taft, LLP, is a procurement contract.[13]

On October 3, 2010, Treasury's authority under the TARP expired. This does not affect Treasury's ability to enter into new contracts and agreements, although its needs for such arrangements have changed.

The Congressional Oversight Panel is specifically required by EESA to examine "[t]he use by the Secretary of authority under this Act, including with respect to the use of contracting authority and administration of the program."[14] Several previous Panel reports have touched on the issue of contracting under the TARP,[15] but none have focused exclusively on the issue.

B. Provisions that Govern TARP Contracts and Agreements

1. EESA

As discussed above, under EESA and pre-existing law, the Secretary of the Treasury is authorized to use two separate mechanisms to employ private parties to provide goods and services necessary to the implementation of the statute. First, the Secretary may enter into contracts.[16] Second, the Secretary may designate financial institutions as "financial agents" to assist Treasury in implementing the statute.[17]

a. Contracting Authority

The Secretary's contracting authority under EESA includes contracts for services as well as contracts for goods.[18] EESA does not bar contractors from hiring subcontractors or impose any conditions on the subcontracting process. EESA authorizes the Secretary to waive "specific provisions" of the FAR, the regulation that typically governs the acquisition of goods and services and which is discussed in more detail below. This waiver authority was included to permit a more "streamlined process" if the Secretary determined that "urgent and compelling circumstances make compliance with such provisions contrary to the public interest."[19] Treasury has not, however, made use of this authority.[20] Treasury states that it

---

[12] *Id.* at Subpart 7.5.

[13] See Annex II, *infra,* contract number TOFS–09–D–0011.

[14] 12 U.S.C. § 5233(b)(1)(A)(i).

[15] April 2010 Oversight Report, *supra* note 3, at 86; October 2009 Oversight Report, *supra* note 3, at 44; Congressional Oversight Panel, *February Oversight Report: Valuing Treasury's Acquisitions,* at 12 (Feb. 6, 2009) (online at cop.senate.gov/documents/cop-020609-report.pdf).

[16] 12 U.S.C. § 5211(c)(2).

[17] 12 U.S.C. § 5211(c)(3).

[18] Contracts for services are permissible only if they are authorized by 5 U.S.C. § 3109, a provision governing the "employment of experts and consultants." *See* 12 U.S.C. § 5211(c)(2). EESA mentions only one potential contractor by name: the statute requires Treasury to consider the FDIC during the process of selecting asset managers for residential mortgage loans and residential mortgage-backed securities. 12 U.S.C. § 5217(c).

[19] 12 U.S.C. § 5217(a).

[20] Although Treasury has not waived any of the provisions of the FAR—and therefore the FAR applies to all of the TARP procurement contracts—it has used the expedited procedures prescribed in the FAR. Treasury conversations with Panel staff (Aug. 30, 2010).

determined it could accomplish its objectives in a timely fashion without the need for a waiver.[21]

b. Financial Agent Authority

EESA authorized Treasury to employ a second, separate regime to use private parties to assist with the statute's implementation: it permitted Treasury to designate "financial institutions" as "financial agents" to perform "all such reasonable duties related to this Act as financial agents of the Federal Government as may be required."[22] Historically, financial agents could be employed to perform only "inherently governmental" functions.[23] If an agency wanted to hire a private entity to perform non-governmental functions, it was required to use a procurement contract. It may be the case, however, that EESA broadened Treasury's authority to employ financial agents to an extent that Treasury is no longer constrained by this limitation. EESA authorizes the Secretary to take actions he "deems necessary to carry out the authorities in this Act, including, *without limitation,"* the designation of financial agents, and it states that those agents "shall perform *all such reasonable duties* related to this Act . . . as may be required."[24]

Unlike when it hires a contractor, an executive agency is not bound by the FAR when it hires a financial agent. As a result, there are essentially no restrictions on the process Treasury may use for selecting financial agents. Although financial agents exist outside the FAR's regulatory regime, the law is well settled that a financial agent must abide by the principles of agency law, since the financial agent acts an agent for the government, the principal. As a result, the fiduciary duties that would attach in any other principal-agent relationship attach to financial agents, including the duty of loyalty and the duty of care.[25] Treasury describes financial agents as "an extension of Treasury to act on behalf of the Government in order to address the unique and often urgent needs of TARP and OFS."[26] If a financial agent decides to engage a subcontractor to assist in the performance of the agreement, it is "responsible for the acts or omissions of its affiliates and contractors as if the acts or omissions were by the Financial Agent."[27]

---

[21] Treasury conversations with Panel staff (Sept. 16, 2010).

[22] 12 U.S.C. § 5211(c)(3).

[23] *Transactive Corp. v. United States,* 91 F.3d 232 (D.C. Cir. 1996).

[24] 12 U.S.C. § 5211(c)(3) (emphasis added).

[25] *See, e.g., United States v. Citizens & Southern National Bank,* 889 F.2d 1067, 1069 (Fed. Cir. 1989) ("[T]he government as principal and in its sovereign capacity delegates to its financial agents some of the sovereign functions that the government itself would otherwise perform. . . . The body of procurement law . . . by contrast, applies to Treasury only when it is acting as a commercial purchaser of goods and services."); Treasury Procurement Contracts and Agreements, *supra* note 10 ("Financial agents have the fiduciary obligation to protect the interests of the United States. Financial Agency Agreements entered into by Treasury do not constitute procurement contracts under the purview of Federal Acquisition Regulations.").

[26] Congressional Oversight Panel, Joint Written Testimony of Gary Grippo, deputy assistant secretary for fiscal operations and policy, and Ronald W. Backes, director of procurement services, U.S. Department of the Treasury, *COP Hearing on Treasury's Use of Private Contractors,* at 2 (Sept. 22, 2010) (online at cop.senate.gov/documents/testimony-092210-treasury.pdf) (hereinafter "Prepared Statement of Gary Grippo and Ronald Backes").

[27] *See, e.g.,* U.S. Department of the Treasury, *Financial Agency Agreement Between U.S. Department of the Treasury and The Bank of New York Mellon,* at 8 (Oct. 14, 2008) (Contract No. TOFA–09–FAA–001) (online at www.financialstability.gov/docs/ContractsAgreements/Bank%20of%20New%20York%20Mellon.pdf) (hereinafter "Financial Agency Agreement Between Treasury and BNY Mellon").

2. Federal Acquisition Regulation

Unless specifically exempted by statute or regulation, executive agencies attempting to use appropriated funds to acquire goods and services must comply with the FAR. The FAR is more than 1,900 pages long and contains eight subchapters and 53 parts. It includes four guiding principles:

(1) Satisfying the customer in terms of cost, quality, and timeliness of the delivered product or service;

(2) Minimizing administrative operating costs;

(3) Conducting business with integrity, fairness, and openness; and

(4) Fulfilling public policy objectives.[28]

The FAR governs areas as general as contractor selection, including requirements that certain contracts must be "set aside" for small businesses,[29] and as specific as notification procedures for the delivery of radioactive material.[30] It prohibits a contractor from offering a gratuity—defined as "an entertainment or gift"—to a government official in an attempt to secure a contract.[31] It also provides a variety of circumstances in which provisions may be suspended if "urgent and compelling" circumstances exist.[32] Individual federal agencies may also issue supplemental guidelines to assist with their implementation of the FAR, and Treasury states that it uses the "Department of the Treasury Acquisition Regulation supplement" as additional guidance for its TARP procurement contracts.[33]

The FAR does not prohibit contractors from hiring subcontractors to perform the duties specified in the contract.[34] While it requires contractors to receive consent from the contracting executive agency prior to entering certain types of subcontracts, the FAR itself generally does not apply to subcontractors.[35] Although the primary contractor has a direct relationship to the contracting agency, the subcontractor does not; it is bound by the contract between it and the primary contractor.

3. Interim Final Rule on TARP Conflicts of Interest

EESA required the Secretary to issue "regulations or guidelines necessary to address and manage or to prohibit conflicts of interest that may arise in connection with the administration and execution" of the statute.[36] In accordance with this provision, Treasury issued an Interim Final Rule (the IFR) on January 21, 2009.[37]

---

[28] Federal Acquisition Regulation, *supra* note 11, at Subpart 1.10.

[29] *See* Federal Acquisition Regulation, *supra* note 11, at Subpart 9.5. *See also* Section F, *infra.*

[30] Federal Acquisition Regulation, *supra* note 11, at Subparts 6, 9, 23.6.

[31] Federal Acquisition Regulation, *supra* note 11, at Subparts 3.202, 52.203–3(a).

[32] *See, e.g.,* Federal Acquisition Regulation, *supra* note 11, at Subpart 31.10.

[33] Treasury Procurement Contracts and Agreements, *supra* note 10.

[34] *See generally* Federal Acquisition Regulation, *supra* note 11.

[35] *See* Federal Acquisition Regulation, *supra* note 11, at Subpart 44 (stating that a consent is required in certain types of contracts, and in others the contracting officer "may require" consent if he determines that it "is required to protect the Government adequately because of the subcontract type, complexity, or value, or because the subcontract needs special surveillance.").

[36] 12 U.S.C. § 5218(a).

[37] U.S. Department of the Treasury, *TARP Conflicts of Interest,* 74 Fed. Reg. 3431–3436 (Jan. 21, 2009) (codified as 31 CFR § 31) (hereinafter "TARP Conflicts of Interest"). This Interim Final Rule followed Treasury's issuance of the Interim Guidelines for Conflicts of Interest on October 6, 2008, only three days after the passage of EESA. U.S. Department of the Treasury, *Interim Guidelines for Conflicts of Interest* (Oct. 6, 2008) (online at www.treas.gov/press/releases/hp1180.htm). Treasury has not yet issued a final rule, although it has indicated that it does

Many interested parties commented on aspects of the IFR.[38] Although the rule technically remains "interim," the public comment period ended on March 23, 2009, and in practice, the rule has the same binding force as any other agency regulation.[39] The rule applies to any "retained entity" that seeks or holds "contracts or financial agency agreements . . . for services under the TARP." It applies to subcontractors and consultants, but not to entities hired to provide "administrative services identified by the TARP Chief Compliance Officer" or to "special government employees."[40] The rule emphasizes that it does not replace provisions of the FAR and should instead be read as supplementing them.[41]

The IFR creates two separate schemes to govern two different types of conflicts: organizational conflicts of interest (OCIs) and personal conflicts of interest (PCIs). The rule defines an OCI as "a situation in which the retained entity has an interest or relationship that could cause a reasonable person with knowledge of the relevant facts to question the retained entity's objectivity or judgment to perform under the arrangement, or its ability to represent

---

plan to issue one. Treasury conversations with Panel staff (Sept. 23, 2010). At the Panel's hearing on contracting, Scott Amey of the Program on Government Oversight expressed concern that a final rule had not yet been issued. Congressional Oversight Panel, Testimony of Scott Amey, general counsel, Project on Government Oversight, *Transcript: COP Hearing on Treasury's Use of Private Contractors* (Sept. 22, 2010) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-092210-contracting.cfm) (hereinafter "Transcript Testimony of Scott Amey").

[38] During the 60-day public comment period, several organizations and individuals filed comments on the Interim Final Rule on TARP Conflicts of Interest. The bulk of these comments were submitted by contractors, potential contractors, and organizations that represent contractors or potential contractors. *See* Letter from Michael W. Mutek, chair, Section of Public Contract Law, ABA, & Karl J. Ege, chair, Section of Business Law, ABA, to the executive secretariat, Office of Financial Stability, U.S. Department of the Treasury, *Interim Rule on TARP Conflicts of Interest* (Mar. 24, 2009) (online at www.regulations.gov/search/Regs/home.html#documentDetail?R=090000648092db60) (stating that the Interim Final Rule is too cumbersome to follow, imposes unrealistic deadlines, needs more clarification and illustrative examples, and shifts too much of the work away from Treasury and onto the retained entities); Letter from Hugh Ching, Post-Science Institute, to the executive secretariat, Office of Financial Stability, U.S. Department of the Treasury, *Decisions Should Be Based On Expected Rate of Return, Not Just Conflict of Interest* (Mar. 23, 2009) (online at www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480929889) (stating that the government should focus on expected rates of return, not on conflicts of interest, and that conflicts of interest are only a problem when they reduce expected rates of return); Letter from PricewaterhouseCoopers LLP, to the executive secretariat, Office of Financial Stability, U.S. Department of the Treasury, *Interim Rule on TARP Conflicts of Interest* (Mar. 23, 2009) (online at www.regulations.gov/search/Regs/home.html#documentDetail?R=090000648092a315) (stating that the Interim Final Rule needs more clarification because conflict-of-interest standards must be clear and unambiguous); Letter from Mark R. Manley, senior vice president and deputy general counsel, AllianceBernstein, to the executive secretariat, Office of Financial Stability, U.S. Department of the Treasury, *TARP Conflicts of Interest—Comments on Interim Rule* (Mar. 23, 2009) (online at www.regulations.gov/search/Regs/home.html#documentDetail?R=09000064809290be) (stating that the Interim Final Rule is too burdensome and costly because it would require AllianceBernstein to reallocate a disproportionate amount of compliance resources); Letter from Ben A. Plotkin, executive vice president, Stifel Nicolaus, to the executive secretariat, Office of Financial Stability, U.S. Department of the Treasury, *TARP Conflicts of Interest: Interim Rule 31 CFR Part 31* (Feb. 18, 2009) (online at www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480931588) (stating that the Personal Conflicts of Interest section of the Interim Final Rule should be narrowed to focus on those retained entities whose financial obligations might actually give rise to a conflict of interest in connection with their performances of services).

[39] As discussed in more detail above, formal regulations are not the sole constraints on financial agents. As agents of the federal government, financial agents are bound by two primary fiduciary duties: a duty of loyalty and duty of care. The duty of loyalty encompasses a prohibition on self-dealing, which would prevent a financial agent from entering into many transactions that would raise conflict-of-interest questions.

[40] For the purposes of this provision, administrative services include commercially-available services, such as LexisNexis or other computer database services. No "special government employees" have been exempted under this provision. All "special government employees" are required to comply with Treasury's ethics processes. Treasury conversations with Panel staff (Oct. 4, 2010).

[41] TARP Conflicts of Interest, *supra* note 37.

the Treasury."[42] OCIs are prohibited unless they are disclosed to Treasury and either mitigated under a Treasury-approved plan or waived by Treasury.[43]

The rule defines a PCI as a "personal, business, or financial interest of an individual, his or her spouse, minor child, or other family member with whom the individual has a close personal relationship, that could adversely affect the individual's ability to perform under the arrangement, his or her objectivity or judgment in such performance, or his or her ability to represent the interests of the Treasury."[44] A retained entity must "ensure" that "all management officials" working on the contract or agreement do not have PCIs unless the conflict has been either "neutralized" by mitigation measures or waived by Treasury. All retained entities and their employees are prohibited from accepting certain gifts and "favors."[45]

The IFR includes several additional requirements that apply to the selection process. Retained entities are barred from making an offer of "future employment" to a Treasury employee and from giving "any money, gratuity, or other thing of value" to a Treasury employee. The rule also places limitations on the use of nonpublic information, stating that retained entities shall not "solicit or obtain" from a Treasury employee any nonpublic information that was "prepared for use by Treasury for the purpose of evaluating an offer, quotation, or response to enter into an arrangement."[46] These prohibitions are aimed at ensuring that the selection process is open, competitive, and fair.[47]

Treasury also has established a set of procedures to implement and enforce the principles articulated in the IFR. During the inception phase, before Treasury enters an arrangement, it considers the proposed work plan and the nature of the entity selected to do the work in order to devise a list of potential conflicts. Treasury includes provisions on conflicts of interest in the text of the arrangements after discussions with the entity, so that the provisions are individually tailored to each entity. These provisions include requirements that the entity self-disclose relevant information, requirements that are customized to match monitoring needs based on the entity's type of business. To ensure that such provisions were included in arrangements entered into prior to the promulgation of the IFR, those early contracts were renegotiated so as to incorporate the IFR. Treasury also reviews the mitigation plans developed by the entities to ensure that they are sufficient.[48] Treasury, and not the retained entity, is responsible for determining the

[42] 31 CFR § 31.201.
[43] 31 CFR § 31.211(a); 31 CFR § 31.211(e).
[44] 31 CFR § 31.201.
[45] 31 CFR § 31.213(a)(1).
[46] 31 CFR § 31.216(a).
[47] *See* Prepared Statement of Gary Grippo and Ronald Backes, *supra* note 26, at 4–5 ("Treasury works diligently to identify and prevent any potential conflicts of interest related to its use of financial agents and contractors within OFS. In enforcing the TARP conflicts of interest interim final rule (31 CFR Part 31), Treasury works with its contractors and financial agents, as well as independently, to identify and mitigate potential organizational and personal conflicts of interest that may arise during the retention of financial agents, the awarding of procurement contracts and blanket purchase agreements, and during the performance periods of such agreements and contracts.").
[48] Treasury conversations with Panel staff (Sept. 23, 2010). *See also* Prepared Statement of Gary Grippo and Ronald Backes, *supra* note 26, at 2.

sufficiency of the mitigation measures.[49] Treasury then engages in ongoing discussions with the entities to monitor their compliance, and it receives quarterly reports from them. If the business structure changes, for example, Treasury may revisit and revise the original mitigation plan. Finally, contractors and agents submit inquiries on conflicts issues, which Treasury tracks in a database. Treasury estimates that it receives an average of approximately 40 inquiries per month.[50]

4. Treasury's Internal Policies

Treasury developed a set of internal rules to provide additional guidance regarding its relationships with financial agents and contractors. While most procurement policies and procedures are described in detail in the FAR and in Department of the Treasury Acquisition Regulation (DTAR) supplements,[51] OFS supplements these policies and procedures with implementing guidance related to six areas: submitting purchase requests, Contracting Officer Technical Representative (COTR) nomination and file organization, contact and inquiries, web publications, contract and agreement distribution, and acquisition planning. The "Policies and Procedures" for Financial Agents cover seven separate areas: compensation procedure, guidance and direction procedure, oversight policy, selection and designation procedure, access control procedure, vendor approval, and performance measurement.[52] For the most part, these documents contain general information on aspects of financial agent selection, performance, and monitoring, but they do not add substantial specific detail to the information included in the financial agency agreements themselves. The "oversight policy" document, for example, states simply that Treasury is required to work to "ensure that service levels are being met."[53]

5. Recommendations by Oversight Bodies

SIGTARP and the Government Accountability Office (GAO) have also played a meaningful role in guiding Treasury's implementation of its contracting authority.

a. SIGTARP

During the early months of the TARP, SIGTARP made two recommendations related to the Secretary's contracting authority:

(1) That all TARP contracts be posted on the Treasury website; and

(2) That transparency and oversight-related language be inserted in recent TARP contracts.

---

[49] Congressional Oversight Panel, Testimony of Gary Grippo, deputy assistant secretary for fiscal operations and policy, U.S. Department of the Treasury, *Transcript: COP Hearing on Treasury's Use of Private Contractors* (Sept. 22, 2010) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-092210-contracting.cfm) (hereinafter "Testimony of Gary Grippo") ("[E]ven though we ask all our agents and contractors to identify conflicts and come up with plans, ultimately we are the ones who are determining whether the conflicts have been mitigated.").

[50] Treasury conversations with Panel staff (Sept. 23, 2010). *See also* Prepared Statement of Gary Grippo and Ronald Backes, *supra* note 26, at 2.

[51] *See* Section B.2, *supra.*

[52] Documents provided to Panel staff by Treasury staff (Aug. 27, 2010).

[53] U.S. Department of the Treasury, *Financial Agent Oversight Policy,* at 4 (Apr. 30, 2010) (hereinafter "Treasury Financial Agent Oversight Policy").

Treasury took steps to address these recommendations, as described in SIGTARP's initial report to Congress on February 6, 2009. According to SIGTARP, Treasury adopted the first recommendation "in full." With respect to the second recommendation, Treasury did not adopt such language in its initial contracts, but it did adopt it in some subsequent agreements with large financial institutions.[54] SIGTARP asserted that these subsequent agreements were "far superior than earlier contracts from an oversight perspective."[55]

b. GAO

In several of its reports, GAO provided Treasury with recommendations for improving its contracting procedures. For example, in its March 19, 2009 report on the "Status of Efforts to Address Transparency and Accountability Issues," GAO recommended that Treasury "expedite efforts to ensure that sufficient personnel are assigned and properly trained to oversee the performance of all contractors, especially for contracts priced on a time-and-materials basis."[56] Similarly, in its June 2009 report, GAO recommended that Treasury should "explore options for providing to the public more detailed information on the costs of TARP contracts and agreements, such as a dollar breakdown of obligations and/or expenses."[57] Several additional recommendations are included in other GAO reports. For example, GAO recommended that "[f]or contracting oversight . . . Treasury review and renegotiate existing conflict-of-interest mitigation plans, as necessary, to enhance specificity and conformity with the new interim conflicts of interest regulation and that it take continued steps to manage and monitor conflicts of interest and enforce mitigation plans."[58]

According to both Treasury and GAO, Treasury took meaningful steps to address several of these recommendations. In its February 24, 2009 and March 19, 2009 reports, for instance, GAO noted that "consistent with our recommendation about contracting oversight, Treasury has enhanced such oversight by tracking costs, schedules, and performance and addressing the training requirements of personnel who oversee the contracts."[59] Treasury also tracks some of these recommendations, noting the status of its progress and pro-

---

[54] Office of the Special Inspector General for the Troubled Asset Relief Program, *Initial Report to the Congress,* at 5 (Feb. 6, 2009) (online at www.sigtarp.gov/reports/congress/2009/SIGTARP_Initial_Report_to_the_Congress.pdf) (hereinafter "SIGTARP Initial Report to the Congress").

[55] *Id.* at 5.

[56] *See* U.S. Government Accountability Office, *Troubled Asset Relief Program: Status of Efforts to Address Transparency and Accountability Issues,* at 3, 12 (Mar. 19, 2009) (GAO–09–484T) (online at www.gao.gov/new.items/d09484t.pdf) (hereinafter "March 2009 GAO Report on Transparency and Accountability"). This recommendation was included in other GAO reports as well. *See, e.g.,* U.S. Government Accountability Office, *Troubled Asset Relief Program: Status of Efforts to Address Transparency and Accountability Issues,* at 3 (Feb. 24, 2009) (GAO–09–417T) (online at www.gao.gov/new.items/d09417t.pdf) (hereinafter "February 2009 GAO Report on Transparency and Accountability").

[57] U.S. Government Accountability Office, *Troubled Asset Relief Program: June 2009 Status of Efforts to Address Transparency and Accountability Issues,* at 84 (June 2009) (GAO–09–658) (online at www.gao.gov/new.items/d09658.pdf) (hereinafter "June 2009 GAO Report on Transparency and Accountability").

[58] *See, e.g.,* March 2009 GAO Report on Transparency and Accountability, *supra* note 56, at 13.

[59] February 2009 GAO Report on Transparency and Accountability, *supra* note 56, at 5; March 2009 GAO Report on Transparency and Accountability, *supra* note 56, at 4.

viding extensive detail on the steps it has taken to address the recommendations.[60]

C. How Treasury Decided What Functions to Outsource

1. In-house vs. Outsourcing Determinations

The acquisition decisions of the Office of Financial Stability (OFS), the office that oversees the TARP, are overseen by the OFS's Contract and Agreement Review Board (CARB), which is composed of program and procurement executives. CARB centralizes decisions regarding the office's contracting and financial agency requirements, serving as the deliberative body for determining whether to perform a function in-house or to outsource it.[61] This formalized process was established in March 2009, after the urgency of the initial stages of the financial crisis had subsided.

In testimony before the Panel, Treasury outlined the key factors that govern the decision-making process regarding the potential acquisition of contracting and financial agent services.[62] In addition to other issues, including the availability of resources in other parts of the federal government (which are explored in more detail below), Treasury cited three main factors that it considers in determining whether outside assistance is needed, either in the form of a contractor or a financial agent:

- Infrastructure: The ability of the government to build efficiently or leverage in-house resources may be overly expensive or unnecessary to scale for the particular task at hand. For example, Treasury does not have a trading desk to execute capital markets transactions or the extensive capital markets transaction experience or in-house expertise in certain industries (for example, the automotive industry) that would match that of a large law firm. Further, the utility of establishing long-term infrastructure for a program that by definition was billed as temporary was also a factor.
- Objective Third Party: Treasury may require an independent third party opinion to assess the valuation of an asset or the wisdom of a proposed transaction. This may be particularly im-

[60] Data provided by Treasury staff to Panel staff (Sept. 2, 2010). The list provided to Panel staff included only seven recommendations in total, derived from only two GAO reports: December 2008 and January 2009. Several of these recommendations were reiterated in later reports, such as the March 19, 2009 report. According to the data provided by Treasury staff, the status of all of these recommendations is "closed." However, while Treasury and GAO agree that Treasury has addressed several of the recommendations, it is not clear that the list provided to Panel staff is fully complete, as it omits the recommendation that Treasury provide more detailed information on TARP contracts and agreements. The Panel has received no information about whether Treasury is tracking progress on this recommendation.

[61] Once a decision to outsource is made, separate processes govern the procurements or financial agency agreements, which are discussed in more detail later in the report. In terms of deliverables, the process for these determinations are as follows (Treasury conversations with Panel staff (Sept. 16, 2010)):

a. Procurement contracts: For most contracts, the program officer who would like a contractor to perform a particular service will send a document outlining the scope of work to be performed to the relevant COTR, the specially certified officials who manage the contracts day to day. The COTR will then translate that scope of work into specific deliverables that will be included in the contract or task order. For complex or large contracts, Treasury has a more formal system that requires program officers to submit a work request.

b. Financial agency agreements: An informal process exists for determining specific deliverables for all financial agents other than Fannie Mae and Freddie Mac. For Fannie and Freddie, the process is more elaborate (and discussed in greater detail in Annex I, *infra*). Treasury maintains a deliverables list for both Fannie and Freddie. These lists are constantly updated to reflect Treasury's needs and are reviewed weekly by two committees.

[62] Prepared Statement of Gary Grippo and Ronald Backes, *supra* note 26, at 2–3.

portant to assess the financial and strategic assumptions underpinning contemplated transactions with taxpayer money (for example, similar to a fairness opinion provided by an independent financial advisor to the board of a company assessing a proposed transaction).

- Expediency or Timing Considerations: Particularly in the context of the crisis backdrop in the wake of the TARP's passage, efforts to build internal capabilities organically may have been prohibitively slow given the length of time needed to reach critical mass, as well as Treasury's expectation that TARP programs would be wound down as quickly as possible.

In discussions with Panel staff, Treasury addressed additional factors that often limit its ability to assume more work in-house, necessitating the use of contractual and financial agent resources.[63] (See Annex I for an example of the factors informing Treasury's decision to hire Fannie Mae and Freddie Mac.) These include the availability of in-house or other government agency expertise. While other agencies, such as the Federal Reserve Board (FRB) and the Federal Deposit Insurance Corporation (FDIC), may have staff with the appropriate expertise, Treasury explained that there are practical limitations associated with pursuing this route, given that other agencies are hesitant to "loan" key staff, particularly when that expertise is required in-house. A related factor is the difficulty in identifying and hiring the appropriate full-time staff (and the ability to terminate/reassign in-house employees after completion of the task), compared to the relative ease of seeking temporary outside help. In many instances, Treasury is more likely to outsource a potential task if there is limited long-term utility from the project (for example, its expected duration is less than six months).[64] In any case, Treasury did of course make selective hires of specialists to manage specific areas of the department's TARP mandate (restructuring specialists, for example), including financial agent and contracting service providers.

2. Distinctions Between Financial Agency and Contracting Arrangements

Decisions to task financial agents differ from contracting services, reflecting the recognition that contracting involves the "acquisition of goods and services from the marketplace," whereas financial agents "serve as an extension of Treasury to act on behalf of the Government in order to address the unique and often urgent needs of TARP and OFS."[65]

When determining whether to contract services, the following questions, outlined in Treasury testimony, are most important:

(1) Are the required goods and/or services other than something that is inherently governmental?

(2) Can the services be obtained at a competitive price from the private sector?

(3) Can the services be acquired without creating an immitigable conflict of interest?

---

[63] Treasury conversations with Panel staff (Sept. 16, 2010 and Oct. 4, 2010).

[64] Treasury conversations with Panel staff (Sept. 16, 2010).

[65] Prepared Statement of Gary Grippo and Ronald Backes, *supra* note 26, at 2–3. See Section E.3, *infra,* for discussion of contracting vs. financial agency agreements.

(4) Will it be more cost-effective, for duration or other reasons, to outsource the work? [66]

The decision to employ a financial agent focuses on the following two factors:

(1) Does the work entail the direct management of public assets, such as the purchase, valuation, custody, or disposition of investments or cash? (Financial agent authority is used to obtain the infrastructure, inherent capabilities, or special expertise of a financial institution.)

(2) Does the work entail close collaboration between Treasury and a provider such that a fiduciary relationship is required? Simply put, does OFS require the services of an agent who can act as an extension of Treasury? [67]

3. Additional Factors Affecting Initial Determinations

Treasury maintains that it will not engage a financial agent or contractor if it is unable to mitigate an identified conflict. In terms of potential conflicts of interest that would disqualify certain tasks from being outsourced to a particular entity,[68] Treasury stated that hiring a TARP recipient to manage TARP assets or a law firm that represented a client on the other side of a transaction with Treasury are examples of conflicts that cannot be mitigated.[69] In the cases of The Bank of New York Mellon Corporation (BNY Mellon) and Morgan Stanley, two TARP recipients, Treasury noted that BNY Mellon was not making investment decisions in its role as master custodian of the TARP,[70] and that Morgan Stanley had paid back its TARP funds prior to receiving the job of managing TARP assets.[71] It could be argued, however, that by taking government money in the first place, even if acceptance of the money was mandatory and it was subsequently repaid, certain TARP recipi-

---

[66] Prepared Statement of Gary Grippo and Ronald Backes, *supra* note 26, at 2.

[67] Prepared Statement of Gary Grippo and Ronald Backes, *supra* note 26, at 2–3.

[68] As discussed in more detail in Section H, *infra,* EESA does not require Treasury to bar all conflicts of interest outright. Rather, the statute permits Treasury to develop procedures to "address and manage or to prohibit" conflicts (see 12 U.S.C. § 5218(a)).

[69] Testimony of Gary Grippo, *supra* note 49; Treasury conversations with Panel staff (Sept. 23, 2010 and Oct. 4, 2010).

[70] Treasury contracted BNY Mellon's securities services unit to "provide the accounting of record for the portfolio, hold all cash and assets in the portfolio, provide for pricing and asset valuation services and assist with other related services. The Bank of New York Mellon will serve as auction manager and conduct reverse auctions for the troubled assets." *See* Bank of New York Mellon, *The Bank of New York Mellon Chosen to Assist the U.S. Department of the Treasury* (Oct. 14, 2008) (online at bnymellon.mediaroom.com/index.php?s=43&item=316). To date, BNY Mellon's actual duties performed under TARP have been limited to custodial services.

[71] While Morgan Stanley was not engaged as a financial advisor to Treasury in connection with its sale of Citigroup shares until March 29, 2010—after its $10 billion repayment of TARP funds on June 9, 2009 and the subsequent repurchase of its TARP warrant for $950 million on August 6, 2009—the firm was previously retained as a financial advisor to Treasury in connection with its restructuring of Fannie Mae and Freddie Mac on August 5, 2008. *See* U.S. Department of the Treasury, *Treasury Announces Plan to Sell Citigroup Common Stock* (Mar. 29, 2010) (online at www.treas.gov/press/releases/tg615.htm); Morgan Stanley, *Morgan Stanley Statement on Paying Back TARP Funds* (June 9, 2009) (online at www.morganstanley.com/about/press/articles/580e1eb2-54f3-11de-96f6-3f25a44c9933.html); Morgan Stanley, *Morgan Stanley Agrees to Repurchase Warrant from the U.S. Government* (Aug. 6, 2009) (online at www.morganstanley.com/about/press/articles/42d008d5-8209-11de-b5d1-6d6288639586.html); Morgan Stanley, *Morgan Stanley to Advise U.S. Department of the Treasury Regarding Fannie Mae and Freddie Mac* (Aug. 5, 2008) (online at www.morganstanley.com/about/press/articles/6742.html). Separately, the firm was also engaged by the Federal Reserve Bank of New York on October 16, 2008 in connection with the restructuring of AIG. *See* Federal Reserve Bank of New York, *Agreement Between Morgan Stanley and the Federal Reserve Bank of New York Regarding American International Group, Inc.* (Oct. 16, 2008) (online at www.nyfrb.org/aboutthefed/Morgan_Stanely_AIG.PDF).

ents had a special status that should have disqualified them from acting as a financial advisor in relation to TARP funds.

Conflict identification and mitigation efforts not only inform the competitive bidding process,[72] they are also addressed earlier in the process, shortly after an external need is identified, but before solicitations are released for proposals. OFS assesses the nature of potential conflicts, taking into account the business structure of likely offerors. Based on this analysis, OFS compiles contract language that is targeted to identifying likely conflicts at the outset of the process.[73] For both contracts and financial agency agreements, Treasury solicits information related to "actual, potential, or apparent organizational and personal conflicts of interest."[74] These inputs form the basis for conflict mitigation plans that are reviewed and approved by Treasury.

Treasury officials maintain that they have not identified any instances where wholesale potential conflicts within a certain segment of the industry prevented Treasury from following through on seeking outside assistance. And while OFS has disqualified individual contractors based on perceived conflicts in the bidding process, Treasury informed the Panel that there have been no instances of financial agents that had otherwise been selected who have been rejected based on conflicts that have been uncovered during the process.[75]

Treasury also claims that eligibility for financial agent roles is limited to institutions "without material or debilitating regulatory findings" or "any findings that would represent a risk to Treasury."[76] Treasury noted that there are procedures in place, supplemented by an internal information database, that allow "appropriate information-sharing mechanisms" with other regulators to assess if there is a potential reputational problem for Treasury.[77]

In the contracting realm, issues related to reputational risk may be handled differently; reputational risk may be defined somewhat narrowly to focus on problematic business units or broad-based financial wrongdoing. For example, although Fannie Mae and Freddie Mac were awarded financial agency agreements after they went into government receivership, the agreements were for functions that did not rely on credit risk assessments. (It is difficult to envision a scenario wherein these contracts had any material bearing on either firm's financial health, given the relative small size of the contracted amount, in the context of the more than $90 billion in losses reported between the two firms in 2009.)[78]

---

[72] Conflicts are discussed in greater detail in Sections G and H, *infra*.

[73] Treasury conversations with Panel staff (Sept. 23, 2010).

[74] Prepared Statement of Gary Grippo and Ronald Backes, *supra* note 26, at 5.

[75] Treasury conversations with Panel staff (Sept. 23, 2010).

[76] Testimony of Gary Grippo, *supra* note 49.

[77] Testimony of Gary Grippo, *supra* note 49. The quotations specifically reference determinations for financial agents, although procedures for contractors are similar. Treasury conversations with Panel staff (Oct. 4, 2010).

[78] The revenue from the TARP contracts for Fannie Mae and Freddie Mac had no material impact on either firm's financial results given that both firms suffered aggregate losses of $93.6 billion in 2009. As of October 8, 2010, $111.3 million and $79 million have been expended through Treasury's TARP financial agency agreements with Fannie Mae and Freddie Mac, respectively. This represents 2.2 percent of Fannie Mae's and 0.5 percent of Freddie Mac's 2009 net revenue. While the $111.3 million expended under the TARP contract with Fannie Mae represented 14.4 percent of the firm's $773 million earned from fees and other income in 2009, the amount is still diminutive when compared to total revenues.

To minimize the potential conflict between bank regulators and policymakers, financial agent and contracting decisions are vested with non-regulatory offices within Treasury (i.e., outside the Office of the Comptroller of the Currency and the Office of Thrift Supervision), with determinations made by career government officials rather than policy officials or political appointees.[79]

4. Unique Backdrop Weighed Heavily on Determinations

An assessment of Treasury's decisions to seek outside help with implementing and managing TARP versus staffing projects internally must necessarily be viewed in the context of the emergency backdrop following the passage of EESA. This backdrop understandably altered the decision tree that would have otherwise held sway. The expertise, infrastructure, and associated time-to-market required for Treasury to achieve the necessary scale within its infrastructure were compromised by the fast-moving nature of the crisis. This process was further complicated by the broad fallout of the crisis, which arguably left few financial institutions (and potential contractors or financial agents) that could claim not to have benefited from either direct or indirect government support.[80] Finally, building a significant in-house infrastructure would not have been consistent with the intent of EESA, which established TARP as a temporary program to stabilize the financial system. Accordingly, the actions by Treasury reflect a bias to push hard to mitigate potential conflicts versus building out internal resources or leveraging other government agencies.

D. Description of Contracts and Agreements

There are 81 TARP-related procurement contracts awarded pursuant to the FAR and 15 financial agency agreements awarded

---

Drilling down further, looking at pre-crisis net revenue for each firm, the expended amount of the Fannie Mae TARP contract represented 1.0 percent of the average 2004–2006 net revenue while the expended amount of the Freddie Mac TARP contract constituted 1.2 percent of 2004–2006 net revenues. Net revenues are calculated here as the sum of net interest income and non-interest income. Federal National Mortgage Association, *Form 10–K for the Fiscal Year Ending December 31, 2009,* at 262 (Feb. 26, 2010) (online at www.sec.gov/Archives/edgar/data/310522/000095012310018235/w77413e10vk.htm); Federal Home Loan Mortgage Corporation, *Form 10–K for the Fiscal Year Ended December 31, 2009,* at 57 (Apr. 12, 2010) (online at www.sec.gov/Archives/edgar/data/1026214/000102621410000019/f71244e10vkza.htm); Federal National Mortgage Association, *Form 10–K for the Fiscal Year Ending December 31, 2006,* at F–4 (Aug. 26, 2007) (online at www.sec.gov/Archives/edgar/data/310522/000095013307003508/w36762e10vk.htm); Federal Home Loan Mortgage Corporation, *2006 Annual Report,* at 96 (2006) (online at www.freddiemac.com/investors/ar/pdf/2006annualrpt.pdf).

[79] See Section E.2, *infra,* for discussion of Treasury's internal controls.

[80] The statute's language is somewhat ambiguous as to whether Treasury can seek the assistance of non-U.S. financial agents and contractors. A financial institution is defined as an institution "established and regulated under the laws of the United States . . . and having significant operations in the United States, but excluding any central bank of, or institution owned by, a foreign government." 12 U.S.C. 5202(5). This definition might be read to include a financial institution incorporated and regulated in the United States, but owned by a non-U.S. institution.

Treasury's financial agency agreement with AllianceBernstein, a subsidiary of a French holding company (AXA), is the only example of a financial agency agreement with a foreign-owned institution (AllianceBernstein, in turn, subcontracted work to the U.S. subsidiary of Deutsche Bank). EESA's financial institution definition does not apply to contracting, which can include non-financial institutions. However, the governing language on the contracting side permits foreign contracting under certain circumstances (e.g., *Federal Acquisition Regulation,* at Subpart 25).

In any case, as explored in the Panel's August 2010 report, national distinctions in the global financial marketplace are increasingly difficult to delineate, given the cross-border nature of markets and operations. *See* Congressional Oversight Panel, *August Oversight Report: The Global Context and the International Effects of the TARP* (Aug. 12, 2010) (online at cop.senate.gov/documents/cop-081210-report.pdf) (hereinafter "August 2010 Oversight Report").

pursuant to the financial agent authority granted under EESA.[81] Under these arrangements, there are a total of 98 subcontracts, 40 of which are procurement contracts, and the remaining 58 of which are financial agency agreements.[82] The principal metrics used to describe the contracts and agreements are "obligated value" and "expended value." "Obligated value" is the amount that Treasury is obliged to pay, provided that the contractor or financial agent performs in accordance with the terms of the arrangement,[83] while "expended value" is the amount that Treasury owes for goods and services already delivered under the contract or agreement.[84] The obligated value of these contracts and agreements is $436.7 million, with $109.3 million attributable to procurement contracts and $327.4 million attributable to financial agency agreements.[85] The expended value under these contracts and agreements totals $363.0 million, with procurement contracts accounting for $87.0 million and financial agency agreements accounting for the remaining $276.0 million.

In terms of obligated value, Fannie Mae is the largest financial agent, with $126.7 million, while PricewaterhouseCoopers LLP (PricewaterhouseCoopers) is the largest contractor, with $25.8 million of obligated value. Figure 1 lists the largest contractors and financial agents providing services under different arrangements with OFS.

---

[81] Unless otherwise noted, all information in this Section was derived from data updated through September 30, 2010 and provided by Treasury to the Panel staff (Oct. 8, 2010). Base contracts, novations, modifications, and task orders all count as a single contract. However, task orders under Treasury contracts for Phacil Inc. and the MITRE Corporation were counted as separate contracts. There were two novations, a contract with the law firm Thacher Proffitt & Wood was novated to a contract with Sonnenschein Nath & Rosenthal LLP, and a contract with McKee Nelson LLP was novated to Bingham McCutchen LLP. For the purposes of this analysis, the novations count as a single contract. The total number of procurement contracts includes eight contracts, which were awarded by other branches within the Procurement Services Division pursuant to a common Treasury service level and subject to a reimbursable agreement with the Office of Financial Stability, or were awarded by other agencies on behalf of the Office of Financial Stability and not administered by the Procurement Services Division. The obligated and expended values of these eight contracts are approximately $477,000 and $143,000, respectively. These contracts were not included in the analysis in Sections D.1 and F, *infra*.

[82] The information on subcontractors was derived solely from information produced by Treasury. For procurement contracts the information is as of July 31, 2010. Treasury indicated that it is the responsibility of the prime contractor to report any information on the subcontracts and the subcontractors. Treasury's view is that since there is no privity of contract between Treasury and the subcontractors, financial agents and contractors are responsible for the management of the subcontractors. For the financial agency agreements, Fannie Mae engaged several subcontractors not listed, but payment was made to them based on arrangements between Fannie Mae and OFS. Treasury conversations with Panel staff (Sept. 16, 2010). *See* Sections D.1.f and D.2.b, *infra*.

[83] For procurement contracts, the obligated value is the value indicated on either the contract or task order. In a fixed price contract, the contractor is entitled to invoice for the full obligated value (the negotiated price), however, for labor hour or time and materials contracts, the contractor can only invoice for the hours actually worked plus allowable and allocable costs incurred. For financial agency agreements, the obligated value represents the funds that are specifically allocated by Treasury to a given agreement based on Treasury's estimate of the funds that will be earned pursuant to the compensation terms of the financial agency agreements. Treasury conversations with Panel staff (Oct. 4, 2010).

[84] The expended value includes both the value that has been invoiced by the contractor/financial agent and, to the extent Treasury has the information, work that has been performed but has yet to be invoiced. Treasury conversations with Panel staff (Sept. 16, 2010 and Oct. 4, 2010).

[85] Interagency agreements were not included in this analysis. These agreements have an obligated value of $76.5 million, and the bulk of that value relates to office space, personnel, various administrative functions, and oversight, including $53.5 million for administrative support in the form of financial management, human resources, information technology, general counsel and other reimbursable support services and $23.0 million in oversight costs. However, $7.8 million of that obligated value stems from an agreement between Treasury and the Pension Benefit Guarantee Corporation, which then subcontracted that financial advisory services work for the TARP's Automotive Industry Financing Program (AIFP) to Rothschild, Inc. Documents provided by Treasury to Panel staff (Oct. 8, 2010).

FIGURE 1: LARGEST CONTRACTORS AND FINANCIAL AGENTS BY OBLIGATED VALUE

Contractor	Type of Arrangement	Obligated Value	Potential Contract Value [86]	Expended Value [87]
Fannie Mae	Financial Agency Agreement.	$126,712,000		$111,339,451
Freddie Mac	Financial Agency Agreement.	88,850,000		79,296,499
The Bank of New York Mellon Corp.	Financial Agency Agreement.	28,495,412		23,777,002
PricewaterhouseCoopers LLP	Contract	25,781,474	$50,252,231	23,525,631
Morgan Stanley & Co.	Financial Agency Agreement.	23,577,000		13,175,423
AllianceBernstein L.P.	Financial Agency Agreement.	22,399,943		21,207,253
Cadwalader Wickersham & Taft LLP	Contract	21,939,919	147,645,619	19,069,083
Ernst & Young LLP	Contract	11,397,968	33,391,392	10,710,092
FSI Group LLC	Financial Agency Agreement.	11,102,500		10,770,000
Simpson Thacher & Bartlett LLP	Contract	10,827,988	21,025,000	5,479,614
Total		**$371,084,204**	**N/A**	**$318,350,048**

[86] See footnote 89, *infra,* for a more complete discussion of the term ''potential contract value.''

[87] The expended value does not include $3.9 million attributable to Cadwalader as a subcontractor under a procurement agreement and $3.4 million and $21.5 million to PricewaterhouseCoopers and Ernst & Young, respectively, for subcontract work performed under financial agency agreements.

A complete list of the procurement contracts and financial agency agreements appears as Annex II to this report.

1. Procurement Contracts

To date, Treasury has entered into 73 procurement contracts with 53 contractors; 46 of those contracts are currently active.[88] The total obligated value under all the procurement contracts is $108.8 million, and the total potential contract value is $407.3 mil-

[88] Eight contracts, which were awarded by other branches within the Procurement Services Division pursuant to a common Treasury service level and subject to a reimbursable agreement with the Office of Financial Stability, or were awarded by other agencies on behalf of the Office of Financial Stability and not administered by the Procurement Services Division with a total obligated value of approximately $477,000, were not considered as part of this analysis. The five contracts with other branches of the procurement services division were with American Furniture Rentals, Immix Technology (two contracts), Heery International, and the Washington Post. In addition the other three contracts were entered into with the IRS and they were with CSC Systems and Solutions, Turner Consulting and KnowledgeBank. Active contracts are those contracts that have a performance end date after September 30, 2010.

lion.[89] Active contracts account for $282.5 million of the remaining potential contract value.[90]

a. Types of Procurement Contracts

Treasury's procurement contracts have two different structures: (i) task or delivery order contracts; and (ii) definitive contracts.[91] Task or delivery order contracts are structured such that exact times and exact quantities of future deliveries and services are not known at the time of the contract award, and that information is supplied later through the use of task and/or delivery orders.[92] Task or delivery order contracts do not have fixed fees for services, and the value of the contracts appears in the specific task orders and modifications to those contracts.[93] For example, OFS's contract with Debevoise & Plimpton for restructuring legal services is a task or delivery order contract.[94]

---

[89] The "potential contract value" is the program ceiling for task or delivery order contracts and the total amount of the award for definitive contracts. For the three contracts without a ceiling, it was assumed that the potential contract value was equal to the potential contract values that Treasury indicated were recorded on task orders and modifications. For multiple contract awards, the total program value is counted once for aggregate numbers, while on an individual basis the potential contract value is included for each awardee as if it would receive task orders for the full amount of the award. Language in many of the contracts indicates that a firm could receive the entire award. For example, in each of the three contracts for a multiple award with a total potential contract value of $20,687,500, the contract stated that, "the contract ceiling value of all contracts awarded under this solicitation, individually and collectively, is $20,687,500." *See, e.g.,* U.S. Department of the Treasury, *Contract Between U.S. Department of the Treasury and Debevoise & Plimpton, LLP* (July 30, 2009) (Contract No. TOFS–09–D–0012) (online at www.financialstability.gov/docs/ContractsAgreements/Debevoise%20&%20Plimpton.pdf) (hereinafter "Contract Between Treasury and Debevoise & Plimpton"). However, each awardee under a multiple award IDIQ contract must receive a guaranteed minimum; therefore the total potential contract value is slightly less than the full program amount. Since these amounts are relatively small (and not always denoted in terms of dollars), they were not factored into the potential contract ceilings used. Treasury indicated that it would be unlikely that one contractor would receive the full potential contract value in a multiple award contract or that, in fact, the full potential value of the program would be expended. However, Treasury also indicated that if one firm consistently proposes outstanding technical or management approaches, a positive record of past performance, and competitive pricing, they may win more task orders than other contractors. Treasury conversations with Panel staff (Sept. 28, 2010 and Oct. 4, 2010).

[90] This amount is calculated by subtracting the obligated value from the potential contract value for all contracts with a performance end date after September 30, 2010. The remaining potential contract value does not include the potential contract value for the three contracts without ceilings. Four of the multiple award contracts account for $235.4 million of the remaining potential contract value.

[91] For the purposes of this analysis, "task or delivery order contracts" includes both contracts classified as indefinite delivery/indefinite quantity (IDIQ) contracts and blanket purchase agreements (BPAs) placed against multiple award schedules under the FAR. Federal Acquisition Regulation, *supra* note 11, at Subparts 16.504 and 8.405–3. The principal difference derives from the sourcing; IDIQ contracts are new contracts formed for a specific purpose based on a "statement of work," whereas BPAs piggyback on existing government contracts found on the GSA Schedule. See Section D.1.d, *infra.*

[92] Under the FAR, an IDIQ contract "provides for an indefinite quantity, within stated limits, of supplies or services during a fixed period" and a BPA is a mechanism used to "fill repetitive needs." Federal Acquisition Regulation, *supra* note 11, at Subparts 16.50(a) and 8.405–3.

[93] *See* Federal Acquisition Regulation, *supra* note 11, at Subparts 8.405–3, 16.504, 16.505, and 16.702. However, the IDIQ contracts are required to have a minimum amount that is not de minimis. For instance, for the legal contracts, the minimum has been expressed in terms of dollar amounts and hours of work. A contract with the law firm Debevoise & Plimpton LLP had a minimum dollar amount of $25,000, while a contract with the law firm of Sonnenschein Nath & Rosenthal LLP has a guaranteed minimum of 100 labor hours. *See, e.g.,* Contract Between Treasury and Debevoise & Plimpton, *supra* note 89; U.S. Department of the Treasury, *Contract Between U.S. Department of the Treasury and Sonnenschein Nath & Rosenthal, LLP* (Dec. 10, 2008) (Contract No. TOS09–014C) (online at www.financialstability.gov/docs/ContractsAgreements/Sonnenschein%20TOS09-014C%20redacted.pdf).

[94] Contract Between Treasury and Debevoise & Plimpton, *supra* note 89. There has been one modification under this contract (to extend the contract term) and one task order with an obligated value of $159,175.

OFS designates contracts with defined terms as definitive contracts.[95] OFS has entered into the following types of definitive contracts: cost-reimbursement plus fixed price, fixed price, fixed price or time, and materials and labor-hour. Fixed price contracts have been used, for example, for the purchase of office equipment.[96]

OFS has awarded 48 task or delivery order contracts and 25 definitive contracts, accounting for obligated values of $101.9 million and $6.9 million, and potential contract values of $398.1 million and $9.2 million, respectively.[97]

The majority of the task or delivery order contracts have potential contract values.[98] Of the 48 task or delivery order contracts, 45 have these ceilings,[99] and three have no potential contract value specified in the base contracts.[100] The potential contract values range from $250,000 to $100.0 million.

OFS has awarded 25 definitive contracts awarded to specific contractors.[101] The total obligated value and total potential contract value under these contracts is $6.9 million and $9.2 million, respectively. The potential value under these contracts ranges from less than $3,000 to $2.7 million.

The FAR uses different mechanisms to foster competition. For example, for task or delivery order contracts not issued under the

---

[95] Federal Acquisition Regulation, *supra* note 11, at Subparts 16.2, 16.3, and 16.6.

[96] U.S. Department of the Treasury, *Contract Between U.S. Department of the Treasury and Herman Miller, Inc.* (Apr. 17, 2009) (Contract No. TOFS–09–O–0003) (online at www.financialstability.gov/docs/ContractsAgreements/Herman%20Miller.pdf); U.S. Department of the Treasury, *Contract Between U.S. Department of the Treasury and Whitaker Brothers Business Machines, Inc.* (Jan. 27, 2009) (Contract No. TDOX090038) (online at www.financialstability.gov/docs/ContractsAgreements/Whitaker%20Brothers%20Bus%20Machines%20Contract.pdf).

[97] *See* Section B, *supra.* Based on the information provided by Treasury, the Phacil task order was considered a task or delivery order contract and the MITRE arrangement was considered a definitive contract. For this analysis, the contract with Locke Lord Bissell & Liddell, LLP was considered a task or delivery order contract, based on the language of the contract even though it was classified as a definitive contract by Treasury. U.S. Department of the Treasury, *Contract Between U.S. Department of the Treasury and Locke Lord Bissell & Liddell, LLP* (Feb. 12, 2009) (Contract No. TOS0922) (online at www.financialstability.gov/docs/ContractsAgreements/Locke%20CONTRACT(FINAL)%2002′12′09.pdf). The difference between the obligated and potential values for the definitive contracts is primarily due to the availability of options under two contracts; one for the lease of parking spaces and the other for a subscription for financial, regulatory and market data, and services. *See* U.S. Department of the Treasury, *Contract Between U.S. Department of the Treasury and Colonial Parking, Inc.* (Jan. 7, 2009) (Contract No. TOS09–017) (online at www.financialstability.gov/docs/ContractsAgreements/Colonial%20Parking,%20Inc.%20Contract.pdf); U.S. Department of the Treasury, *Contract Between U.S. Department of the Treasury and Colonial Parking, Inc.* (Sept. 30, 2009) (Contract No. TOFS–09–O–0016) (online at www.financialstability.gov/docs/ContractsAgreements/Colonial%20Parking,%20Inc.%20Contract.pdf).

[98] Under the FAR, IDIQ contracts have a "stated limit" where quantity limits may be stated as number of units or as dollar values; however, BPAs "shall address the frequency of ordering, invoicing, discounts, requirements (e.g. estimated quantities, invoicing, discounts, requirements (e.g. estimated quantities, work to be performed), delivery locations, and time." Federal Acquisition Regulation, *supra* note 11, at Subpart 16.50.

[99] Twelve contracts have been modified to increase the potential contract value.

[100] All three of those task or delivery order contracts are BPAs that were awarded under a GSA Schedule Competition. The contracts were with PricewaterhouseCoopers LLP, Ernst & Young LLP, and FI Consulting Inc. with obligated values of $24.5 million, $11.4 million, and $1.9 million, respectively. U.S. Department of the Treasury, *Blanket Purchase Agreement Between U.S. Department of the Treasury and PricewaterhouseCoopers* (Oct. 8, 2008) (Contract No. T2009–TARP–0001) (online at www.financialstability.gov/docs/ContractsAgreements/PWC%20T2009TARP0001%20redacted.pdf); U.S. Department of the Treasury, *Blanket Purchase Agreement Between U.S. Department of the Treasury and Ernst & Young, LLP* (Oct. 18, 2008) (Contract No. T2009–TARP–0002) (online at www.financialstability.gov/docs/ContractsAgreements/ErnstYoung%202009-TARP-0002%20redacted.pdf); U.S. Department of the Treasury, *Contract Between U.S. Department of the Treasury and FI Consulting, Inc.* (Mar. 31, 2009) (Contract No. TOFS–09–B–0001) (online at www.financialstability.gov/docs/ContractsAgreements/FI%20Consulting.pdf).

[101] A complete list of these contracts is included as Annex II, *infra.*

GSA schedule, the FAR encourages multiple award contracts.[102] Furthermore, when contracts are issued under multiple award task or delivery order contracts or the GSA schedule, unless an exemption applies, the FAR requires that there be a fair opportunity for all eligible contractors to compete.[103] Under a multiple award contract, contract awards are made to two or more contractors under a single solicitation. Seven multiple awards account for 30 of the 48 task or delivery order contracts. The potential program values of the multiple awards range from $5.0 million to $100.0 million, and the total value of these contract awards is $289.2 million. Of the $42.3 million in obligated value under the multiple awards, $17.5 million is attributable to legal services for the Automotive Industry Financing Program performed by Cadwalader.[104]

b. Programs to which Contracts Relate

Some procurement contracts relate to a specific TARP program, while others have been categorized as relating to multiple programs and program operations.[105] However, three of the contracts designated as applying to multiple programs have task orders issued under them for specific programs, and one contract designated for the Automotive Industry Financing Program has an obligated value of $3.6 million relating to work on the Small Business Administration 7(a) Loan Program.[106] Of the 73 contracts, 21 relate to one TARP program, and 52 contracts relate to multiple TARP programs (including program operations).[107] Work for the Automotive Industry Financing Program was performed under seven contracts, for an obligated value of $24.3 million. The following table details the obligated value and the potential contract value by program.

FIGURE 2: CONTRACT BREAKDOWN BY TARP PROGRAM[108]

Program	Number of Contracts	Obligated Value	Potential Contract Value
Multiple Programs	38	$47,845,708	$233,652,903
Automotive Industry Financing Program (AIFP)	7	24,320,992	37,888,603
Capital Purchase Program (CPP)	6	14,794,781	12,880,161
Public-Private Investment Program (PPIP)	4	8,292,540	2,897,400
Program Operations	18	4,402,477	115,604,144
SBA 7(a) Securities Purchase Program	3	4,007,085	1,870,626
Capital Assistance Program (CAP)	2	2,612,032	0
Home Affordable Modification Program (HAMP)	3	2,507,251	2,507,251

[102] For IDIQ contracts, with a few exceptions, for advisory and assistance services, which exceed three years and $10 million, a contracting officer is required to make multiple awards. Federal Acquisition Regulation, *supra* note 11, at Subpart 16.50. See footnotes 92 and 98, *supra,* for the distinction between IDIQ contracts and BPAs.

[103] Federal Acquisition Regulation, *supra* note 11, at Subpart 16.504(c).

[104] *See* Section D.1.e, *infra.*

[105] Program operations includes services that relate to all TARP programs, including FOIA and IT services. Treasury conversations with Panel staff (Oct. 4, 2010).

[106] Work for CPP, PPIP and CAP was performed under multiple program contracts. The obligated value for the CPP, PPIP and CAP work was $5.7 million and $3.0 million and $2.6 million, respectively. However, the potential contract value for these contracts is accounted for under multiple programs.

[107] Five contracts identified as relating to "antifraud," administrative services, or not identifying a specific program were included in the Program Operations category. These contracts accounted for less than $30,000 in obligated value and potential program value.

FIGURE 2: CONTRACT BREAKDOWN BY TARP PROGRAM [108]—Continued

Program	Number of Contracts	Obligated Value	Potential Contract Value
Total [109]	N/A	$108,782,867	$407,301,088

[108] It is possible for the potential contract value to be less than the obligated value. This is because all of the obligated value for task or delivery order contracts is attributable to the task and delivery orders, while the potential contract value stems from the base contract and modifications that increased the contract ceiling, if any. Furthermore, there are instances where task orders under a contract specify a program while the base contract lists the program as a multiple program. For example, the obligated value under the CAP, a program that was never implemented, stems from task orders created under a base contract for multiple programs, therefore there is the anomalous situation of having obligated value for a program while there is no potential contract value for that program.

[109] The total number of contracts will exceed the actual number of procurement contracts as work performed under several programs will count as a contract under each of those programs.

c. Type of Work Performed under Procurement Contracts

Seven categories of work are performed under the TARP procurement contracts. Of the 73 contracts, 35 are for legal advisory work. Legal advisory work accounts for the largest obligated and potential contract values, $55.6 million and $203.4 million, respectively. The following table details the obligated and potential contract value of the procurement contracts by category of work.

FIGURE 3: PROCUREMENT CONTRACT BREAKDOWN BY TYPE OF WORK PERFORMED

Category	Number of Contracts	Obligated Value	Potential Contract Value
Legal Advisory	35	$55,559,077	$203,375,064
Accounting/Internal Controls	4	39,115,309	41,592,642
Financial Advisory	4	7,890,379	16,770,190
Information Technology	5	3,942,820	101,200,526
Administrative Support	17	2,017,870	21,737,430
Facilities Support	4	257,412	631,812
Compliance	4	0	21,993,424
Total	**73**	**$108,782,867**	**$407,301,088**

d. Competition

Treasury used a competitive process to select the contractors. Under the FAR, contracts must be made through full and open competition, unless there is an exemption.[110] Permitted exemptions allow for limited competition during circumstances of unusual and compelling urgency.[111] Contracts issued under the GSA Schedule are considered to be issued under full and open competition.[112] The following table details the obligated and potential contract value based on the method for awarding the original base contract. GSA Schedule awardees accounted for the largest obligated and potential contract value at $54.9 million and $193.0 million, respectively.[113]

[110] Federal Acquisition Regulation, *supra* note 11, at Subpart 6.2.

[111] Federal Acquisition Regulation, *supra* note 11, at Subpart 6.302–2.

[112] *See* Federal Acquisition Regulation, *supra* note 11, at Subparts 8.404 and 6.10.

[113] GSA establishes long-term government wide contracts with commercial firms, and those contracts are listed on the GSA schedule, creating a simplified process so that simplified process for obtaining commercial supplies and services at prices associated with volume. Sourcing through the GSA Schedule is required before sourcing through general commercial providers. Federal Acquisition Regulation, *supra* note 11, at Subparts 8.002 and 8.4.

FIGURE 4: PROCUREMENT CONTRACT BREAKDOWN BY COMPETITION AT SELECTION [114]

Competition	Number of Contracts	Obligated Value	Potential Contract Value
GSA Schedule Competition	22	$54,861,486	$193,033,966
Limited Competition—Unusual and Compelling Urgency	19	50,131,135	86,471,942
Full and Open with Small Business Set-aside	13	1,997,820	99,791,842
Full and Open	10	953,782	21,214,694
Sole Source—Only Responsible Source	3	750,526	750,526
Full and Open after Exclusion of Sources (Total Small Business Set-Aside)	1	50,000	6,000,000
SAP—Competed [115]	2	24,975	24,975
SAP—Not Competed [116]	2	9,930	9,930
GSA Schedule—Sole Source	1	3,213	3,213
Total	**73**	**$108,782,867**	**$407,301,088**

[114] Task orders and modifications are grouped by the form of competition for the initial base contract. One contract from Treasury (TOS09–007) was classified as a GSA Schedule Competition with a task order indicating Limited Competition. The potential contract value on the base contract was $500,000, and the contract was analyzed as a limited competition contract.

[115] SAP or simplified acquisition procedure is used for purchases under a certain dollar threshold. Federal Acquisition Regulation, *supra* note 11, at Part 13.

[116] Federal Acquisition Regulation, *supra* note 11, at Part 13.

e. Largest Contractors

The largest contractor in terms of obligated value is PricewaterhouseCoopers. PricewaterhouseCoopers was the recipient of three contracts, one of which for internal controls has $24.5 million in obligated value, $22.4 million of which has been expended. In addition, PricewaterhouseCoopers has been granted one of the multiple awards for program compliance support services, with a potential program value of $22.0 million.

The largest contractor in terms of potential contract value was Cadwalader.[117] Cadwalader has four contracts, two of which are currently active. Under these contracts, Cadwalader has $21.9 million in obligated value, $19.1 million of which has been expended by the Treasury. These contracts include a multiple award contract. Cadwalader was one of 13 law firms awarded a contract for the omnibus procurement for legal services; the total potential program value for the 13 contracts is $99.8 million. In addition, Cadwalader worked as a subcontractor under another law firm's contract with Treasury. To date, the expended value of this subcontract is $3.9 million.

Ernst & Young has the largest amount of expended value attributable to its work. Ernst & Young has performed work as a contractor under a procurement contract as well as a subcontractor under financial agency agreements. Of the $32.2 million in expended value attributable to Ernst & Young, $10.7 million is re-

[117] The total expended value attributed to Cadwalader as the prime contractor, from the onset of the program until September 30, 2010, is equivalent to 4.2 percent of the firm's total revenue in 2009. The amount of funds expended under the contract is used in the calculation of this ratio rather than the obligated amount in order to provide a more accurate reflection of its impact on firm revenue. Data on amounts expended provided by Treasury (Oct. 8, 2010); American Lawyer, *The Am Law 100 2010—Gross Revenue: Baker & McKenzie Tops Skadden* (online at www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202448484841) (accessed Oct. 12, 2010). Cadwalader indicated that the rate it billed Treasury was a "30% discount from the firm's 2009 median rate for each professional category as determined in accordance with the guidelines issued by the governing professional bodies that include a variety of factors leading to the establishment of billing rates for similar matters of similar complexity and with similar demands on the firm and its resources." Data provided by Treasury and Cadwalader to Panel staff (Oct. 5, 2010). Cadwalader invoiced Treasury $525 per hour for partners (partners normally charge $625 to $1,050 per hour), $287.50 per hour for associates (normally charged out at a rate of $310 to $575) and $440 per hour for special counsel (normally charged out at a rate of $590 to $880 per hour). Treasury documents provided to Panel staff (Oct. 8, 2010).

lated to a procurement contract for accounting services, and $21.5 million is related to subcontracts under financial agency agreements, $17.7 million of which was expended under a subcontract with Freddie Mac and the remaining $3.8 million was expended under a subcontract with Fannie Mae. In addition, Ernst & Young has been granted the same $22.0 million multiple awards as PricewaterhouseCoopers.

Cadwalader had the largest concentration of legal work. In terms of obligated and expended value, respectively, Cadwalader accounts for 39 percent and 48 percent of all the legal advisory work under TARP.[118] Approximately 80 percent of Cadwalader's obligated value and 90 percent of its expended value stems from Cadwalader's role as lead counsel for the Automotive Industry Financing Program.[119] Although some firms have argued that TARP legal work should have been awarded to a larger number of firms, some of these contracts by their nature are not easily divisible due in part to the need for coordination across different practice areas and disciplines required in time-sensitive, complex financial transactions. Four law firms accounted for approximately 80 percent of the legal work on an obligated and expended value basis.[120]

For accounting and internal control work, there was a more significant amount of concentration. Together, Ernst & Young and PricewaterhouseCoopers performed 95 percent of this work in terms of obligated value, with PricewaterhouseCoopers accounting for 66 percent of the total obligated value.

f. Subcontracts

There are 40 subcontracts under 12 procurement contracts.[121] The total value of these subcontracts is $11.3 million dollars, with an average contract value of $0.3 million. The largest obligated value under a subcontract is $3.9 million to Cadwalader for legal services.

2. Financial Agency Agreements

There are currently 15 financial agency agreements and 58 subcontracts.[122] The obligated value under these agreements is $327.4

---

[118] These amounts do not include the $3.9 million that was expended to Cadwalader under a subcontract.

[119] Treasury conversations with Panel staff (Sept. 28, 2010).

[120] The four largest law firms as a percentage of obligated and expended value, respectively were: Cadwalader (39 percent, 48 percent); Simpson Thacher & Bartlett LLP (19 percent, 14 percent); Squire Sanders & Dempsey LLP (13 percent, 8 percent); and Sonnenschein Nath & Rosenthal LLP (9 percent, 12 percent).

[121] A table of the subcontracts is attached as Figure 12 in Annex II, *infra.*

[122] The agreements are listed in Figure 13 in Annex II, *infra.* Some of these agreements have incentive clauses or provide that an incentive arrangement will be established within a year. *See generally,* U.S. Department of the Treasury, *Financial Agency Agreement Between U.S. Department of the Treasury and FSI Group, LLC* (Apr. 20, 2009) (Contract No. TOFA–09–FAA–0006) (online at www.financialstability.gov/docs/ContractsAgreements/FSI%20FAA%20Equity%20Asset%20Manager%20FINAL.pdf) (hereinafter "Financial Agency Agreement Between U.S. Department of the Treasury and FSI Group, LLC"). For example, both Fannie Mae and Freddie Mac were eligible to receive incentive payments, up to 20 percent, based on specified metrics determined by Treasury. Neither GSE has received any incentive pay under these agreements. U.S. Department of the Treasury, *Financial Agency Agreement Between U.S. Department of the Treasury and Fannie Mae* (Feb. 18, 2009) (Contract No. TOFA–09–FAA–0002) (online at www.financialstability.gov/docs/ContractsAgreements/Fannie%20Mae%20FAA%20021809%20.pdf) (hereinafter "Financial Agency Agreement Between U.S. Department of the Treasury and Fannie Mae"); U.S. Department of the Treasury, *Financial Agency Agreement Between U.S. Department of the Treasury and Freddie Mac* (Feb. 18, 2009)

Continued

million, and the expended value for these agreements is $276.0 million. The largest obligated value under an agreement is with Fannie Mae for $126.7 million. Figure 5 lists the financial agency agreements in order of obligated value.[123]

FIGURE 5: FINANCIAL AGENCY AGREEMENTS

Financial Agent	Description	Obligated Value	Expended Value
Fannie Mae	HAMP Administration	$126,712,000	$111,339,451
Freddie Mac	HAMP Compliance	88,850,000	79,296,499
The Bank of NY Mellon Corporation	Custodian	28,495,412	23,777,002
Morgan Stanley & Co.	Disposition Services	23,577,000	13,175,423
AllianceBernstein L.P.	Asset Management Services	22,399,943	21,207,253
FSI Group LLC	Asset Management Services	11,102,500	10,770,000
Lazard Freres & Co. LLC	Transaction Structuring Services	7,500,000	2,166,667
Piedmont Investment Advisors LLC	Asset Management Services	5,615,000	5,120,000
KBW Asset Management, Inc.	Asset Management Services	3,803,333	3,279,167
Earnest Partners	Small Business Assistance Program	4,050,000	1,955,000
Howe Barnes Hoefer & Arnett, Inc.	Asset Management Services	1,250,000	950,000
Lombardia Capital Partners, LLC	Asset Management Services	1,250,000	937,500
Paradigm Asset Management Co., LLC	Asset Management Services	1,250,000	925,000
Avondale Investments, LLC	Asset Management Services	750,000	562,500
Bell Rock Capital, LLC	Asset Management Services	750,000	575,000
Total		**$327,355,188**	**$276,086,462**

a. Programs Using Financial Agency Agreements

The 15 financial agency agreements are categorized in Figure 6, below, by the type of service provided. There are 12 agreements to provide asset services, two agreements for HAMP, and one agreement for custodial services.[124] There was a variety of asset work, including asset management (for both the CPP and SBA 7(a) program), disposition, and transaction structuring services. The largest obligated and expended values, $215.6 million and $190.6 million, respectively, are for HAMP. Figure 6 details the obligated and expended values by type of service provided.

FIGURE 6: FINANCIAL AGENCY AGREEMENT BREAKDOWN BY PROGRAM TYPE

Service Provided	Number of Contracts	Obligated Value	Expended Value
HAMP	2	$215,562,000	$190,635,950
Asset Management Services	9	48,170,776	44,326,420
Custodian	1	28,495,412	23,777,002
Disposition Agent	1	23,577,000	13,175,423
Transaction Structuring (AIFP)	1	7,500,000	2,216,667
SBA 7(a) Program	1	4,050,000	1,955,000
Total	**15**	**$327,355,188**	**$276,086,462**

(Contract No. TOFA–09–FAA–0003) (online at www.financialstability.gov/docs/ContractsAgreements/Freddie%20Mac%20Financial%20Agency%20Agreement.pdf) (hereinafter "Financial Agency Agreement Between Treasury and Freddie Mac"); Treasury conversations with Panel staff (Sept. 16, 2010).

[123] These companies are considered together because they are all financial agents. Treasury formed financial agency agreements with entities with which it needed a fiduciary relationship. For instance, Treasury decided it required this type of relationship with AllianceBernstein for its asset management services, BNY Mellon for its custodial work, and Fannie Mae and Freddie Mac for their role in the administration and compliance of HAMP.

[124] BNY Mellon performs custodial services for many of the TARP programs, while the asset managers' work is related to assets from the CPP, CDCI, SSFI, AIFP, and AGP portfolios. Data provided by Treasury to Panel staff (Sept. 29, 2010).

The agreements provide for several different types of payment structures. For instance, asset managers are compensated with a flat fee for each financial institution whose TARP assets they manage.[125] BNY Mellon's arrangement is more complex due the variety of services it provides for the different programs and its compensation structure reflects this mix. Its fee schedule includes flat fees, per transaction fees, as well as variable fees.[126]

b. Subcontractors

Six financial agents engaged a total of 58 subcontractors for a reported subcontract value of $81.7 million.[127] Freddie Mac used the most subcontractors at 26 for an expended value of $43.2 million. The average expended value per subcontract was $1.4 million and ranged from $7,000 to $17.8 million. Freddie Mac engaged Ernst & Young for an expended value of $17.8 million for business process support.

c. Largest Financial Agents

The five largest financial agents were Fannie Mae, Freddie Mac, BNY Mellon, Morgan Stanley, and AllianceBernstein L.P. Both BNY Mellon and Morgan Stanley received TARP funds through the CPP.[128] All five financial agents are U.S. companies, although AllianceBernstein is a subsidiary of AXA, a French holding company. Fannie Mae was the single largest financial agent with $126.7 million in obligated value and $111.3 million in expended value as part of HAMP.[129] For HAMP, Fannie Mae reported that it engaged 15 subcontractors, which accounted for $28.9 million of its expended value.[130]

Other financial agents have made significant amounts of money not from fees paid by Treasury, but from commissions. For example, as a requirement of EESA, Treasury was given warrants for common stock of the financial institutions it made investments in

---

[125] For instance, the FSI Group, LLC receives a flat annual fee for each financial institution whose assets it manages. The fee is $50,000 for the first 50 financial institutions under management, $40,000 for the next fifty, and $30,000 thereafter for each financial institution with assets under FSI Group's management. Financial Agency Agreement Between Treasury and Freddie Mac, *supra* note 122.

[126] For instance, for CPP, BNY Mellon receives an annual rate of 0.0015 percent of the daily average aggregate acquisition value of specified financial instruments in its custody. Financial Agency Agreement Between Treasury and Freddie Mac, *supra* note 122.

[127] The subcontractor information is reported by the financial agents to Treasury and is as of August 31, 2010. Two of the subcontractors were engaged by two different financial agents. Ernst & Young was engaged by both Fannie Mae and Freddie Mac, which accounted for an expended value of $21.5 million, while Williams, Adley & Company, LLP was engaged by BNY Mellon and Freddie Mac for a total expended value of $1.2 million.

[128] On October 28, 2008, Treasury purchased $3 billion of preferred stock with warrants in BNY Mellon and $10 billion of preferred stock with warrants in Morgan Stanley. BNY Mellon and Morgan Stanley both repaid Treasury's investment on June 17, 2009. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending September 30, 2010,* at 1 (Oct. 4, 2010) (online at financialstability.gov/docs/transaction-reports/10-4-10%20Transactions%20Report%20as%20of%209-30-10.pdf) (hereinafter "Treasury Transactions Report").

[129] For further discussion of the size and effect of the TARP contracts with Fannie Mae and Freddie Mac *see* footnote 78, *supra.*

[130] Treasury indicated that Fannie Mae also engages numerous marketing, site hosting, and IT vendors that are not individually reported on due to the quantity of these contractors, their low average dollar-value, and the associated costs of these contracts. OFS pays a fixed fee to Fannie Mae pursuant to its financial agency agreement with them, which is approximately $700,000 for marketing costs and 44 percent of the $8–$10 million of estimated costs for other services, including site hosting and IT vendors. Treasury conversations with Panel staff (Sept. 16, 2010).

through the CPP.[131] Treasury has disposed of these warrants by either selling them back to the issuing institution or through a "Dutch Auction," a form of public offering that is registered with the Securities and Exchange Commission (SEC).[132] Deutsche Bank Securities Inc. (Deutsche Bank) was retained as a subcontractor to act as the primary financial agent executing these sales. In this role, Deutsche Bank has earned from 1 percent to 5 percent of the gross proceeds from the sale of these securities.[133] For example, Deutsche Bank acted as the sole book-running manager for the sale of the Bank of America warrants Treasury received for its assistance to that company. Deutsche Bank earned 1.5 percent, or $23.5 million, of the gross proceeds from this sale.[134] To date, the TARP has paid $110 million in underwriting fees in order to sell warrants publicly that have produced $5 billion in gross proceeds.[135]

E. Evaluation of Treasury's Contracting and Agreement Procedures and Process

As discussed above, the use of private contractors and financial agents to fill short- and long-term needs has been a key factor in Treasury's ongoing efforts to help implement, operate, and administer the TARP. In this section of the report, the Panel evaluates the process underlying Treasury's contracting and agreement procedures. In order to assess whether Treasury could or should have done anything differently, the Panel analyzes whether Treasury's stated procedures comply with both the legal regime under which it operates and with its internal controls, and evaluates Treasury's monitoring and supervision of contract and financial agent compliance and performance.

---

[131] If the CPP recipient is a private institution, Treasury received and immediately exercised warrants to purchase additional shares of preferred stock since warrants for common stock shares were not available. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for Period Ending Sept. 16, 2010,* at 17 (Sept. 20, 2010) (online at financialstability.gov/docs/transaction-reports/9-20-10 Transactions Report as of 9-16-10.pdf) (hereinafter "Treasury Transactions Report").

[132] U.S. Department of the Treasury, *Treasury Announces Intent to Sell Warrant Positions in Dutch Auctions* (Nov. 19, 2009) (online at www.financialstability.gov/latest/tg_11192009b.html) ("These offerings will be executed using a modified Dutch auction methodology that establishes a market price by allowing investors to submit bids at specified increments above a minimum price specified for each auction.").

[133] Data provided by Dealogic. In comparison, Zions Bancorp, a TARP participant, sold two sets of non-TARP warrants publicly. The first sale, completed May 19, 2010, was valued at $185 million and the gross underwriting fee was three percent. The second sale was completed September 22, 2010 and raised $36.8 million with a gross underwriting fee of four percent.

[134] Treasury sold three different sets of Bank of America warrants: The first investment, associated with the original assistance through the CPP, grossed $186,342,969 in proceeds. The second sale associated with the CPP—the investment originally made in Merrill Lynch—grossed $124,228,646 in proceeds. Finally, the Treasury made gross proceeds of $1,255,639,099 from the Bank of America warrants it received in conjunction with its Targeted Investment Program. In aggregate, this represents $1,566,210,714 in gross proceeds. Following the pricing of these securities, Treasury announced that the "aggregate net proceeds to Treasury from the offerings are expected to be approximately $1,542,717,552.79." Treasury Transactions Report, *supra* note 131, at 17; U.S. Department of the Treasury, *Treasury Department Announces Pricing of Public Offerings of Warrants to Purchase Common Stock of Bank of America Corporation* (Mar. 1, 2010) (online at www.financialstability.gov/latest/pr_03042010.html).

[135] Data provided by Dealogic. Deutsche Bank employs other financial services firms as "co-managers" for these offerings and therefore does not retain the entirety of its percentage on each deal.

1. Compliance with Legal Obligations

a. Contracting and the FAR

Treasury's use of procurement contracts is governed by the FAR.[136] EESA permitted the Secretary, upon a finding of "urgent and compelling circumstances," to waive any provision of the FAR.[137] Treasury, however, has not exercised this power.[138] The Panel commends this decision as an important commitment to following contracting best practices.

According to the GAO, Treasury has complied with FAR requirements in its selection of contractors.[139] To date, companies that bid for but did not win contracts have not filed any protests with either GAO or the Court of Federal Claims alleging that Treasury used improper procedures in selecting the winning company.[140] Indeed, at times Treasury has done more than it was required to do. For example, the FAR allows for contracts to be awarded with less than full and open competition in certain circumstances, such as when there are circumstances of unusual and compelling urgency.[141] In several instances, Treasury determined that there were urgent and compelling circumstances but nevertheless solicited and received competitive bids.[142]

b. Financial Agency Agreements

The exact contours of Treasury's legal authority to use financial agency agreements are not clear after the enactment of EESA. Only financial institutions can be financial agents,[143] but the FAR does not apply to financial agency agreements, and although financial agents are bound by the duties imposed by agency law, this does not restrict Treasury's discretion in selecting financial agents or administering financial agency agreements.

Treasury has had the authority to designate financial agents since the National Bank Acts of 1863 and 1864, and case law prior to EESA suggests that financial agents must be used only to perform inherently governmental functions and that financial agents must be paid from non-appropriated funds.[144] EESA, though, arguably has broadened Treasury's financial agent authority to displace the case law restrictions. EESA mandates that financial agents may perform "all such reasonable duties related to this Act . . . as may be required."[145] Though still untested in court, such broad language can be read to give Treasury statutory authority to em-

---

[136] For a more complete description of the FAR requirements, see Section B.2, *supra.*

[137] 12 U.S.C. § 5217(a).

[138] Treasury conversations with Panel staff (Aug. 30, 2010).

[139] Government Accountability Office conversations with Panel staff (Aug. 26, 2010).

[140] Treasury conversations with Panel staff (Oct. 5, 2010).

[141] Federal Acquisition Regulation, *supra* note 11, at Subpart 6.302–2(a)(2); Government Accountability Office conversations with Panel staff (Aug. 26, 2010). *See also* Section I, *infra.*

[142] Government Accountability Office conversations with Panel staff (Aug. 26, 2010).

[143] 12 U.S.C. § 5211(c)(3). Financial institutions are defined as "any institution, including, but not limited to, any bank, savings association, credit union, security broker or dealer, or insurance company, established and regulated under the laws of the United States or any State, territory, or possession of the United States, the District of Columbia, Commonwealth of Puerto Rico, Commonwealth of Northern Mariana Islands, Guam, American Samoa, or the United States Virgin Islands, and having significant operations in the United States, but excluding any central bank of, or institution owned by, a foreign government." 12 U.S.C. § 5202(5).

[144] *Transactive Corp. v. United States,* 91 F.3d 232 (D.C. Cir. 1996); *Marketing & Management Information, Inc. v. United States,* 57 Fed. Cl. 665 (Fed. Cl. 2003).

[145] 12 U.S.C. § 5211(c)(3).

ploy financial agents for a much wider spectrum of duties than just inherently governmental functions.

In exercising the financial agency agreement authority, Treasury has not made any in-depth analysis of this legal ambiguity public. As discussed above, in Section C, Treasury's primary consideration in deciding when to execute a financial agency agreement was whether Treasury needed a close, fiduciary relationship with the company providing the service. According to officials in OFS's Office of Financial Agents (OFA), which is responsible for selecting, administering, managing day-to-day, and overseeing financial agency agreements, the OFA did not consider whether a service was inherently governmental or not. OFA officials stated that they had never taken the discussion that far.[146]

Despite not having published a legal justification for its use of financial agency agreement authority, Treasury's practice in awarding financial agency agreements relies on an interpretation of EESA as having displaced prior case law. First, all the financial agents were paid from appropriated funds. Second, at least some of the financial agency agreements were for functions that were not inherently governmental, such as those for whole loan or securities management. Historically, these services have been obtained through procurement contracts, which cannot be used for inherently governmental functions.[147]

If this broad reading of EESA is accepted, Treasury has likely fulfilled its legal obligations. Nevertheless, Treasury's departure from prior limits on financial agency agreement authority, and the fact that a broad reading of EESA has not yet been tested in court, means that Treasury's use of its financial agency agreement authority may be open to debate.

It is important to note, however, that this does not imply that Treasury has misused its broad financial agency agreement powers. Under a broad reading of EESA, Treasury had unprecedented, unfettered authority to make financial agency agreements. Though the Panel does question specific decisions elsewhere in this report,[148] the Panel has no reason to believe that Treasury abused its discretion, despite the real possibility afforded by such unconstrained authority. Indeed, at times Treasury has voluntarily gone beyond what was required, without any legal obligation. For example, when selecting a financial agent to be a custodian, Treasury had no legal obligation to bid the agreement competitively. Nevertheless, Treasury publicly sought bids for the financial agency agreement and received 70. Of these 70, 10 met minimum eligibility requirements, and three institutions were asked to give presentations to Treasury before The Bank of New York Mellon was ultimately selected as the financial agent.[149]

---

[146] Treasury conversations with Panel staff (Sept. 16, 2010).

[147] James J. McCullough & William S. Speros, *These Agents Act for the Treasury Department,* Legal Times (Nov. 10, 2008) (online at www.ffhsj.com/siteFiles/Publications/C770B7734821251EE89B86279A25212E.pdf).

[148] See Sections G, H, and Annex I, *infra.*

[149] U.S. Government Accountability Office, *Troubled Asset Relief Program: Additional Actions Needed to Better Ensure Integrity, Accountability, and Transparency,* at 37 (Dec. 2, 2008) (GAO–09–161) (online at www.gao.gov/new.items/d09161.pdf) (hereinafter "December 2008 GAO Report").

2. Compliance with Treasury's Internal Controls

EESA requires Treasury to establish and maintain an effective system of internal controls consistent with the standards prescribed under Section 3512(c) of Title 31, U.S. Code, to provide reasonable assurance of "the effectiveness and efficiency of operations, including the use of the resources of the TARP," "the reliability of financial reporting, including financial statements and other reports for internal and external use," and "compliance with applicable laws and regulations."[150] Internal controls include the policies, procedures, and guidance that help management ensure effective and efficient use of resources; compliance with laws and regulations; and prevention and detection of fraud, waste, and abuse. Effective internal controls are a fundamental part of managing any organization to achieve desired outcomes and manage risk.

As the GAO has noted, a key challenge that OFS faced following the enactment of EESA was the need to develop simultaneously a comprehensive system of internal controls while it was trying to react quickly to financial market dislocations.[151] Due to the rapid evolution of the TARP, OFS developed controls as various aspects of the program became operational, instead of implementing a controls system prior to the establishment of different programs. For example, as discussed above,[152] Treasury developed "Policies and Procedures" to govern its financial agency agreements. These controls, however, were written in late 2009 and early 2010, and received final approval only at various points in 2010—serving as a further indication that Treasury's system of internal controls has been a process of gradual development, implementation, and evolution. Furthermore, OFS has yet to develop internal written procedures for overseeing and monitoring Fannie Mae's and Freddie Mac's administrative and compliance activities, including verifying the completeness and accuracy of their data.[153] While the Panel recognizes the rapid pace of Treasury's program implementation and the evolving nature of the TARP, the lack of a comprehensive system of internal controls at the beginning increased the risk that the interests of the government and taxpayers may not have been adequately protected and that the program objectives may not have been achieved in the most efficient and effective manner.

Moreover, for financial agency agreements, the now-finalized guidance is either procedural or general, not substantive. For example, the oversight policy document mandates only that Treasury must "ensure that service levels are being met."[154] Such requirements are so amorphous that it is impossible to meaningfully evaluate whether or not Treasury complied. Alternatively, the guidance is logistical, as when the compensation procedures direct that obligating funds requires the "completion of a Funding Authorization for Financial Agent Activity Sheet, submission of a purchase request, commitment of funds, and the creation of an obliga-

[150] 12 U.S.C § 5226(c)(1)(A)–(C).
[151] December 2008 GAO Report, *supra* note 149, at 43.
[152] *See* Section B.4, *supra*.
[153] For further discussion of Fannie Mae and Freddie Mac, see Annex I, *infra*.
[154] Treasury Financial Agent Oversight Policy, *supra* note 53, at 4.

tion."[155] The Policies and Procedures do not constrain Treasury's discretion or provide practical guidance to Treasury employees charged with selecting and administering financial agency agreements. As a result, compliance with these internal Policies and Procedures will have little practical effect on Treasury's use of its financial agency agreement authority.[156]

The internal controls for contracts are more extensive. The internal controls cover six areas: web publication of contracts, purchase request guidelines, contact and inquiries procedures, COTR nomination and file organizations, contract distribution procedure, and acquisition planning guidelines. Though some of these policies are procedural, others contain substantive requirements for each step of the contracting process. Such clear directions ensure consistency in administration and that adequate procedures are used for all contracts.

3. Evaluation of How Treasury Selects Contractors and Agents

Once the decision to outsource a particular function has been made,[157] and companies have submitted bids, Treasury still must determine which specific company will be awarded the contract or agreement. For contracts, the FAR provides straightforward requirements: agencies select the company whose bid represents the best value.[158] The FAR also lists a number of factors and subfactors to use in evaluating bids.[159] Financial agency agreements, by contrast, have far fewer formal requirements, and therefore OFA has considerably more discretion in selecting agents.

OFA does limit its options by imposing certain threshold requirements, discussed more fully above, in Section C. Nevertheless, OFA's broad discretion resulted in decisions like hiring Fannie Mae and Freddie Mac without apparently taking into account either public or private sector alternatives, which raised a number of issues that are addressed in detail later in this report.[160] Treasury selected Fannie Mae and Freddie Mac based on three criteria: (1) Their nationwide housing knowledge, as well as the resources and capabilities they had acquired in the course of performing their unique role in housing finance markets; (2) the limited time frame for implementing HAMP; and (3) prior market research by Treasury for a separate program that indicated Fannie Mae and Freddie Mac were well qualified for the program.[161] According to Deputy Assistant Secretary Gary Grippo, "we made a determination that there were no other parties with the capabilities and infrastructure

---

[155] U.S. Department of the Treasury, *Financial Agent Compensation Procedure,* at 5 (June 30, 2010).

[156] It is unfortunately impossible to determine whether such guidance is typical of Treasury's usual practices with regard to financial agents. Treasury currently has 26 financial agency agreements that are unrelated to the TARP and are administered separately. There is, however, little public information regarding the internal controls Treasury has adopted to help administer these agreements, making a comparison to TARP-related financial agency agreements impossible.

[157] For a discussion of how Treasury decides what to outsource, see Section C, *supra.*

[158] Federal Acquisition Regulation, *supra* note 11, at Subpart 15.3.

[159] Federal Acquisition Regulation, *supra* note 11, at Subpart 15.3.

[160] For a more complete discussion of the Fannie Mae and Freddie Mac financial agency agreements, see Annex I, *infra.*

[161] Treasury conversations with Panel staff (Sept. 27, 2010).

to operate a national mortgage modification program."[162] Testimony from the Panel's recent hearing, however, suggests that the roles of Fannie Mae and Freddie Mac as financial agents were not simply an extension of what they were already doing. In addition, both Fannie Mae and Freddie Mac have relied heavily on subcontractors to implement HAMP, calling into question whether they had the operating capabilities and infrastructure to operate a national foreclosure mitigation program.[163]

4. Evaluation of Treasury's Post-Award Management of Contracts and Agreements

a. Who Manages Post-Award Contracts and Agreements?

Treasury has improved its post-award contract and agreement management staff over time. Given the rapid deployment of the TARP in response to the financial crisis and the need to begin operations immediately, management staffing was initially inadequate. In late 2008 and early 2009, GAO developed a number of recommendations designed to ensure the integrity, transparency, and accountability of Treasury's TARP contracting process.[164] In general, GAO recommended that Treasury expedite its efforts to ensure that a sufficient number of appropriately trained personnel were in place to oversee the performance of all contractors. Since then, Treasury has dedicated more personnel to help facilitate effective management and oversight of TARP contracts and financial agency agreements.[165]

i. Procurement Contracts

Procurement contracts are overseen by contracting officers, who have overall responsibility for managing a contract. The day-to-day monitoring of a contract is delegated to Contracting Officer's Technical Representatives (COTRs), who act as the contracting officer's technical experts and representatives in the administration and monitoring of all TARP contracts. With limited exceptions, COTRs are required by Treasury's internal guidance to be trained and certified in their acquisition-related responsibilities prior to their appointments.[166]

Initially, Treasury did not have enough trained COTRs to manage the contracts, so it assigned a number of its senior officials as COTRs. Given the limited timeframe for executing the program, some of these officials were assigned COTR responsibilities without receiving formal training in their acquisition-related responsibilities.[167] While Treasury replaced the senior-level COTRs with certified COTRs over time, the fact that officials without proper procurement training were charged with the administration and moni-

---

[162] Testimony of Gary Grippo, *supra* note 49.

[163] For a more complete discussion of the Fannie Mae and Freddie Mac financial agency agreements, see Annex I.

[164] U.S. Government Accountability Office, *Troubled Asset Relief Program: Status of Efforts to Address Transparency and Accountability Issues,* at 76–77 (Jan. 30, 2009) (GAO–09–296) (online at www.gao.gov/new.items/d09296.pdf) (hereinafter "January 2009 GAO Report on Transparency and Accountability"); December 2008 GAO Report, *supra* note 149, at 59–60.

[165] Treasury conversations with Panel staff (Sept. 2, 2010).

[166] January 2009 GAO Report on Transparency and Accountability, *supra* note 164, at 51–52.

[167] January 2009 GAO Report on Transparency and Accountability, *supra* note 164, at 51–52.

toring of contracts for a time potentially impeded efforts to implement effectively and oversee the TARP.

Since then, trained and certified COTRs have been put in place for all OFS contracts,[168] and Treasury has held a number of internal workshops and best practice exchanges for COTRs. Personnel from other agencies have been brought in to share different agencies' practices.[169] Treasury also plans to hold annual refresher training programs intended to supplement the formal training and certification required prior to COTR appointment and further enhance skills development for COTRs assigned to TARP contracts and financial agency agreements.[170] In addition, OFS has developed an online COTR document management structure for contract and agreement administration to ensure consistent and complete documentation of COTR files, standardize processes, and facilitate personnel transition through access to information and shared practices.[171] In areas where COTR oversight may potentially be weak, Treasury has gone further. For example, Treasury noted that COTRs might be unable to assess compliance effectively in the context of legal services. To mitigate this potential problem, Treasury had all of the attorneys who worked with retained law firms receive training and become COTR-certified.[172]

Additionally, Treasury has hired two senior-level contract specialists to both supervise and support all pre-award and post-award procurement actions in support of OFS.

ii. Financial Agency Agreements

OFA is responsible for the administration, day-to-day management, and oversight of the financial agency agreements supporting the implementation of EESA. OFA assists the Treasury Fiscal Assistant Secretary and Deputy Fiscal Assistant Secretary in the selection, designation, and management of financial agents in support of the TARP. OFA is responsible for providing financial agents with proper instructions and with formal direction and guidance in executing their responsibilities under their financial agency agreements. Within OFA, financial agent managers are the primary points of contact for specific financial agency agreements; their responsibilities include ensuring that funds are obligated to financial agency agreements and that invoices and accruals are processed in a timely fashion. In addition, with respect to Freddie Mac's financial agent functions, senior-level officials within OFS direct and closely monitor Freddie Mac's activities, and OFS has four employees assigned to work full-time to oversee Freddie Mac (three of whom work full time on-site in Freddie Mac's office).[173] Addition-

---

[168] There are currently 21 COTRs overseeing Treasury's contracts.

[169] Treasury conversations with Panel staff (Sept. 16, 2010).

[170] Treasury conversations with Panel staff (Sept. 2, 2010); U.S. Department of the Treasury, *OFS Actions During Fiscal Year 2010 to Enhance Oversight of TARP Contractor and Financial Agent Performance* (Aug. 19, 2010) (hereinafter "OFS Actions to Enhance Oversight"). Treasury has also indicated that it has trained additional personnel for COTR certification to ensure workloads are balanced so sufficient attention is given to managing contracts and financial agency agreements.

[171] *Id.*

[172] Treasury conversations with Panel staff (Sept. 16, 2010).

[173] Treasury conversations with Panel staff (Sept. 23, 2010); Congressional Oversight Panel, Written Testimony of Paul Heran, program executive, Making Home Affordable—Compliance, Freddie Mac, *COP Hearing on Treasury's Use of Private Contractors,* at 2 (Sept. 22, 2010) (online

ally, Treasury's MHA Compliance Committee (composed of senior Treasury officials leading the MHA program and chaired by the director of compliance at OFS) meets weekly with Freddie Mac's MHA compliance senior management team to discuss the program's status, issues, and challenges.[174]

Since September 2009, Treasury has also made organizational and staffing improvements to strengthen its oversight of financial agents, including the hiring of seven full-time staff members. Originally anticipated to have only around five staff members, OFA currently has 11 staff, with four more expected to be hired by the end of 2010. The improvements at OFA also include the hiring of a permanent full-time director who has 10 years of experience in managing billion-dollar federal contracts and Treasury operations supported by financial agents as well as the reorganization of OFA into dedicated teams charged with the monitoring and oversight of each major financial agent.[175]

iii. Additional Post-Award Management

OFS has created the Contracting Agreement and Review Board (CARB), which meets at least monthly and is charged with administering contracts and financial agency agreements, ensuring sufficient and effective planning, administration, and management, and examining issues with planned TARP acquisitions.[176]

In addition, Treasury hired an executive contract administration manager to oversee the planning of long-range requirements, implement contract management best practices, and provide leadership and guidance to COTRs and OFA management personnel. The contract administration manager reports to the OFS chief operating officer and holds weekly roundtable meetings with COTRs to identify significant issues and actions on particular contracts and financial agency agreements, facilitate cross-training and professional development of COTRs, and continuously improve the administration and oversight of OFS contracts and agreements.[177]

OFS has also established OFS–Compliance (OFS–C) to perform some compliance monitoring. OFS–C currently has 27 employees and plans to add 20 more positions. Of these 27, five are tasked with reviewing all of Treasury's arrangements for conflicts of interest.[178] Four employees help monitor the financial agency agreements with Fannie Mae and Freddie Mac, which is discussed in more detail below, in Annex I. Other staff are not specifically assigned to monitor performance but do so part-time in the course of reviewing TARP programs such as the CPP.

---

at cop.senate.gov/documents/testimony-092210-heran.pdf) (hereinafter "Testimony of Paul Heran").

[174] *Id.* at 2; Treasury conversations with Panel staff (Sept. 23, 2010).

[175] U.S. Department of the Treasury, *Update on Changes in Key Positions for TARP Oversight of Contractors and Financial Agents* (Sept. 14, 2010).

[176] Treasury conversations with Panel staff (Sept. 2, 2010).

[177] Treasury conversations with Panel staff (Sept. 2, 2010).

[178] For more discussion of this conflicts of interest group, see Section H, *infra.*

b. Treasury Procedures for Post-Award Contract and Agreement Management

i. Procurement Contracts

The specific procedures and metrics Treasury uses to administer a contract are laid out in each contract on a contract-by-contract basis. In general, though, Treasury has several layers of controls to manage contractor performance. The first layer is the COTR, who monitors contract performance on a daily or weekly basis. The COTR also prepares a monthly report, which evaluates the contractor for cost control, performance, and business relations.[179] For contracts for legal services, the attorneys who work with the contractor law firm help the COTR prepare these monthly reports. At present, Treasury's contracts are overseen by 21 COTRs, with a COTR overseeing, at most, $38 million worth of contracts and usually much less.

The next layer of controls is the CARB, which reviews the COTRs' monthly reports. The CARB monitors performance data from all contracts to ensure consistent and effective performance management. Treasury also relies on self-certifications from contractors. For example, contractors must certify that they have accurately reported all conflicts of interest.

Ongoing efforts on the part of Treasury to enhance its oversight of contractor performance include an OFS Contract Administration Management Plan, which is a comprehensive strategy to improve acquisition planning, implement consistent and reliable processes for contract execution and implementation, manage contractor performance based on level of risk, and reduce reliance on contracted support as OFS retains in-house expertise.[180]

In the event that a contract violation is found, the COTR has several options, including rejecting or withholding payment, stopping or reducing the amount of work the contractor receives, considering the performance as an element of future award decisions, and issuing a formal notice to the contractor to cure.

These procedures follow well-established norms for monitoring contract performance.[181] Though additional procedures such as requiring independent audits of contractors would provide added assurances of contract performance, it is not clear they would be worth the added administrative time and expense.[182]

ii. Financial Agency Agreements

Since September 2009, Treasury has strengthened its infrastructure for monitoring, managing, and overseeing its financial agents, including the installation of performance measurement and monitoring initiatives.

OFA's primary mechanism for monitoring compliance with the terms of a financial agency agreement is agent self-certification.[183]

---

[179] Treasury conversations with Panel staff (Sept. 16, 2010).

[180] OFS Actions to Enhance Oversight, *supra* note 170.

[181] Project on Government Oversight conversations with Panel staff (Sept. 27, 2010); Christopher Yukins, Professor of Law, George Washington University Law School, conversations with Panel staff (Sept. 29, 2010).

[182] Christopher Yukins, Professor of Law, George Washington University Law School, conversations with Panel staff (Sept. 29, 2010).

[183] Treasury conversations with Panel staff (Sept. 16, 2010).

The agent must certify that they are complying with 10 to 15 selected terms of the agreement, such as that all conflicts of interest have been addressed, and that they safeguarded protected information.[184] In addition, agents are required to review the effectiveness of their internal control processes annually, which most agents do either by hiring an independent reviewer to perform an SAS 70 audit,[185] or by conducting a comparable internal audit.[186] Treasury also requires agents to submit information regarding conflicts of interest, which it reviews on an ongoing basis.[187]

OFA has instituted an annual on-site spot check program for financial agents. These spot checks are not formal audits, but instead select a few provisions in the agency agreements and test the agent's processes with regard to those provisions. For example, a spot check may verify that the agent has sufficient measures in place for protecting confidential information, including that all employees have signed non-disclosure forms.[188]

In addition to compliance with the terms of the financial agency agreement, OFA also evaluates agents on their performance under the financial agency agreement on a monthly or quarterly basis. The process involves all OFS stakeholders and balances both quantitative and qualitative factors. Quantitative measures include counts of work product, for example. Qualitative assessments principally consist of interviews with the relevant program officers.[189] Survey responses are also used.[190] Together, these quantitative and qualitative assessments are used to create a scorecard, which is linked to incentive fees in some cases.[191]

Furthermore, Treasury has instituted a bi-annual customer satisfaction survey of OFA's internal stakeholders (for example, OFS), which provides a subjective evaluation of whether the financial agents are responsive to Treasury requirements.[192]

If an agent does not perform, OFA relies on general Treasury procedures to respond. Treasury has a three-strike policy. On the first instance of non-performance, Treasury will meet the agent, present proof of non-performance, and establish a remediation plan, which will be monitored weekly. If the agent fails to perform again, Treasury will issue a formal letter and possibly issue sanctions. A third incident usually results in termination of the agree-

---

[184] *See, e.g.,* U.S. Department of the Treasury, *Financial Agency Agreement Between U.S. Department of the Treasury and Avondale Investments* (Dec. 22, 2009) (Contract No. TOFS–10–FAA–001) (online at www.financialstability.gov/docs/ContractsAgreements/Avondale%20Signed%20FAA.pdf); Financial Agency Agreement Between Treasury and BNY Mellon, *supra* note 27.

[185] An SAS 70 audit is an in-depth review of a company's control objectives and control activities performed by an independent accounting and auditing firm. It was developed by the American Institute of Certified Public Accountants and is a widely recognized auditing standard. For more information on the auditing standard, see SAS 70 Audit, *SAS 70—Overview* (online at sas70.com/sas70_overview.html).

[186] Prepared Statement of Gary Grippo and Ronald Backes, *supra* note 26, at 6.

[187] Treasury conversations with Panel staff (Sept. 16, 2010). For a more complete discussion of Treasury's monitoring of contractor and agent conflicts of interest, see Section H, *infra.*

[188] Treasury conversations with Panel staff (Sept. 16, 2010); Prepared Statement of Gary Grippo and Ronald Backes, *supra* note 26, at 6.

[189] Treasury conversations with Panel staff (Sept. 16, 2010).

[190] Prepared Statement of Gary Grippo and Ronald Backes, *supra* note 26, at 6.

[191] Prepared Statement of Gary Grippo and Ronald Backes, *supra* note 26, at 6.

[192] U.S. Department of the Treasury, *Update on Changes in OFS Actions for Enhancing Contractor and Financial Agent Oversight* (Sept. 14, 2010).

ment. To date, OFA has not proceeded to this third step against any agent.[193]

Despite these several layers of controls, OFA's procedure has failed to detect at least one serious failing by an agent. Discussed in more detail below, in Annex I, Fannie Mae published incorrect information regarding mortgage borrower re-default rates under HAMP. The error was detected not by Treasury but by a group of outside analysts.[194] OFS and OFA officials readily admit that Treasury lacked adequate controls with respect to the communication of program requirements and the validation of data.[195] This admission calls into question the level of independent scrutiny, verification, and oversight that Treasury has implemented with respect to the monitoring of its financial agents.[196] While the Panel recognizes and appreciates that Treasury's monitoring and oversight have strengthened over time, proper implementation of the TARP and oversight of financial agents require rigorous monitoring and controls from program inception.

Some have argued that the best method for ensuring agent performance is to create monetary incentives in the agreement to reward excellent performance. Such incentives also provide clear metrics for judging success and would force Treasury to define its goals for each contract before it is awarded. This technique has been used in some agreements such as those with Fannie Mae and Freddie Mac.[197] On the other hand, others argue that such incentives are not always necessary. Agents may be motivated to perform well by, for example, a desire to build capacity in a particular area or the prestige associated with successfully accomplishing the task.

iii. Subcontracts

Although Treasury's consent is required before any contractor or financial agent can engage a subcontractor, Treasury has limited oversight ability after the subcontract is awarded. Before giving consent, OFA examines potential financial agent subcontractors to ensure that there is an adequate budget and that the tasks envisioned for the subcontractor are within the original scope of work. In addition, the relevant program office can become involved to ensure that program objectives will be met. Contracts are most carefully examined when they involve payment arrangements where Treasury may bear the risk of cost overruns.[198]

Prior to giving approval, Treasury also examines all subcontracts for conflict of interest information. The prime contractor or financial agent is responsible for collecting conflicts information from the potential subcontractors and submitting it to Treasury. Potential

---

[193] Treasury conversations with Panel staff (Sept. 16, 2010).

[194] MITRE, *Assessment of the Home Affordable Modification Program (HAMP) Re-Default Table,* Conducted for the U.S. Department of the Treasury—Office of Financial Stability, at 2–1 (Aug. 9, 2010) (online at www.financialstability.gov/docs/MITRE%20Final%20Public%20Version%208-6-10.pdf) (hereinafter "MITRE HAMP Re-Default Report").

[195] Treasury conversations with Panel staff (Sept. 23, 2010).

[196] This concern is exacerbated by Treasury's exclusive reliance on Fannie Mae to act as record keeper and program administrator, which creates significant risks to both effective program implementation and financial agent oversight. For further discussion, see Annex I, *infra.*

[197] For a more complete discussion of incentives in these agreements, see footnote 122, *supra.*

[198] Treasury conversations with Panel staff (Sept. 16, 2010).

subcontractors have been rejected because of conflicts of interest issues.[199]

After approving a subcontract, Treasury primarily relies on the prime contractor or the financial agent to ensure their subcontractors' compliance. Prime contractors and financial agents, in their required self-certifications, also certify to the compliance of their subcontractors. Prime contractors and financial agents collect ongoing conflicts of interest information from their subcontractors, and then send this information to Treasury. Treasury, however, does directly collect some information on subcontractors through day-to-day inquiries, annual reports from prime contractors and financial agents, and from monthly reports that identify subcontractors, subcontract values, and other information.

Even without direct oversight, Treasury retains tools to control subcontractor behavior by working through prime contractors and financial agents. All the terms of the original contract or financial agency agreement flow down to, and bind, the subcontractors. Prime contractors and financial agents also remain directly liable to Treasury in the event that a subcontractor fails to perform adequately.[200] In addition, continually adding further layers of direct oversight risks adding to administrative costs without correspondingly great increases in accountability.[201]

Despite these controls, however, Treasury lacks critical basic information about subcontractors, such as the text of the subcontracts themselves[202] and the dates on which they were awarded.[203] Treasury should collect this information. In addition, though prime contractor and financial agent direct liability will provide incentive to ensure subcontractors are adequate, it does not necessarily ensure that Treasury receives the best value. More troublingly, without direct oversight, Treasury will have difficulty detecting violations of contract terms that are not related to work product, such as whether or not a subcontractor has ensured the confidentiality of information or that there are no conflicts of interest. At present, Treasury must simply trust that prime contractors or financial agents will enforce these provisions.[204]

F. Evaluation of Small Business Arrangements

Under the FAR, any acquisition between $3,000 and $100,000 must be set aside exclusively for small business concerns, unless

---

[199] Treasury conversations with Panel staff (Sept. 16, 2010).

[200] Treasury conversations with Panel staff (Sept. 16, 2010).

[201] Professor Lawrence Lessig, a Professor of Law at Harvard Law School and Director of the Edmond J. Safra Foundation Center for Ethics, described this problem as the "Bee Watcher-Watcher" problem, referencing the Dr. Seuss story that features a bee being watched by a watcher, who is in turn watched by another watcher (a watch-watcher), who is in turn watched by another watcher (a watch-watcher-watcher) in an ever-expanding chain of oversight. Dr. Seuss, *Did I Ever Tell You How Lucky You Are?,* at 29 (1973); Lawrence Lessig, Professor of Law, Harvard Law School, conversations with Panel staff (Sep. 20, 2010).

[202] Treasury conversations with Panel staff (Sept. 13, 2010).

[203] Treasury conversations with Panel staff (Sept. 16, 2010).

[204] This lack of direct oversight and its associated dangers are not unique to Treasury. Treasury's procedure for managing subcontractors is typical of most government agencies. Steven Schooner, Professor of Law, George Washington University Law School, conversations with Panel staff (Oct. 5, 2010); Project on Government Oversight conversations with Panel staff (Oct. 6, 2010). Over the past twenty years, the government's contract management staff has been cut while the total value of its acquisitions has increased. This has left the government with insufficient resources for contract management and has eviscerated the resources available for overseeing subcontractors. Steven Schooner, Professor of Law, George Washington University Law School, conversations with Panel staff (Oct. 5, 2010).

the contracting officer determines that competitive offers from small businesses cannot be obtained.[205] For all other contracts, the FAR expresses a preference for contracting with small businesses, but does not require it. No requirements at all exist for small business financial agency agreements.[206]

From the beginning of the TARP, however, OFS has encouraged small businesses, including minority-, veteran-, and women-owned small businesses, to pursue procurement opportunities under both its contracting authority and for financial agency agreements.[207] Where subcontracting opportunities exist for a given work requirement, OFS requires contractors to submit small business subcontracting plans.[208] OFS considers a potential contractor's efforts to use small businesses as part of its selection criteria for all contracts.[209] Each contract is reviewed internally by a small business specialist to examine opportunities for small business participation.[210] In addition, the financial agency agreements for both Fannie Mae and Freddie Mac provide a floor for the government-sponsored enterprises' (GSEs') use of small business contractors, including minority- or women-owned contractors. In entering into their financial agency agreements with Treasury, Fannie Mae and Freddie Mac agreed to "engage one or more small businesses as contractors, including minority- or women-owned businesses," in fulfilling their responsibilities.[211] OFS has also reached out to small businesses, including minority-, veteran-, and women-owned small businesses. For example, on May 27, 2009, Treasury held an Industry Day and Small Business Networking event where 11 small businesses presented their capabilities to an audience of approximately 40 interested firms.[212] In some cases, OFS has called small business trade associations to notify them of a new solicitation available to small businesses.[213] These efforts notwithstanding, Treasury has received considerable criticism of its efforts to promote small business contracting. A recurring critique is that Treasury's solicitations are too large, covering too much work or too large a geographic area. Instead of awarding one large contract that small businesses cannot feasibly perform, these organizations argue, Treasury should break down the work into multiple smaller contracts.[214] Other criticisms include that Treasury's outreach efforts have not included small professional services firms such as

---

[205] Federal Acquisition Regulation, *supra* note 11, at Subpart 9.5.

[206] December 2008 GAO Report, *supra* note 149, at 39.

[207] U.S. Government Accountability Office, *Troubled Asset Relief Program: One Year Later, Actions Are Needed to Address Remaining Transparency and Accountability Challenges,* at 28 (Oct. 2009) (GAO–10–16) (online at www.gao.gov/new.items/d1016.pdf) (hereinafter "October 2009 GAO Report on Transparency and Accountability"). One of Treasury's objectives is to provide contracting opportunities for small businesses. *See* Treasury Procurement Contracts and Agreements, *supra* note 10 ("Treasury actively encourages the participation of small, minority, veteran, and women-owned businesses in fulfilling its needs. . . . Where subcontracting opportunities exist for a given work requirement Treasury requires contractors to submit small business subcontracting plans with specific goals for small, minority, veteran, and women-owned business subcontracts.").

[208] Treasury Procurement Contracts and Agreements, *supra* note 10.

[209] Treasury conversations with Panel staff (Sept. 16, 2010).

[210] Treasury conversations with Panel staff (Sept. 16, 2010).

[211] Financial Agency Agreement Between Treasury and Freddie Mac, *supra* note 122. For a more complete discussion of Fannie Mae and Freddie Mac, see Annex I, *infra.*

[212] Treasury conversations with Panel staff (Sept. 16, 2010).

[213] Treasury conversations with Panel staff (Sept. 16, 2010).

[214] National Association of Minority and Women Owned Law Firms conversations with Panel staff (Sept. 30, 2010); National Association of Real Estate Brokers conversations with Panel staff (Oct. 5, 2010).

law firms,[215] and that Treasury has not provided sufficient, conveniently located training sessions on how to win contracts.[216]

OFS has not established any specific targets for how many contracts, agreements, and subcontracts to award to small businesses. Treasury in general, however, establishes, in negotiation with the Small Business Administration, internal goals for small business contracts. Their goals for disadvantaged, women-owned, and veteran-owned small businesses are subsets of their broader small business goals. Figure 7 below displays the goals for fiscal years 2010 and 2011.

FIGURE 7: TREASURY'S SMALL BUSINESS CONTRACTING GOALS, FISCAL YEARS 2010 and 2011[217]

Category	Goal[218] (Percent)
Prime Contracts	
Small Business	28.5
Small Disadvantaged Business	5.0
Women-Owned Small Business	5.0
Service-Disabled Veteran-Owned Small Business	3.0
Subcontracts	
Small Business	44.7
Small Disadvantaged Business	5.0
Women-Owned Small Business	5.0
Service-Disabled Veteran-Owned Small Business	3.0

[217] Office of Small and Disadvantaged Business Utilization, *Fiscal Year 2010 & 2011 Small Business Program Goals* (online at www.treas.gov/offices/management/dcfo/osdbu/accomplishments.shtml) (accessed Oct. 12, 2010).
[218] The goal is a percentage of contract dollars obligated, not the number of contracts.

OFS initially did not contract with many small businesses, but has substantially increased its share of small business contracts over time.[219] As of September 30, 2010, a majority of financial agency agreements (eight of 15) and 13 contracts have been awarded to small businesses. Small businesses have won 55 subcontracts, although it is possible that Treasury's lack of transparency regarding subcontractors has concealed even greater opportunities for small businesses.[220] These contracts, subcontracts, and agreements have already expended $42.3 million to small businesses and have an obligated value of $54.3 million.

FIGURE 8: TOTAL NUMBER OF CONTRACTS, SUBCONTRACTS, AND FINANCIAL AGENCY AGREEMENTS, AS OF AUGUST 13, 2010[221]

	Prime Contracts	Financial Agency Agreements	Subcontracts
Large Business	60	7	43
Service Disabled Veteran Owned Small Business	2	0	2
Small Business	6	2	20
Small Disadvantaged Business[222]	1	0	2
Women and Minority Owned Small Business	1	0	5
Woman Owned Small Disadvantaged Business	1	0	1
Women Owned Small Business	2	1	15
Minority Owned Small Business	0	5	10
Other	0	0	1

[221] Data from Treasury (Sept. 30, 2010). Data for contractors to financial agents is as of August 31, 2010.

[215] National Association of Minority and Women Owned Law Firms conversations with Panel staff (Sept. 30, 2010).
[216] National Association of Real Estate Brokers conversations with Panel staff (Oct. 5, 2010).
[219] October 2009 GAO Report on Transparency and Accountability, *supra* note 207, at 28–29.
[220] The Panel compiled this number from data provided from Treasury (Sept. 30, 2010).

[222] Despite the potential overlap, Treasury used both the Minority Owned Small Business and Small Disadvantaged Business categories in the data provided to the Panel.

FIGURE 9: VALUE OF CONTRACTS, FINANCIAL AGENCY AGREEMENTS, AND SUBCONTRACTS, AS OF AUGUST 13, 2010 [223]

	Prime Contracts	Financial Agency Agreements	Subcontracts
Large Business	$74,551,966	$180,380,453	$62,095,468
Service Disabled Veteran Owned Small Business	89,032	0	$187,843
Small Business	[224]1,931,694	4,229,167	14,621,028
Small Disadvantaged Business	0	0	191,368
Women and Minority Owned Small Business	0	0	3,466,979
Woman Owned Small Disadvantaged Business	0	0	422,499
Women Owned Small Business	1,307,071	575,000	7,892,877
Minority Owned Small Business	0	9,180,000	3,999,121
Other	0	0	87,360

[223] Data from Treasury (Sept. 30, 2010). All values are expended values. For prime contracts and financial agency agreements, the subcontract values were deducted from the prime contract or financial agency agreement expended value to avoid double counting. Data for contractors to financial agents is as of August 31, 2010.

[224] One small business contract had a listed expended value that was less than the value of its subcontract. This resulted in an expended value that was negative. As a result, this prime contract has been given an expended value of zero for purposes of this Figure.

Despite OFS's efforts to promote small business contracting opportunities, large businesses still receive the overwhelming majority of prime contracts,[225] both in terms of value and number. OFS has not met Treasury's goals for small business prime contracts. Indeed, less than 5 percent of prime contract dollars go to small businesses, far short of the 28.5 percent goal. Though not so far below the goal as for prime contracts, OFS has also failed to meet Treasury's goals for subcontracting dollars. Although Treasury has made efforts to include small businesses, there remains room to improve.

Also of note is the limited involvement of women- and minority-owned small businesses.[226] Despite increases over time in small business contracting, the situation has not substantially improved with regard to minority- and women-owned businesses. Only one prime contract has been awarded to a minority-owned business. Trade associations representing minority- and women-owned businesses, moreover, state that Treasury has not reached out to them as it has done for small businesses more generally.[227] The Panel notes with concern the lack of outreach to minority- and women-owned small businesses.

[225] A prime contract is the original contract.

[226] Treasury has received considerable criticism on this point. *See, e.g.,* Senate Small Business Committee, *Investing in Small Business: Jumpstarting the Engines of our Economy* (Jan. 29, 2009) (online at sbc.senate.gov/public/index.cfm?p=Hearings&ContentRecord_id=3fa523ec-8771-4093-ac96-94f08aecba46&ContentType_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group_id=43eb5e02-e987-4077-b9a7-1e5a9cf28964&MonthDisplay=1&YearDisplay=2009); House Financial Services, Subcommittee on Housing and Community Opportunity, *Minorities and Women in Financial Regulatory Reform: The Need for Increasing Participation and Opportunities for Qualified Persons and Businesses* (May 12, 2010) (online at financialservices.house.gov/Hearings/hearingDetails.aspx?NewsID=1066); James Byrne, *Eye on Washington,* Minority Business Entrepreneur (May/June 2009); Marcia Wade Talbert, *Opportunities for Minority Contracts in TARP Limited,* Business News (Oct. 25, 2008) (online at www.blackenterprise.com/business/business-news/2008/10/25/opportunities-for-minority-contracts-in-tarp-limited/).

[227] National Association of Minority and Women Owned Law Firms conversations with Panel staff (Sept. 30, 2010); National Association of Real Estate Brokers conversations with Panel staff (Oct. 5, 2010); National Association of Securities Professionals conversations with Panel staff (Oct. 8, 2010).

G. Evaluation of Transparency and Accountability

Transparency and accountability are of heightened importance in the context of contracting.[228] A contractor is not a government entity. Its employees do not take an oath of office, and it is not obligated to stand for election, so U.S. citizens have no opportunity to cast a vote on its performance. In this context, it is critical that Treasury use rigorous transparency and accountability standards to ensure that the public has access to the identities and performance records of the private entities working with Treasury to implement the TARP.

1. Transparency

A core element of the Panel's mandate is to examine the "extent to which the information made available on transactions under the [TARP] has contributed to market transparency."[229] In previous reports, the Panel has examined this issue in detail, stressing the importance of transparency with respect to a wide array of TARP programs and institutions.[230]

Treasury has disclosed a significant amount of information, and in testimony before the Panel, one expert stated that "Treasury earns strong marks for its transparency efforts."[231] Yet despite Treasury's provision of basic information on contractors and financial agents, and despite making the contracts and agreements themselves publicly available, it may be beneficial for Treasury to disclose key information in three critical areas:

- material information in arrangements, including use of subcontractors;
- performance under arrangements; and
- monitoring procedures.

The absence of sufficient information in these three areas reflects the critical difference between "formalistic transparency" and "meaningful transparency" that was highlighted in testimony before the Panel.[232]

a. Disclosure of Material Information

Treasury has disclosed some information with respect to its relationships with private entities, including the names of both contractors and financial agents, the date the contract was awarded, the value, and the anticipated end date. Treasury posts a list of the

---

[228] *See* Congressional Oversight Panel, Testimony of Allison Stanger, Russell J. Leng '60 Professor of International Politics and Economics, Middlebury College, *Transcript: COP Hearing on Treasury's Use of Private Contractors* (Sept. 22, 2010) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-092210-contracting.cfm) (hereinafter "Testimony of Allison Stanger") ("I am increasingly convinced that getting as much information out in the public domain and encouraging self-policing behavior, and encouraging the American people to hold their government accountable is really the key.").

[229] 12 U.S.C. § 5233(b)(1)(A)(iii).

[230] *See, e.g.,* August 2010 Oversight Report, *supra* note 80, at 4 ("In the interests of transparency and completeness, and to help inform regulators actions in a world that is likely to become ever more financially integrated, the Panel strongly urges Treasury to start now to report more data about how TARP and other rescue funds flowed internationally and to document the impact that the U.S. rescue had overseas.").

[231] Congressional Oversight Panel, Written Testimony of Steven Schooner, professor of law and co-director of the government procurement law program, The George Washington University School of Law, *COP Hearing on Treasury's Use of Private Contractors,* at 5 (Sept. 22, 2010) (online at cop.senate.gov/documents/testimony-092210-schooner.pdf).

[232] *See Id.* at 5.

contractors and financial agents, as well as the documents themselves, on financialstability.gov.[233]

Not all material information is publicly available, however. While Treasury provides basic information on the total value of the contract and the general services to be provided by the contractor, it does not provide "detailed information" on the contractor's obligations under the contract or on specific expenses incurred.[234] Many of the contracts are task or delivery order contracts, where critical specifics typically appear in task orders, rather than in the contracts themselves.[235] Treasury does not release these task orders to the public; it maintains that it does not disclose them due to the volume of the orders.[236] Treasury also does not disclose hourly rates for law firms. On one hand, Treasury should make as much information available as possible, but on the other, billing rates may be regarded as the type of trade secret that traditionally has been exempted from disclosure requirements. An expert testified before the Panel that while not "all cost or pricing data should be protected by the government, protecting proprietary information is the general rule."[237]

In addition, Treasury does not publicly disclose detailed information with respect to the names and duties of subcontractors, nor does it publish the subcontracts themselves. The result is that in cases in which contractors delegate substantial portions of their duties to subcontractors, the public possesses limited access to information.[238] Subcontractor status operates like an umbrella, shielding contractors, financial agents, and Treasury from the need to disclose valuable information about the disposition of taxpayer funds.[239]

In one case, Treasury awarded a contract to a "small disadvantaged business"—Anderson, McCoy & Orta, an Oklahoma City small business—which (with Treasury approval, as required) in turn delegated roughly 80 percent of the contract to Cadwalader, a "large business."[240] Thus, although on the surface it appears that the contract is being performed by a small business, in actuality a

---

[233] Treasury updates the site approximately every 30 days. List of Procurement Contracts and Agreements Under EESA, *supra* note 8 (accessed Oct. 12, 2010); Treasury conversations with Panel staff (Aug. 30, 2010).

[234] June 2009 GAO Report on Transparency and Accountability, *supra* note 57, at 84.

[235] *See* Section D.1.a, *supra.*

[236] Treasury conversations with Panel staff (Sept. 16, 2010).

[237] Congressional Oversight Panel, Written Testimony of Scott Amey, general counsel, Project on Government Oversight, *COP Hearing on Treasury's Use of Private Contractors,* at 4 (Sept. 22, 2010) (online at cop.senate.gov/documents/testimony-092210-amey.pdf).

[238] GAO has noted Treasury's subcontracting process and its efforts to ensure that small businesses, minority-owned businesses, and women-owned businesses are well-represented. *See* June 2009 GAO Report on Transparency and Accountability, *supra* note 57, at 63–64. Of course, while it may be true that a substantial percentage of subcontracts have been awarded to these types of businesses, this evidence is obscured from public view because it is not made publicly available. The fact that it is not publicized makes it difficult to identify both cases of concern, such as the Anderson contract example discussed in the paragraph below, and success stories.

[239] Based on past practice, it seems reasonable to think Treasury would be capable of disclosing information on subcontractors. *See* Congressional Oversight Panel, Written Testimony of Allison Stanger, Russell Leng '60 Professor of International Politics and Economics, Middlebury College, *COP Hearing on Treasury's Use of Private Contractors,* at 6, 8 (Sept. 22, 2010) (online at cop.senate.gov/documents/testimony-092210-stanger.pdf) (hereinafter "Testimony of Allison Stanger") ("The old version of USAspending.gov used to have a page entirely dedicated to subcontracts and linked to the home page. . . . I stand ready to be persuaded otherwise, but to date, I have found most concerns about the costs of transparency to be misplaced, excessively focused on the short term at the expense of the sustainable.").

[240] Data provided to Panel staff by Treasury (Aug. 27, 2010).

large business is essentially responsible for performance.[241] Because information on subcontracts is not made public, this fact is likely to remain obscured from public view.[242]

According to two experts who testified before the Panel, one option for addressing concerns about disclosure is to include more robust disclosure terms in future contracts and agreements. In certain situations—such as the TARP, which was designed and implemented during a period of extreme economic upheaval—these provisions could require disclosure of certain information that could be withheld during "normal" times under other disclosure regimes. Such contracts could require the disclosure of certain types of proprietary information. Including such provisions would allow potential contractors and agents to decide in advance whether they want to enter an arrangement that imposes heightened disclosure responsibilities. Yet in considering this option, it is important to recognize that emergency situations may call for Treasury to hire competent contractors within a very short period of time. Program implementation should not be placed at risk by incorporating disclosure provisions that discourage potential bidders. On the other hand, in certain types of economic emergencies, business considerations may put Treasury in a strong negotiating position. In the fall of 2008, for example, Wall Street firms—both law firms and financial firms—were losing business rapidly. Simultaneously, Treasury was soliciting contracts for work that was both lucrative and prestigious. In such a situation, Treasury may be able to secure qualified contractors despite the inclusion of expanded disclosure provisions in the contracts.

b. Disclosure of Performance

Treasury publishes almost no information on the performance of contractors and financial agents during the life of the arrangement. For example, the monthly MHA reports mention the activities of the HAMP compliance agent, but offer few specifics on whether the agent is actually meeting performance targets. There is even less information available on the performance of other retained entities. This lack of disclosure makes it hard to determine whether the process has been aggressive, robust and transparent enough. As a result of this lack of disclosure, it is impossible for the public to verify that a retained entity is acting in accordance within the terms of its arrangement or to advocate for arrangements to be canceled when a contractor is performing poorly. Thus, in the absence of more detailed information on performance while the arrangement is active, any public concerns about a retained entity's performance are likely to surface after it has already been paid in full.

---

[241] While it is not illegal for a small business contractor to subcontract to a large business, this practice raises red flags. After all, although a contractor is not obligated to subcontract with a small business when it pursues a subcontract, the example in the text above highlights one way in which limited disclosure makes it difficult for the public to assess the degree to which small businesses are involved in the implementation of the TARP.

[242] *Cf.* October 2009 GAO Report on Transparency and Accountability, *supra* note 207, at 28 ("The share of work by small businesses—including minority-and women-owned businesses—under TARP contracts and financial agency agreements has grown substantially since November 2008, when only one of Treasury's prime contracts was with a small business and only one minority small business firm was a subcontractor with a large business contractor.").

Other relevant aspects of performance are also not disclosed to the public. While Treasury has provided detailed guidance on how retained entities should address conflict of interest issues, it does not disclose information concerning ongoing conflict monitoring and mitigation efforts.[243] Additionally, neither contractors nor financial agents have published any qualitative information on "best practices" or implementation challenges. The absence of this type of qualitative information deprives future generations of policymakers of a useful tool for learning how to deploy contractors and agents effectively.[244]

c. Disclosure of Monitoring Procedures

Prior to the Panel's hearing on TARP contracting on September 21, 2010, Treasury had not publicly disclosed significant details about its procedures for monitoring TARP contracts and agreements. Treasury testimony during the hearing illuminated several of these monitoring procedures, including daily oversight by COTRs for contracts and quantitative monthly or quarterly measures for financial agents.[245] While these disclosures are useful in helping the public understand Treasury's monitoring procedures, there are additional disclosures that would enhance the transparency of the monitoring process.

First, Treasury does not make the results of its monitoring efforts publicly available, so it is difficult to determine whether these monitoring efforts are successful. Second, Treasury created detailed "Policies and Procedures" to govern its relationship with contractors and financial agents,[246] but it has not made these documents public. Treasury maintains that it generally does not disclose "policies and procedures" and that they are intended to be used solely for internal processes.[247] Regardless of past practice, disclosure of the documents is particularly important with regard to financial agents because of their unique status: unlike traditional contractors who are awarded procurement contracts with the federal government, financial agents are not subject to the FAR.

2. Accountability

When it passed EESA, Congress emphasized the importance of accountability. One of the statute's purposes was to ensure that the use of TARP authority was subject to "public accountability."[248]

---

[243] After submitting their original conflict-of-interest mitigation plans, some entities submitted amended plans to Treasury. Data provided by Treasury staff to Panel staff (Sept. 14, 2010). Nonetheless, Treasury does not publish these amended plans, nor does it publish information on ongoing conflict assessments or ongoing mitigation efforts. *See also* Testimony of Allison Stanger, *supra* note 228 ("[Y]ou really can't talk about mitigating conflicts of interest until you see what the interests are. That's why I come down on the side of radical transparency.").

[244] As noted in at the Panel's hearing on contracting, better availability of "best practices" information would have assisted government officials and retained entities in employing the best possible processes for establishing and carrying out their TARP contracts and agreements. *See* Congressional Oversight Panel, Testimony of Steven Schooner, professor of law and co-director of the government procurement law program, The George Washington University School of Law, *Transcript: COP Hearing on Treasury's Use of Private Contractors* (Sept. 22, 2010) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-092210-contracting.cfm) ("[F]rom an aspirational standpoint, there's always room for improvement on a contract-by-contract basis. We can all sit down and do better. Give them a little more time and a lot more staff, a little bit of training and some more best practices, there's plenty of room for improvement.").

[245] *See* Prepared Statement of Gary Grippo and Ronald Backes, *supra* note 26, at 6.

[246] *See* Section B.4, *supra.*

[247] Treasury conversations with Panel staff (Oct. 4, 2010).

[248] 12 U.S.C. § 5201(2)(D).

Notwithstanding this concern, EESA enabled the Secretary to use private entities to implement the TARP, even though private parties—unlike public officials—would not be subject to traditional accountability mechanisms, such as public elections, direct Congressional oversight, or statutory disclosure regimes like the Freedom of Information Act (FOIA). For these reasons, establishing rigorous oversight mechanisms is essential to fulfilling Congress's mandate that contractors and financial agents are held accountable.[249]

Treasury has taken several steps to attempt to enhance accountability of contractors and financial agents, such as making contracts and agreements available online, describing financial agents' fiduciary duties in the text of the agreements, assigning oversight responsibility to specific Treasury employees, and training those employees to oversee contractors' performance.[250] Treasury also hired additional full-time staff to assist with monitoring efforts.[251]

Yet while Treasury has taken significant steps to improve its accountability regime, the regime remains imperfect. Treasury has failed to provide detailed, public descriptions of its plans for holding contractors and agents accountable.[252] Some of the earliest TARP contracts included weak language on the contractors' transparency and accountability duties.[253] For example, the contract with the law firm Simpson Thacher & Bartlett LLP included no provisions on transparency and accountability.[254] Similarly, subcontractors of financial agents are bound neither by agency law nor by the FAR.[255] The result is that some of the entities responsible for implementing the TARP are subject to an amorphous accountability regime.

Fannie Mae and Freddie Mac provide relevant examples.[256] Although they may be somewhat unique, they demonstrate some of the shortcomings of the existing accountability regime. For instance, although Treasury outlined broad, general goals for HAMP

---

[249] *See* Senate Budget Committee, Written Testimony of James Carafano, director, Douglas and Sarah Allison Center for Foreign Policy Studies, The Heritage Foundation, *Responsible Contracting: Modernizing the Business of Government,* at 1 (July 15, 2010) (online at budget.senate.gov/democratic/testimony/2010/Carafano_Testimony_715.pdf) ("Getting contracting right is a fundamental responsibility of good governance—essential to the practice of limited government and fiscal responsibility.").

[250] U.S. Government Accountability Office, *Troubled Asset Relief Program: March 2009 Status of Efforts to Address Transparency and Accountability,* at 39 (Mar. 2009) (GAO–09–504) (online at www.gao.gov/new.items/d09504.pdf).

[251] Data provided by Treasury staff to Panel staff (Sept. 15, 2010). While Treasury's decision to hire additional staff to monitor contractors' performance constitutes a meaningful step toward enhancing accountability, the scale of Treasury's contracting efforts—as well as the myriad subcontract agreements that exist—suggests that Treasury may still not have adequate capacity to conduct truly comprehensive monitoring. In addition, the staffing challenge lies not only at the first level of monitoring, but also at the second level: effective monitoring necessitates that monitors are supervised such that they are held accountable for their performance as well. Developing a system to "monitor the monitors" risks the creation of layer upon layer of oversight.

[252] Treasury created "Policies and Procedures" that provide some guidance on its relationships with financial agents, but they apply only to financial agents, provide few details on specific accountability mechanisms (such as the methods Treasury will use to monitor performance), and cover only five subject areas, omitting key issues like public disclosure obligations. *See* Section B.4, *supra.*

[253] *See* SIGTARP Initial Report to the Congress, *supra* note 54, at 5 ("SIGTARP also recommended that transparency and oversight-related language be inserted in recent TARP contracts; Treasury included such language in the recent auto industry, Citigroup, and Bank of America contracts, making them far superior than earlier contracts from an oversight perspective.").

[254] *See* U.S. Department of the Treasury, *Contract Between U.S. Department of the Treasury and Simpson Thacher & Bartlett* (Oct. 10, 2008) (Contract No. TOFS–09–D–0009) (online at www.financialstability.gov/docs/ContractsAgreements/Simpson%20Contract%2010′10′08.pdf).

[255] *See* Section B.1.b, *supra.*

[256] *See* Annex I, *infra.*

in March 2009, Treasury has not announced specific performance metrics for the program, nor has it revised its initial objectives as circumstances have changed. In the absence of benchmarks for the program that are both more specific and more realistic, it is difficult to determine whether Fannie Mae and Freddie Mac are performing adequately under their financial agency agreements. Moreover, OFS has not yet developed written procedures for oversight and monitoring of the two entities, which makes it difficult for OFS to monitor performance systematically and "identify key risks" in the program.[257]

Moreover, contractors are not bound by the FOIA, a core accountability tool that applies to federal agencies.[258] Therefore, substantial portions of the work performed to effectuate the TARP may be forever shielded from public scrutiny. Without access to this information, it will be challenging for the public to hold Treasury, as well as its contractors, subcontractors, and financial agents, fully accountable.[259]

H. Discussion of Conflicts of Interest

As discussed in more detail in Section B, Treasury issued the Interim Final Rule on January 21, 2009 to guide contractors, financial agents, and subcontractors (collectively referred to as "retained entities") in the performance of their agreements with Treasury.[260] The rule is relatively extensive and comprehensive in some areas, but weak in others. In terms of many traditional ethical issues—such as acceptance of gifts and other sorts of "bribes" during the contract solicitation process—the regulations are robust. Of the public comments filed in response to the publication of the interim rule, several opposed the rule on the grounds that it would impose undue regulatory burdens on retained entities, and for potential contractors, the costs of compliance would outweigh the benefits of receiving the contract. According to these comments, the effect would be to discourage the strongest firms from bidding on TARP contracts and subcontracts. In contrast, none of the public comments stated that the regulations were too lax or insufficiently extensive.[261]

While it is challenging to address the merits of these comments without more disclosure from Treasury and retained entities—

---

[257] U.S. Government Accountability Office, *TARP Management Report: Improvements are Needed in Internal Control Over Financial Reporting for the Troubled Asset Relief Program,* at 13 (June 30, 2010) (GAO–10–743R) (online at www.gao.gov/new.items/d10743r.pdf) (hereinafter "June 2010 GAO Report on Internal Control Over Financial Reporting").

[258] FOIA obligates federal agencies to disclose requested information unless they are able to show that it is covered by one of nine exemptions. In contrast, contractors are permitted to disclose requested information, but they are not obligated to do so. 5 U.S.C. § 552(b). *See also* Federal Acquisition Regulation, *supra* note 11, at 24.20. Likewise, financial agents are not compelled to comply with the FOIA.

[259] *See* Senate Budget Committee, Written Testimony of Allison Stanger, Russell Leng '60 Professor of International Politics and Economics, Middlebury College, *Responsible Contracting: Modernizing the Business of Government,* at 7 (July 15, 2010) (online at budget.senate.gov/democratic/testimony/2010/Stanger_Testimony_715.pdf) ("The American people need to be able to see where and how their tax dollars are spent—right through to the sub-award level. Companies as well as governments can operate with the purest of intentions, but if their most important transactions are opaque to the public, they will lose trust and effectiveness.").

[260] *See* Section B.3, *supra* (discussing the "TARP Conflicts of Interest" regulations, which are codified in the Code of Federal Regulations at 31 CFR § 31).

[261] *See generally* TARP Conflicts of Interest, *supra* note 37 (listing all public comments to the Interim Final Rule on TARP Conflicts of Interest, none of which fault the rule for being insufficiently extensive).

Treasury has not made information on compliance costs or ongoing mitigation efforts publicly available—the public comments on the IFR do reflect Treasury's broad conception of its "conflict of interest" mandate. Section 107 of EESA requires only that the Secretary "issue regulations or guidelines necessary to address and manage or to prohibit conflicts of interest," including "any other potential conflict of interest, as the Secretary deems necessary or appropriate in the public interest."[262]

Yet despite being faced with these sparse requirements, Treasury drafted the IFR to include a broad array of provisions covering a diverse set of subjects, regulating everything from the disclosure of nonpublic information—including requiring "periodic training" for employees on the proper handling of nonpublic information—to "favors" and gifts.[263] Just as the IFR takes steps beyond the minimal obligations imposed by EESA in terms of the breadth of its coverage, it also takes a robust approach in terms of the strictness of its methodology for dealing with two core types of conflicts of interest: OCI and PCI. EESA does not require Treasury to bar all conflicts of interest: the statute permitted Treasury simply to develop regulations to "address and manage *or* to prohibit" them.[264] Instead, the IFR prohibits all OCIs and PCIs unless they have been mitigated or Treasury waives them.[265] The presumptive prohibition seems to reflect an aggressive approach to certain types of conflicts of interest.

However, the regulations do not address all situations in which conflicts of interest could arise. The Panel is concerned about the potential for a conflict of interest to develop in the following situations:

- Treasury treats a retained entity differently in Treasury's exercise of its public responsibilities;
- A retained entity carries out its assignments in a manner that serves its interest and not the public interest;
- A retained entity carries out its assignments in a manner that serves the interest of the entity's other clients;
- A retained entity uses information it obtains from its work for the TARP in a manner that benefits itself or its other clients.

The discussion below lays out the basis for the Panel's concerns in greater detail.

1. Treasury Gives Preferential Treatment to a Retained Entity

There are four situations in which Treasury's relationship with a retained entity could compromise its ability to act impartially in the exercise of its public responsibilities.

- Treasury contracts with a firm and then seeks to regulate the firm or its industry.
- Treasury enters into an arrangement with a contractor or financial agent—or that contractor or financial agent enters into an arrangement with a subcontractor—and subsequently in-

[262] 12 U.S.C. § 5218(a).
[263] 31 CFR §§ 31.213(a)(1), 31.217(c)(3).
[264] 12 U.S.C. § 5218(a) (emphasis added).
[265] 31 CFR § 31.211(a); 31 CFR § 31.212(a).

tends to hire an employee from one of those retained entities, or one of the retained entities intends to hire a Treasury employee.

- Treasury develops an overreliance on one specific firm because it has entered multiple arrangements with that firm.
- Treasury hires a contractor or financial agent—or that contractor or financial agent hires a subcontractor—that needs government support in the future.

The remainder of this subsection addresses each of these situations in turn.

a. Future Industry Regulation

Acting in its regulatory capacity, Treasury may need to regulate a business that it is also employing to do work. It is hard to see how Treasury could avoid the perception of a conflict of interest if it implements industry-specific regulations or regulates an individual business, and such oversight could have direct implications for the ability of a contractor or financial agent to perform.[266] The perception of a conflict may be particularly likely to arise if, as discussed above, a company enters an arrangement with Treasury at below-market rates and expects that it will receive advantages in subsequent legislative, regulatory or enforcement initiatives.

It is also possible that a firm could attempt to leverage its relationship with Treasury to enhance its capacity to lobby effectively with other regulators, such as the Federal Reserve or the FDIC. This concern is particularly relevant in the wake of the Dodd-Frank Wall Street Reform and Consumer Protection Act,[267] when firms are engaged in intense lobbying of the government as it begins the rulemaking process required by the statute.

b. Hiring

Although EESA explicitly requires the Secretary to issue regulations that address "post-employment restrictions on employees,"[268] the IFR includes no provisions related to this issue. According to the "Supplemental Information" provided in the Federal Register, the IFR omits this issue because Treasury believes it is "already adequately covered by existing law."[269]

Existing regulations do provide guidance on this issue.[270] On his first day in office, President Barack Obama issued an executive order that required government appointees and lobbyists entering government to pledge not to work on "any particular matter involving specific parties that is directly and substantially related to my former employer or former clients, including regulations and contracts" for two years. Employees leaving the government are also required to take a pledge that they will abide by post-employment

[266] Treasury asserts that it maintains a wall between its regulatory functions and its policy and political functions. Testimony of Gary Grippo, *supra* note 49. Whether it maintains such a separation or not, the perception of a conflict may nonetheless arise if it issues regulations that appear to favor certain contractors, agents, or their respective industries over others.

[267] *Dodd-Frank Wall Street Reform and Consumer Protection Act,* Pub. L. No. 111–203 (2010).

[268] 12 U.S.C. § 5218(a).

[269] TARP Conflicts of Interest, *supra* note 37.

[270] *Executive Order 13490 of January 21, 2009: Ethics Commitments by Executive Branch Personnel,* 74 Fed. Reg. 4673 (Jan. 26, 2009) (hereinafter "Executive Order 13490"). Additional restrictions on executive branch officials "seeking other employment" are published in the Code of Federal Regulations at 5 CFR § 2635.601 et seq.

communication restrictions and that they will refrain from lobbying executive branch officials until the conclusion of the Administration.[271]

Despite the merit of these provisions, without more disclosure from Treasury, it is difficult to determine whether Treasury has confronted any potential conflicts issues for either its employees seeking employment in the private sector or for private sector employees seeking opportunities at Treasury. Treasury does not publicly disclose information that identifies the employment paths of its employees. As a result, it is challenging to assess whether the issue of the "revolving door" has been addressed appropriately.[272]

c. Overreliance on Individual Firms

Ensuring that contracts and agreements are awarded to a broad group of firms may be critical to minimizing conflicts of interest.[273] Awarding a large number or value of contracts or agreements to one specific firm may leave Treasury overly reliant on that particular institution. Such overreliance may cause Treasury to be disproportionately dependent on certain firms or industries. For example, Treasury may be less likely to expedite meaningful reforms of Fannie Mae and Freddie Mac when it has employed them for combined arrangements of $240.5 million and when these firms agreed to provide their services at cost, receiving no profit from the deals.[274] Forcing senior Treasury officials into the simultaneous role of regulator and client may place them in an awkward position. Likewise, Treasury may be hesitant to implement certain types of accounting reforms when it has an outstanding contract of $24.6 million with PricewaterhouseCoopers, particularly when such reforms would subject the investment of taxpayer funds to more risk.[275] In addition, Treasury awarded contracts of roughly $27 million to Cadwalader, rather than distributing the legal work among a wider array of law firms. As a whole, disproportionate reliance on particular firms leaves Treasury less nimble to consider the widest possible array of regulatory options and also makes Treasury more vulnerable to lobbying efforts by specific institutions and industries.

d. Future Government Support

The IFR does not prevent Treasury from providing significant future financial support to entities that it has hired as contractors in the past or that are performing work for Treasury under a contract

---

[271] *Id.*

[272] Lawrence Lessig conversations with Panel staff (Sept. 23, 2010).

[273] Treasury testified that its preference is to engage multiple firms, rather than relying on a single entity. Congressional Oversight Panel, Testimony of Ronald W. Backes, director of procurement services, U.S. Department of the Treasury, *Transcript: COP Hearing on Treasury's Use of Private Contractors* (Sept. 22, 2010) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-092210-contracting.cfm).

[274] Congressional Oversight Panel, Testimony of Joy Cianci, senior vice president, Making Home Affordable Program, Fannie Mae, *Transcript: COP Hearing on Treasury's Use of Private Contractors* (Sept. 22, 2010) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-092210-contracting.cfm) (hereinafter "Testimony of Joy Cianci"). *See also* Annex I, *infra.*

[275] List of Procurement Contracts and Agreements Under EESA, *supra* note 8.

in the present.[276] On one hand, such a prohibition may appear to be unnecessary: Treasury's criteria for providing any assistance should focus on the institution's importance to the broader economy and the extent of its need for assistance, not on whether Treasury has existing arrangements with the institution.

But on the other hand, Treasury's previous or ongoing relations with a company may skew its view of both of these criteria. Perhaps Treasury would be inclined to perceive an institution as more important if it was performing substantial, valuable work as a contractor. Or perhaps it would be less reluctant to allow an institution to fail if failure meant that a company would not be able to perform a contract for which it had already been paid. Companies may also exert pressure on Treasury, particularly if they contract with the government at standard government rates, which are often below-market rates.[277] For example, Fannie Mae and Freddie Mac agreed to provide services at cost, receiving no profits from the agreements.[278] Firms that agree to such arrangements may believe that their willingness to provide services at cheap rates entitles them to a better deal when they run into financial difficulties. On the other hand, it may be improbable that Treasury would give such firms preferential treatment in light of the likelihood that the size of the contracts would be small relative to the scope of the firms' financial difficulties.[279] However, given the absence of specific provisions in the IFR related to this issue, as well as an absence of any additional guidance from Treasury, it is not clear how Treasury would address this situation.[280] Without more concrete guidance on this issue, it is possible that future awards of financial assistance to contractors and financial agents could raise the appearance of a conflict of interest.

2. Retained Entity Serves its own Interest and Not the Public Interest

A significant concern is that a contractor will carry out its contractual responsibilities so as to serve its own interest, rather than the public interest.[281] When there is a melding of government and private entities—in terms of both interests and personnel—it may be difficult to pinpoint how and where public interests align with private interests and how and where they diverge. For example, the GSEs may have an interest in maximizing the performance of

---

[276] The Secretary's authority to make all funding commitments under the TARP ended on October 3, 2010. *See* 12 U.S.C. § 5230(b). However, in the future, it is conceivable that the government could provide financial support to institutions under a different program.

[277] *See* Section H.1.a, *supra.*

[278] Testimony of Joy Cianci, *supra* note 274. *See also* Annex I, *infra.*

[279] For example, as discussed in more detail in Annex I, *infra,* the combined obligated value of the Fannie Mae and Freddie Mac agreements is approximately $219 million, but both firms reported combined losses in excess of $108 billion in 2008.

[280] *See* Letter from Danielle Brian, executive director, Project on Government Oversight, to the Chairs and Ranking Members of the Senate Committee on Banking, Housing, and Urban Affairs, the Senate Committee on Finance, the House Committee on Financial Services, and the Joint Economic Committee (May 19, 2009) (online at www.pogo.org/pogo-files/letters/financial-oversight/er-b-20090519.html) (hereinafter "Letter from Danielle Brian to Congressional Leadership") ("It is imperative that Treasury establish strong conflict of interest policies for the TARP, because while the firms that were awarded TARP procurement contracts also have to follow the conflict of interest rules in the Federal Acquisition Regulation, it appears that other firms are being retained as 'financial agents' and would only have to follow the TARP rules.").

[281] *See, e.g.,* Testimony of Allison Stanger, *supra* note 239, at 6, 8 ("Government by contract means that government is entirely dependent on the private sector to conduct its daily business, so effective oversight is too often hostage to a corporate bottom line.").

their mortgage loan portfolios, which could potentially conflict with their responsibilities to administer HAMP and enforce servicer compliance uniformly.[282] In addition, the GSEs may have sought these agreements in order to curry favor with Treasury despite the fact that the agreements do not contribute to their long-term profitability.

It is very challenging to develop regulations that are sufficient to address this concern fully, as it is almost inevitable that any rule or contract will allow some flexibility for entities to make independent decisions that could prioritize their own interests over others. While the IFR includes provisions that address many aspects of this concern, such as its prohibitions on organizational conflicts of interest, there are still opportunities for retained entities to act to maximize their own self-interest.[283] Perhaps the most effective tool to minimize this possibility is to include strong provisions in the contract to bind retained entities to perform at a high level that serves the public interest.[284] As described in more detail in Sections C and D, Treasury has adopted robust provisions in many of its contracts and agreements, and many of its monitoring and compliance procedures appear to be stringent. Nonetheless, the Panel believes that it is important to continue to monitor this issue to ensure that contractors serve the public interest. The Panel also recognizes that if errors are made during the selection process, there may be some conflicts that cannot be mitigated even if they are subjected to an intensive monitoring process.

3. Retained Entity Serves its Clients' Interest and Not the Public Interest

It is also conceivable that a retained entity would act to promote the interest of its clients, rather than the public interest. As discussed above, the IFR and the arrangements themselves include provisions that attempt to ensure that the entity provides the services requested by the government. The introduction to the rule acknowledges that "retained entities may find that their duty to private clients impairs their objectivity when advising Treasury."[285] Even so, it is inevitable that some flexibility will remain that would allow an entity to promote private, rather than public, interests. For example, the GSEs' business relationships with servicers could potentially conflict with their duties to administer HAMP uniformly and to ensure that servicers comply with the program's guidelines.[286] Likewise, the choice of Cadwalader raises questions about conflicts since the firm has represented a number of TARP recipients, including General Motors and Ally.[287] It is important to

---

[282] *See* Annex I, *infra*.

[283] Transcript Testimony of Scott Amey, *supra* note 37 ("I think that there are possible ways to get around these conflicts, because just mitigating them and coming up with firewalls that somebody in a different building [*sic*] doesn't seem to be adequate to me.").

[284] *See* Section G.1.a, *supra*.

[285] TARP Conflicts of Interest, *supra* note 37.

[286] *See* Annex I, *infra*.

[287] In total, Cadwalader represented three clients with respect to which it also represented Treasury: GM, Ally Financial, and First Bancorp. It maintains that the aggregate revenues from these three clients accounted for less than 1 percent of the firm's revenues in each of the last five years. Data provided by Treasury and Cadwalader to Panel staff (Oct. 5, 2010). Treasury maintains that Cadwalader did not perform TARP-related work for any of its clients. Treasury conversations with Panel staff (Sept. 28, 2010).

continue to monitor Treasury's arrangements with private entities to ensure that they act in the public interest as much as possible. In order to ensure that these monitoring efforts are robust, it is important to know both the clients of retained entities and their relative importance to the firm.[288]

It merits mention that the Panel invited Cadwalader to testify at its September 22, 2010 hearing, entitled "Treasury's Use of Private Contractors." In a letter to the Panel on September 21, 2010, John J. Rapisardi, co-chairman of Cadwalader's Financial Restructuring Department, declined the invitation, citing "the difficulty [testifying] would cause in protecting the privilege of both the United States Treasury and our other clients in this forum." The letter also stated that the firm was "willing to provide the Panel with pertinent information provided that the *interests of the Firm's clients* are not prejudiced."[289] This deference to the interests of the firm's clients perfectly illustrates the potential conflicts that could result from Treasury's contracting procedures.

4. Retained Entity Uses Nonpublic Information to Benefit Itself or its Clients

The IFR contains provisions that govern the use of nonpublic information. The introduction to the rule states that "retained entities may find that their duty to private clients impairs . . . their judgment about the proper use of nonpublic information."[290] An entire subsection of the rule deals with confidentiality issues.[291] It specifies that nonpublic information should not be disclosed unless necessary and should not be used "to further any private interest other than as contemplated by the arrangement."[292] It also requires each retained entity to take "appropriate measures to ensure the confidentiality of nonpublic information and to prevent its inappropriate use" and to "document these measures in sufficient detail to demonstrate compliance."[293]

In testimony before the Panel, BNY Mellon outlined a series of steps it has taken in an attempt to mitigate potential problems that could arise from its possession of sensitive information.[294] It used information barrier policies that limit information sharing on a "need to know" basis, a restricted securities list, "enhanced access controls" for TARP-related documents (including electronic files), nondisclosure agreements, and physical separation of employees servicing the TARP from employees engaged in asset management activities. At an individual level, employees are required to provide disclosures on a quarterly basis, and they are restricted from certain personal trading activities.[295] It is not clear, however, that all

---

[288] With respect to Cadwalader, the Panel requested information regarding clients' relative importance to the firm. However, Treasury declined to request this information from its client.

[289] Letter from John J. Rapisardi, co-chairman of Cadwalader's Financial Restructuring Department, to Naomi Baum, executive director of the Congressional Oversight Panel (Sept. 21, 2010) (emphasis added).

[290] TARP Conflicts of Interest, *supra* note 37.

[291] 31 CFR § 31.217.

[292] 31 CFR § 31.217(b).

[293] 31 CFR § 31.217(c).

[294] AllianceBernstein has instituted similarly robust conflict mitigation procedures. AllianceBernstein conversations with Panel staff (Sept. 30, 2010).

[295] Congressional Oversight Panel, Written Testimony of Mark Musi, chief compliance and ethics officer, Bank of New York Mellon, *COP Hearing on Treasury's Use of Private Contractors,* at 3 (Sept. 22, 2010) (online at cop.senate.gov/documents/testimony-092210-musi.pdf).

firms have conflict mitigation processes that are as robust as BNY Mellon's.

Yet despite Treasury's commendable efforts to restrict the inappropriate use of nonpublic information, it is extremely difficult to eliminate the concern entirely. Employees of retained entities may be exposed to nonpublic information that would benefit them in future private pursuits, long after the termination of the TARP relationship. Similarly, the information could assist their lobbying strategies or other types of future engagement with the government. For these reasons, this concern should be monitored even after the TARP expires.

5. Does the IFR Alleviate Conflicts of Interest?

As discussed above, the IFR does not address several key situations that could result in conflicts of interest. Without more guidance, it is possible that if any of these situations were to arise, the public could perceive that a conflict of interest exists. In addition, because much of the monitoring of conflicts of interest is based on self-disclosure by retained entities, Treasury may not have sufficient information to ensure that all relevant conflicts are addressed.[296] The weaknesses of the IFR create a ripe opportunity for Treasury to fill these gaps in the final version of the rule. Alternatively, "radical transparency" of information on contracts, financial agreements, and subcontracts, including disclosure of ongoing conflict-of-interest monitoring efforts, could help to alleviate the perception of conflicts.[297]

More broadly, however, the conflict-of-interest regulations highlight the fundamental conundrum that plagues the TARP's implementation: when the government is tasked with intervening in the private sector to stabilize a faltering economy, how can it partner with private industry while simultaneously preserving public values? This tension is evidenced with respect to specific institutions. When Morgan Stanley, for example, is acting as a financial agent for the U.S. government, will Treasury's ability to develop fair economic policies for the financial industry be compromised? Similarly, the cases of Fannie Mae and Freddie Mac are evidence of some of the possible conflicts that may persist despite the presence of the IFR and Treasury's monitoring regime.[298] In addition, to what extent would truly robust conflict-of-interest regulations impede Treasury's ability to hire the highest-performing contractors and financial agents? While it is in Treasury's interest to remain attractive to the private entities capable of the best performance and to generate the highest possible rates of return on its investments,

[296] Letter from Danielle Brian to Congressional Leadership, *supra* note 280 ("[I]t appears that both the Fed and Treasury are mostly relying on the asset managers for self-disclosure."). Treasury has stated that it "independently review[s] the conflicts posture" for all retained entities and that the IFR was intended solely to outline the responsibilities of retained entities, not to reflect or narrow the range of monitoring activities that Treasury is entitled to undertake on its own. Testimony of Gary Grippo, *supra* note 49; Treasury conversations with Panel staff (Sept. 23, 2010). Nonetheless, Treasury largely relies upon self-disclosure by these entities of the underlying data regarding potential conflicts issues, and then it uses this data as the basis of its own review. Most importantly, it is possible for entities to withhold information from Treasury, and it is difficult for Treasury to then uncover this information with the level of granularity necessary to identify a potential conflict of interest.

[297] For an extended discussion of the benefits of transparency and areas in which enhanced transparency may be possible, see Section G, *supra*.

[298] *See* Annex I, *infra*.

Treasury must also develop policies that are consistent with public values, such as fairness and transparency. In some instances, these values necessarily impose costs, making the contracts less appealing to private firms. At the same time, these costs are critical to ensuring that the public understands how the government uses its money, who receives this money, and the quality of the work that the government receives for the money it spends.

I. Activities of Other Oversight Bodies

As part of their broader duty to oversee the TARP, GAO and SIGTARP have explored the issue of TARP contracting and intend to publish further on this subject near the time of this report's release.

SIGTARP has released seven quarterly reports to Congress since the enactment of EESA. Each of these reports has briefly discussed or offered recommendations regarding an element of TARP contracting.[299] SIGTARP's initial report to Congress, released on February 6, 2009, recommended that all TARP agreements be posted online. This recommendation was fully implemented on January 28, 2009.[300] Furthermore, the majority of SIGTARP reports have cautioned that conflicts of interest may exist at any level of the TARP's administration.

On May 14, 2010, SIGTARP sent an engagement memo to Herbert M. Allison, Jr., the then-Assistant Treasury Secretary for Financial Stability, detailing its intention to audit Treasury's process in procuring professional services for TARP.[301] This audit aims to accomplish two goals: (1) to assess whether the contract prices for these services were fair and reasonable; and (2) to examine the invoices delivered by the contractors to establish whether they reflect actual work completed.

In addition to its work on TARP contracting, SIGTARP has also addressed issues relating to PPIP. The Audit Division of SIGTARP currently has two audits focused on PPIP, one on internal controls and one on the selection of asset managers. The scope of these audits includes the criteria used in the selection of managers, issues of conflicts of interests, as well as internal controls and compliance.[302] The results of SIGTARP's internal compliance audit, in-

---

[299] *See* Office of the Special Inspector General for the Troubled Asset Relief Program, *Quarterly Report to Congress,* at 147–151 (Apr. 21, 2009) (online at www.sigtarp.gov/reports/congress/2009/April2009_Quarterly_Report_to_Congress.pdf); Office of the Special Inspector General for the Troubled Asset Relief Program, *Quarterly Report to Congress,* at 91–92, 171–183 (July 21, 2009) (online at www.sigtarp.gov/reports/congress/2009/July2009_Quarterly_Report_to_Congress.pdf); Office of the Special Inspector General for the Troubled Asset Relief Program, *Quarterly Report to Congress,* at 87, 159–161 (Oct. 21, 2009) (online at www.sigtarp.gov/reports/congress/2009/October2009_Quarterly_Report_to_Congress.pdf) (hereinafter "Quarterly Report to Congress"); Office of the Special Inspector General for the Troubled Asset Relief Program, *Quarterly Report to Congress,* at 140–141 (Jan. 30, 2010) (online at www.sigtarp.gov/reports/congress/2010/January2010_Quarterly_Report_to_Congress.pdf); Office of the Special Inspector General for the Troubled Asset Relief Program, *Quarterly Report to Congress,* at 25–28 (July 21, 2010) (online at www.sigtarp.gov/reports/congress/2010/July2010_Quarterly_Report_to_Congress.pdf) (hereinafter "July 2010 SIGTARP Report").

[300] SIGTARP Initial Report to the Congress, *supra* note 54.

[301] Office of the Special Inspector General for the Troubled Asset Relief Program, *Engagement Memo—Review of Treasury's Process for Contracting for Professional Services Under the Troubled Asset Relief Program* (May 14, 2010) (online at www.sigtarp.gov/reports/audit/2010/SIGTARP%20Memo%20Contracting%20for%20Professional%20services%205.14.10.pdf).

[302] July 2010 SIGTARP Report, *supra* note 299, at 25–28. Treasury selected the following fund managers for PPIP: AllianceBernstein L.P. and its sub-advisors Greenfield Partners, LLC and Rialto Capital Management, LLC; Angelo, Gordon & Co., L.P. and GE Capital Real Estate;

cluding recommendations for Treasury, have so far been evidenced by a series of letters.[303] SIGTARP released the audit report on the selection of asset managers on October 7, 2010.[304] Due to SIGTARP's engagement in this area, contracts with the PPIP asset managers are not examined in this report.

In early November, GAO plans to release a report focusing specifically on TARP contracting. The report will provide an assessment of the effectiveness of Treasury's contracting under the TARP as well as its implementation of recommendations.

J. Conclusion and Recommendations

The TARP was unique in its size and scope and the speed with which it was implemented. In light of these factors, it is not surprising that the government sought outside assistance. Indeed, although the overall amount expended on outsourced work is significant, it is relatively modest in light of the size of the TARP itself. As more work is pushed to private contractors and agents, however, inevitable and perhaps troubling consequences become apparent. Accountability and transparency decrease, and the potential for conflicts of interest increases. The particular requirements of the TARP exacerbated these problems, as some of the services required by Treasury were obtained from law firms and financial institutions that are not by their nature transparent and have many other clients operating in the financial industry, which may have interests that conflict with those of the government.

As discussed above, Treasury has been responsive in adopting the recommendations of oversight bodies, and has earned some praise from the GAO and expert witnesses both for its contracting process and the transparency of its process. Despite the pressing needs of the financial crisis, Treasury complied with the FAR, although it could have waived its provisions, and in some circumstances went above and beyond what it was required to do. This praise must be viewed in context, however. Government contracting is notoriously nontransparent, and it is possible to perform well on a comparative basis, and yet be capable of significant improvement.

The Panel recommends that Treasury address the following issues:

- Treasury should include performance incentives in contracts and agreements, where appropriate.
- Transparency and accountability

  —*Material facts:* Critical information, such as task orders, should be made public. In the future, Treasury should consider including more stringent disclosure provisions in contracts and agreements so as to obligate retained entities to disclose all relevant material information.

  —*Rationale and decision-making process:* Treasury should better explain its rationale and decision-making process behind

---

BlackRock, Inc.; Invesco Ltd.; Marathon Asset Management, L.P.; Oaktree Capital Management, L.P.; RLJ Western Asset Management, LP.; The TCW Group, Inc.; and Wellington Management Company, LLP. U.S. Department of the Treasury, *Legacy Securities Public-Private Investment Program* (Sept. 17, 2010) (online at www.financialstability.gov/roadtostability/legacysecurities.html#press).

[303] July 2010 SIGTARP Report, *supra* note 299, at 281–282.

[304] SIGTARP Report on PPIP, *supra* note 5.

choosing to use contractors and financial agents rather than performing a specific function within Treasury. This is especially important in cases where Treasury enters into contracts or financial agency agreements with institutions like Fannie Mae and Freddie Mac that have received or are likely to receive substantial government assistance.

—*Performance:* Treasury should regularly publish progress updates on the performance of contractors and financial agents. Treasury should publish qualitative information on progress made by contractors and financial agents that include information on "best practices" and implementation challenges.

—*Monitoring procedures:* Treasury should disclose the results of its efforts to monitor contracts and agreements. Treasury should also publicly release its "Policies and Procedures" documents and information concerning the control Treasury retains over the direction of the TARP, the types of oversight Treasury exercises over its TARP contractors and financial agents, and the level of input that TARP contractors and financial agents have with respect to program development, execution, and policy decisions.

—*Accountability:* Treasury should provide detailed, public descriptions of its plans for holding contractors and agents accountable, including the processes it plans to employ to promote a culture of accountability for subcontractors. Any such plans should detail the level of disclosure that is necessary to hold contractors, agents, and subcontractors accountable.

- Subcontracting

—*Material facts:* Treasury should require all contractors to disclose the names and duties of all subcontractors, the values of the subcontracts, and the subcontracts themselves.

—*Small business plans:* Treasury should require its financial agents to submit small business subcontracting plans, and Treasury should make this information publicly available. Treasury should also seek to make more subcontracts available to small businesses.

- Conflicts of Interest

—*Final rule on conflicts:* Treasury should adopt a final rule on conflicts of interest for contractors, agents, and subcontractors. Nearly 22 months have passed since the IFR was issued, far longer than the 60-day notice and comment period. A final rule will provide retained entities with more regulatory certainty.

—*Immediate disclosure of all conflicts and mitigation efforts:* Treasury should disclose detailed, ongoing conflict-of-interest findings for all entities, including ongoing conflict mitigation efforts and the information upon which these findings are based. Where possible, Treasury should remove the redactions of material conflict-of-interest information.

—*Ongoing disclosure:* Treasury should also make regular disclosures of conflicts of interest that arise in the course of the performance of the arrangement, which should include updated information on entities' mitigation efforts.

—*Compliance costs:* Treasury contractors, agents, and subcontractors should publish costs they have incurred in complying with the IFR.

—*Plans for addressing conflicts of interest:* Treasury should develop and publicize plans for addressing the four potential conflicts of interest discussed in this report: (1) preferential treatment of retained entities by Treasury, (2) retained entities that serve their own interests, rather than the public interest, (3) retained entities that serve their clients' interests, rather than the public interest, and (4) retained entities that use nonpublic information to benefit themselves or their clients.

—*Self-disclosure:* While Treasury clearly takes its responsibility for monitoring conflicts seriously, it relies on contractors and agents to provide most of the underlying data upon which their reviews are based. While this may largely be due to the scope and scale of the arrangements, Treasury should consider alternatives that make it less reliant on the retained entities for factual information, such as conducting intensive spot checks on individual entities.

ANNEX I: FANNIE MAE AND FREDDIE MAC: A CASE STUDY

Here, the Panel examines in-depth issues related to two of the financial agency agreements that Treasury has entered into under EESA: those with Fannie Mae and Freddie Mac. The Panel is examining these two contracts in more detail for two reasons. First, these financial agency agreements together represent the largest part of the TARP procurement contract and financial agency agreement universe. Of the $436.7 million in total obligated value for all TARP procurement contracts and financial agency agreements, Treasury has obligated $126.7 million under Fannie Mae's financial agency agreement and $88.9 million under Freddie Mac's financial agency agreement. To date, Treasury has expended $111.3 million and $79.3 million on its financial agency agreements with Fannie Mae and Freddie Mac, respectively.[305] Second, Fannie Mae and Freddie Mac have such a key responsibility in a program designed to prevent qualified borrowers from losing their homes through foreclosure and, as such, play an instrumental role in implementing one of the core purposes of EESA—homeownership preservation.[306] The Panel intends to pursue this topic further in its November 2010 report on the status of Treasury's foreclosure mitigation efforts.

In February 2009, Treasury entered into financial agency agreements with Fannie Mae and Freddie Mac to provide services under the Administration's MHA program, which provides mortgage relief to qualifying homeowners. Treasury executed financial agency agreements with Fannie Mae and Freddie Mac to administer and enforce compliance with HAMP, respectively.[307] These roles are distinct from these entities' participation in HAMP as holders or guarantors of mortgages.

Fannie Mae and Freddie Mac are government-sponsored enterprises (GSEs) chartered by Congress with a mission of providing liquidity, stability, and affordability to the U.S. housing and mortgage markets. Fannie Mae and Freddie Mac operate in the U.S. secondary mortgage market by purchasing and securitizing mortgages, rather than making direct mortgage loans.[308]

---

[305] For comparative purposes, while Treasury had expended less than $500 million on HAMP mortgage modifications as of September 30, 2010, its expenditures under its Fannie Mae and Freddie Mac agreements currently equal $190.6 million.

[306] 12 U.S.C. § 5201.

[307] HAMP is designed to help struggling homeowners avoid foreclosure by reducing their monthly mortgage payments to 31 percent of their pretax monthly income. In order to be eligible, a borrower must meet three criteria: (1) the borrower must be delinquent on their mortgage or facing imminent risk of default; (2) the property must be the borrower's primary residence; and (3) the mortgage was originated before January 1, 2009 and the unpaid principal balance must be no greater than $729,750. If a borrower is eligible, participating servicers will then reduce the borrower's mortgage payment for a trial period. If the borrower successfully makes payments and provides certain documentation for three months, then the modification is made "permanent," for five years. For further information about, and discussion concerning, HAMP, *see* March 2009 Oversight Report, *supra* note 3; October 2009 Oversight Report, *supra* note 3; April 2010 Oversight Report, *supra* note 3.

[308] Congress established Fannie Mae in 1938 to create a secondary market for loans insured by the Federal Housing Administration (FHA), but its charter was amended in 1954 so that it could focus on the secondary market more generally. In 1970, Congress established Freddie Mac as a new government-chartered entity to provide an additional source of liquidity for mortgage loans. Office of Management and Budget, *Analytical Perspectives: Budget of the U.S. Government, Fiscal Year 2011,* at 349 (Feb. 1, 2010) (online at www.whitehouse.gov/sites/default/files/omb/budget/fy2011/assets/spec.pdf) (hereinafter "Analytical Perspectives: Budget of the U.S. Government, FY 2011").

The features of Fannie Mae's and Freddie Mac's government charters (for example, a line of credit with Treasury, public mission requirements, limited competition, and lower capital requirements) created the perception of a government guarantee, which played a part in the GSEs becoming significantly overleveraged and undercapitalized. In 2008, Fannie Mae and Freddie Mac reported combined losses in excess of $108 billion.[309] The Federal Housing Finance Agency (FHFA), the regulator for Fannie Mae and Freddie Mac, placed Fannie Mae and Freddie Mac into conservatorship on September 6, 2008, and they continue to function as government-backed enterprises.[310]

Edward J. DeMarco, the acting director of FHFA, recently described their legal status in testimony before the House Subcommittee on Capital Markets, Insurance, and Government-Sponsored Enterprises. According to Mr. DeMarco, "[t]he statutory purpose of conservatorship is to preserve and conserve each company's assets and put them in a sound and solvent condition. The goals of conservatorship are to help restore confidence in the companies, enhance their capacity to fulfill their mission, and mitigate the systemic risk that contributed directly to instability in financial markets. The Enterprises are responsible for normal business activities and day-to-day operations, subject to FHFA supervision. FHFA exercises oversight as safety and soundness regulator, and, as conservator, holds the powers of the management, board, and shareholders of each Enterprise."[311] Mr. DeMarco commented further that "[a] principal focus of the conservatorships is to maintain the Enterprises' secondary mortgage market role until legislation produces a resolution of their future. FHFA's oversight is also directed toward minimizing losses, limiting risk exposure, and ensuring the Enterprises price their services to address their costs and risk adequately. He also stated that "neither company would be capable of serving the mortgage market today without the ongoing financial support provided by the Treasury."[312] Although Fannie Mae and Freddie Mac have been delisted, their stocks continue to trade over the counter.

Even though Fannie Mae and Freddie Mac have a complicated legal relationship with the government as a result of their being placed into conservatorship over two years ago, they became the government's financial agents when they agreed to perform HAMP administration and compliance for the Treasury Department. As

---

[309] Federally regulated banks must hold 4 percent capital against their mortgages, but Fannie Mae and Freddie Mac were required to hold only 2.5 percent capital against their on-balance sheet mortgage portfolio, and only 0.45 percent against mortgages they guaranteed. *See* House Committee on Financial Services, Written Testimony of Timothy F. Geithner, Secretary, U.S. Department of the Treasury, *Housing Finance—What Should the New System Be Able to Do?: Part I—Government and Stakeholder Perspectives,* at 8–11 (Mar. 23, 2010) (online at www.house.gov/apps/list/hearing/financialsvcs_dem/testimony_-_geithner.pdf).

[310] In connection with the GSEs being placed into conservatorship, Treasury agreed to provide financial support to the GSEs through the establishment of Preferred Stock Purchase Agreements. In December 2009, Treasury decided to replace the $200 billion cap on Treasury's funding commitment to each GSE with a formulaic cap that increases above $200 billion by the amount of any losses and decreases by any gains (but not below $200 billion), which will become permanent at the end of three years. *See* Analytical Perspectives: Budget of the U.S. Government, FY 2011, *supra* note 308, at 350.

[311] House Financial Services, Subcommittee on Capital Markets, Insurance, and Government-Sponsored Enterprises, Written Testimony of Edward J. DeMarco, acting director, Federal Housing Finance Agency, *The Future of Housing Finance: A Progress Update on the GSEs,* at 2 (Sept. 15, 2010) (online at financialservices.house.gov/Media/file/hearings/111/DeMarco091510.pdf).

[312] *Id.* at 2.

discussed above, this results in their having a fiduciary obligation of loyalty and fair dealing to Treasury, including the requirement to act in the best interests of Treasury, and not their own interests, in performance of their duties under the agreements.[313]

A. Role of Fannie Mae in HAMP

In serving as the administrator for HAMP, Fannie Mae's principal responsibilities include: implementing the guidelines and policies for the program and preparing the requisite forms; instructing participating mortgage servicers how to modify loans; serving as paying agent to calculate subsidies and compensation consistent with program guidelines; serving as recordkeeper for executed loan modifications and program administration; and coordinating with Treasury and other parties toward achievement of the program's goals.[314] By also functioning as the program interface for servicers, Fannie Mae provides information and resources to servicers to implement the program.

B. Role of Freddie Mac in HAMP

As the compliance agent responsible for the HAMP Compliance Program, Freddie Mac is responsible for ensuring that servicers are satisfying their obligations under the HAMP Servicer Participation Agreements.[315] Because of the confidential and proprietary information to which it has access, Freddie Mac has established a separate and independent division to conduct its compliance activities, named Making Home Affordable-Compliance (MHA–C), which is responsible for evaluating and reporting to Treasury on mortgage servicers participating in HAMP and their compliance with HAMP requirements. In addition, Treasury asked Freddie Mac, in its role as compliance agent, to develop a "second look" process pursuant to which MHA–C audits a sample of HAMP modification requests to double-check the servicer's determination on the request.

C. Analysis of Treasury's Selection of Fannie Mae and Freddie Mac

In April 2010, the Panel stated: "Treasury still needs to provide detailed public information related to its selection and use of Fannie Mae as financial agent and HAMP program administrator and Freddie Mac as compliance agent. The effectiveness of the financial agent/program administrator and financial agent/compliance agent is instrumental to the success and accountability of HAMP, making the selection process for these agents especially important."[316]

At the Panel's September 22, 2010 hearing on Treasury's use of its exceptional crisis contracting authority under EESA, Deputy Assistant Secretary Gary Grippo provided further background regarding Treasury's decision-making with respect to selecting Fannie

[313] For further discussion concerning the nature of financial agents and the confines of the principal-agent legal relationship, *see* Sections A and B.1.b, *supra*.

[314] Financial Agency Agreement Between Treasury and Freddie Mac, *supra* note 122, at Exhibit A.

[315] Financial Agency Agreement Between Treasury and Freddie Mac, *supra* note 122, at Exhibit A.

[316] April 2010 Oversight Report, *supra* note 3, at 88.

Mae and Freddie Mac as its financial agents. Mr. Grippo stated that Treasury selected Fannie Mae and Freddie Mac to perform HAMP-related duties and responsibilities after making the determination that no other public or private entities (including FHFA and not-for-profits) had the operating capabilities, infrastructure, and resources to operate a foreclosure mitigation program on a national scale.[317]

In further conversations between Treasury and the Panel staff, however, it has become apparent that Treasury selected Fannie Mae and Freddie Mac based on three criteria.

- First, given their housing knowledge of a nationwide scope and resources and capabilities they acquired in the course of performing their unique role in housing finance markets (including loss mitigation expertise), Treasury determined that the GSEs possessed the unique ability to set up a nationwide program such as HAMP. Since the Administration initially projected that HAMP would assist up to 3 to 4 million at-risk homeowners,[318] selecting institutions with the pre-existing capacity and infrastructure became particularly important.[319]
- Second, Treasury's determination was also based in part upon the time frame for implementing HAMP. It was critical for Treasury to select agents that were capable of getting a large program off the ground quickly since HAMP was launched just several weeks after it was announced.[320]
- Finally, as part of the market research that it conducted in October 2008 with respect to the purchases of troubled assets from troubled financial institutions, Treasury identified the GSEs as being very well qualified to help administer and operate a large program on a nationwide scope.[321]

In early 2009 (during the midst of a financial crisis), it is likely that other public or private sector alternatives might have been available to assist Treasury with TARP-related services and responsibilities.[322] However, on the one hand as discussed above, it is not clear that Treasury had other time-effective options given the relative infrastructure, capabilities, and resources issues that were at the crux of the GSEs' selection. On the other hand, the extent to which the GSEs had the infrastructure, capabilities, and resources is not absolutely clear given the amount of subcontracting they engaged in to help fulfill their responsibilities. Treasury never considered the Federal Housing Administration (FHA), which provides mortgage insurance on loans made by FHA-approved lenders throughout the United States and its territories, to be a viable option because it "lacked the infrastructure given its market footprint

[317] Testimony of Gary Grippo, *supra* note 49.

[318] U.S. Department of the Treasury, *Making Home Affordable: Updated Detailed Program Description* (Mar. 4, 2009) (online at www.treas.gov/press/releases/reports/housing_fact_sheet.pdf).

[319] Treasury conversations with Panel staff (Sept. 27, 2010).

[320] Treasury conversations with Panel staff (Sept. 27, 2010).

[321] Treasury conversations with Panel staff (Sept. 27, 2010).

[322] The Panel notes that Fannie Mae and Freddie Mac entered into subcontracts with for-profit companies to assist with their HAMP-related responsibilities during this time. However, it is important to note that other potential alternatives, including Wells Fargo and Bank of America, who were facing their own balance sheet issues at the time, received substantial TARP assistance, and may not have been capable of carrying out such duties and responsibilities over the long-term.

and the nature of its business as an insurer."[323] According to Mr. Grippo, "[s]imply put, we made a determination that there were no other parties with the capabilities and infrastructure to operate a national mortgage modification program. And I can point to experiences that we had in October and November of 2008 in making that determination."[324] The decision to select the GSEs for these responsibilities, however, was made with the approval and encouragement of FHFA.[325]

Testimony from the Panel's recent hearing, however, suggests that the roles of Fannie Mae and Freddie Mac as financial agents were not simply an extension of what they were already doing and also that they may not have had the operating capabilities and infrastructure to operate a national foreclosure mitigation program. For example, given that the responsibilities that Freddie Mac is tasked with under its financial agency agreement are somewhat different from the other types of compliance activities it conducts, it needed to hire staff and recruit personnel with a slightly different skill set (for example, strong auditors that understood controls and control-based auditing). Paul Heran, program executive for MHA–C at Freddie Mac, stated that after being asked by Treas-

---

[323] Treasury conversations with Panel staff (Oct. 7, 2010).

[324] Testimony of Gary Grippo, *supra* note 49; Treasury conversations with Panel staff (Oct. 7, 2010).

In his testimony, Mr. Grippo noted that the GSEs are unique since they "have connections to all the servicers across the country" and "have the information technology capability to manage information related to millions of loans at the loan level, as well as the human capital to implement a national program."

In conversations with Panel staff, Mr. Grippo also noted that in October 2008, Treasury launched (but ultimately did not commence) two programs to purchase troubled assets—a program to purchase residential mortgage-backed securities and a program to purchase whole loans—directly from the institutions that held them. As part of this process, Treasury issued a public notice soliciting interest from financial institutions to serve as financial agents to administer the whole loan purchase program. More than 70 institutions (including both Fannie Mae and Freddie Mac) submitted bids indicating that they were best qualified to be tasked with this responsibility. After conducting due diligence and a thorough evaluation, Treasury concluded that the only entities that could operationally manage this task were the GSEs since they had, among other resources and capabilities, the loan-level information technology requirements and pre-existing servicer relationships. If Treasury had commenced this program, it would have selected the GSEs to assist with the program. Once the Administration decided in early 2009 to launch a foreclosure mitigation program centered on mortgage modifications, however, Treasury again concluded that the GSEs were best able to set up such a program in a "reasonable amount of time." The GSEs' selection was a consensus decision made by the Treasury Department, the National Economic Council, and the Department of Housing and Urban Development after extensive consultation, meetings, policy discussions, and consideration of other options. Whereas other private sector options (including private commercial banks) might have been viable options for performing credit risk and asset management services, Treasury concluded that the GSEs were exclusively capable of helping administer a mortgage modification program. Treasury conversations with Panel staff (Oct. 7, 2010).

[325] Treasury conversations with Panel staff (Oct. 7, 2010) (during which Mr. Grippo indicated that FHFA "was involved from the very beginning," provided its explicit authorization for Treasury's selection, and "always had firsthand knowledge of everything."); FHFA conversations with Panel staff (Oct. 8, 2010); Caroline Herron, former vice president and HAMP consultant, Fannie Mae, conversations with Panel staff (Oct. 6, 2010).

In conversations with Panel staff, FHFA representatives stated that their approval of Treasury's decision to enter into financial agency agreements with Fannie Mae and Freddie Mac was based on two criteria. First, the GSEs have the statutory authority to perform various types of services for the Federal Reserve, home loan banks, and other governmental entities. They are also authorized to be employed as fiscal or other agents of the federal government, and the Secretary of the Treasury is authorized to make those designations. FHFA determined that the roles that Treasury would task Fannie Mae and Freddie Mac with were consistent with the goals of the conservatorship process (for example, a loss mitigation program would help minimize losses by stabilizing the markets and benefitting the GSEs' portfolios). Second, the GSEs had the operational capabilities (including servicer relationships, leadership, and familiarity with housing finance issues) to successfully manage such tasks.

FHFA also noted that while Treasury had initially proposed that the GSEs would be performing the same tasks under HAMP, it advised Treasury to reallocate those roles and give them different responsibilities.

ury in February 2009 to serve as HAMP compliance agent, Freddie Mac's task "essentially was to create a wholly new business function and organization, hire staff (which . . . included transferring qualified personnel from the existing Freddie Mac organization), and begin operations immediately."[326] The type of work Treasury asked Fannie Mae to perform as HAMP administrator is also not within its core competence, nor does Fannie Mae have experience as a client consulting company. These issues raise important questions as to whether Treasury's decision-making undermined the conservatorship process (and exposed the GSEs to additional risk) by transferring qualified personnel that could otherwise have focused their efforts on returning the GSEs to a sound and solvent condition.

On one hand, Treasury's decision to contract with Fannie Mae and Freddie Mac after they were placed into conservatorship has caused some to raise concerns about whether the government was intending to affect their solvency by awarding them large financial agency agreements. *New York Times* columnist David Brooks recently commented that "agencies fail and get rewarded with more responsibilities."[327] Vesting Fannie Mae and Freddie Mac with key roles in a program designed to help stabilize the entire housing market may have provided further benefit and stability to the GSEs on a macroeconomic level. It may be that the resources Fannie Mae and Freddie Mac are devoting to their HAMP responsibilities are simply surplus resources within these two firms during a housing market downturn (which, in the absence of the HAMP work, would be left idle). Viewed in this light, Treasury's decision is only appropriate if using the GSEs is more cost-effective and efficient than turning to other federal resources or contracting with other private firms.

On the other hand, the TARP financial agency agreements with Fannie Mae and Freddie Mac are not material in relation to the economics of the conservancy of those firms.[328] As discussed above, it is difficult to envision a scenario where these financial agency agreements had any material bearing on either firm's financial health, given the relative small size of the contracted amount, in the context of the more than $90 billion in losses reported between the two GSEs in 2009.[329] Any concern as to whether Treasury's decision-making was intended to affect the GSEs' solvency is further lessened by the nature of Fannie Mae's and Freddie Mac's financial agency agreements with the Treasury Department, which are "set at cost, with no mark-up for profit."[330] Furthermore, Mr. Grippo

[326] Testimony of Paul Heran, *supra* note 173, at 1.

[327] David Brooks, *The Responsibility Deficit,* New York Times (Sept. 23, 2010) (online at www.nytimes.com/2010/09/24/opinion/24brooks.html).

[328] If Fannie Mae and Freddie Mac were to collect the full obligated value under their financial agency agreements, it would amount to $219 million. Since their conservatorship is going to cost the federal government several hundred billion dollars, the entire TARP financial agency agreements, at the maximum possible amount, represent only a fraction of the conservatorship amount.

[329] For further discussion concerning how Treasury decided what functions to contract out in making its contracting and financial agent designations, *see* Section C.1, *supra. See also* footnote 78, *supra,* for further discussion concerning how the TARP financial agency agreements represent a small percentage of Fannie Mae and Freddie Mac's annual net revenue.

[330] Congressional Oversight Panel, Written Testimony of Joy Cianci, senior vice president, Making Home Affordable Program, Fannie Mae, *COP Hearing on Treasury's Use of Private Contractors,* at 4 (Sept. 22, 2010) (online at cop.senate.gov/documents/testimony-092210-cianci.pdf)

Continued

testified at the Panel's recent hearing that Treasury's decision-making in engaging Fannie Mae and Freddie Mac as financial agents was not driven by a desire to prop them up.[331] "We had engaged the operating capability of the GSEs. Their information technology, their ability to deal with dozens if not hundreds of servicers in implementing HAMP."[332] Treasury has not used "those parts of their business related to their credit risk management standards, how they ran their own portfolio, or any other credit risk decisions that they made in the subprime space."[333] The Panel notes, however, that the HAMP engagement, although not dispositive to the economic survival of Fannie Mae and Freddie Mac, did give the GSEs the opportunity to present themselves in the best possible light to the Treasury officials who may well be involved in determining the GSEs' ultimate fate.

D. Discussion of Conflicts of Interest

In addition to the IFR, which binds all of Treasury's arrangements with contractors and financial agents, Fannie Mae and Freddie Mac are subject to the conflicts of interest mitigation and information barriers contained within their respective financial agency agreements. These internal controls center on the responsibilities of Fannie Mae and Freddie Mac to ensure the non-disclosure of non-public information and certain program information to personnel involved with other Fannie Mae or Freddie Mac (or subcontractor) activities that may conflict with duties owed by the GSEs to Treasury. According to the GSEs' financial agency agreements, there are four actual or potential conflicts of interest associated with their status as financial agents.[334] These four actual or potential conflicts appear to be comprehensive and carefully thought-out:

- The GSEs' interests in maximizing the performance and minimizing the costs of their retained and guaranteed mortgage loan portfolios, which could potentially conflict with their responsibilities to administer HAMP uniformly and for all borrowers and investors and enforce servicer compliance with program guidelines, respectively;

(hereinafter "Written Testimony of Joy Cianci"); Treasury and Freddie Mac conversations with Panel staff (Sept. 27, 2010). The Panel notes that although the GSEs' financial agency agreements are at-cost, with no mark-up for profit, the subcontracts they have entered into to help carry out their HAMP-related responsibilities are not at-cost, but allow the subcontractors to generate profit. Given that the taxpayers will ultimately cover all of the costs of HAMP, either because of their ownership stakes in Fannie Mae and Freddie Mac or because they ultimately pay all of Treasury's bills, taxpayers may not be indifferent as to how much Fannie Mae and Freddie Mac are being compensated.

While the financial agency agreements for both Fannie Mae and Freddie Mac provide each with the opportunity to receive performance incentive payments, Treasury has indicated that no such incentive payments have been made, and has taken the incentive payment clause off the table indefinitely. Treasury conversations with Panel staff (Sept. 22, 2010). *See also* Testimony of Joy Cianci, *supra* note 274 (stating that "[t]here was a provision in the original contract that provided for the potential for incentives. We have not received incentives to date. And we're in the process of working through a revision to that contract. My understanding is that there will not be an incentive framework forward.").

[331] Testimony of Gary Grippo, *supra* note 49.

[332] *Id.*

[333] *Id.*

[334] Financial Agency Agreement Between Treasury and Freddie Mac, *supra* note 122, at Exhibit F; Financial Agency Agreement Between Treasury and Freddie Mac, *supra* note 122, at Exhibit F.

- The GSEs' business relationships with servicers, which could potentially conflict with their duties to administer HAMP uniformly and enforce servicer compliance with program guidelines, respectively;
- The GSEs' interests in benefitting from HAMP interest rate or principal reduction payments and loan modifications of mortgages in their own portfolios (whether owned or guaranteed), which could potentially conflict with their duties to administer HAMP uniformly for all investors and enforce servicer compliance with program guidelines, respectively; and
- The financial interest of GSE employees in banks or investment funds that could receive or benefit from HAMP interest rate or principal reduction payments, which could potentially conflict with the interests of Treasury.

As the list above demonstrates, Fannie Mae and Freddie Mac appear to have more obvious conflicts of interest than any other contractor or financial agent. Although HAMP operates to modify non-GSE mortgages, there is a companion program under HAMP to modify GSE mortgages. As discussed in several of the Panel's previous reports, the federal government committed $75 billion to HAMP, with $50 billion of TARP funds allocated to modify private-label mortgages and $25 billion from the Housing and Economic Recovery Act (HERA) to modify GSE mortgages.[335] According to the August 2010 Making Home Affordable Program report, 55.2 percent of active permanent and trial loan modifications that have taken place since the program's inception are actually GSE modifications.[336] That the majority of the modifications under HAMP involve mortgages that the GSEs hold or guarantee means that the potential exists for a substantial financial conflict of interest. In a prior report, the Panel noted that "these dual roles—as 'doers' of mortgage modifications for loans that they own or guarantee and 'overseers' of Treasury's mortgage modification program—may present competing interests or diminish the overall effectiveness of Fannie Mae's and Freddie Mac's ability to modify mortgages, engage in HAMP administration or oversight, or both."[337] At the Panel's recent hearing, Mr. Heran stated that while MHA–C "is responsible for evaluating compliance for non-GSE loans only," the GSEs themselves (under the supervision of FHFA) are responsible for evaluating compliance for GSE loans.[338] This means that while MHA–C does not conduct compliance for mortgages owned or guaranteed by Freddie Mac, another department within Freddie Mac is charged with those responsibilities.[339] The Panel is not convinced as to the appropriateness of and logic underlying this particular allocation of responsibilities.

---

[335] October 2009 Oversight Report, *supra* note 3; April 2010 Oversight Report, *supra* note 3.

[336] U.S. Department of the Treasury, *Making Home Affordable Program: Servicer Performance Report Through August 2010* (Sept. 22, 2010) (online at www.financialstability.gov/docs/AugustMHAPublic2010.pdf) (hereinafter "Servicer Performance Report through August 2010").

[337] April 2010 Oversight Report, *supra* note 3, at 88.

[338] Congressional Oversight Panel, Testimony of Paul Heran, program executive, Making Home Affordable—Compliance, Freddie Mac, *Transcript: COP Hearing on Treasury's Use of Private Contractors* (Sept. 22, 2010) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-092210-contracting.cfm).

[339] *Id.*

With respect to the issues arising out of Fannie Mae's and Freddie Mac's ownership or guarantees of mortgage portfolios that could conflict with financial agency agreements, there are several mitigating factors worth noting. First, as discussed above, Fannie Mae and Freddie Mac, as financial agents and fiduciaries of Treasury, owe a duty to look solely to the best interests of Treasury without considering the interests of other clients or its own proprietary interests. This helps ensure that the GSEs will carry out their assignments in a manner that serves the public interest instead of their own interests. In order to carry out these functions, Fannie Mae and Freddie Mac created distinct business units that are segregated from and operate separate and apart from their books of business. Second, Treasury receives advice from two GSEs as well as from other third-party advisers. Third, Treasury retains sole responsibility for developing the HAMP program guidelines, and both GSEs are obligated to comply with those guidelines. Fourth, both Fannie Mae and Freddie Mac must develop and implement an information barrier policy to prevent "misuse of material non-public information to benefit" their portfolios (i.e., insider trading) and a firewall with respect to employees and systems and databases with information regarding modifications of mortgages backing mortgage-backed securities in their portfolios.[340] Fifth, Fannie Mae does not receive any incentive payments to fund loan modifications or fees to servicers and investors for modifications of loans that it owns (other than in its capacity as an investor in mortgage-backed securities).[341]

Finally, FHFA provides an additional layer of oversight in its role as conservator. It closely monitors Fannie Mae's and Freddie Mac's compliance with the financial agency agreements and the nature of the tasks Treasury asks them to perform on an ongoing basis, in addition to helping ensure that the GSEs' HAMP responsibilities are segregated completely from their business lines.[342]

There are several mitigating factors to address the conflict arising out of the GSEs' business relationships with servicers. Treasury's relationships with Fannie Mae and Freddie Mac are structured so that one GSE—Fannie Mae—is charged with program administration and a different GSE—Freddie Mac—is responsible for auditing servicer performance under HAMP. For its part, Freddie Mac was required to adopt an internal policy establishing the principle that in its performance under the financial agency agreement, all decisions are to be made solely based upon the HAMP program objectives and requirements (without consideration of potential benefit to mortgage sellers or servicers with whom it does business or to itself via modifications of mortgages that it owns or guarantees).[343] Freddie Mac is also required to submit copies of its

[340] Financial Agency Agreement Between Treasury and Freddie Mac, *supra* note 122, at Exhibit F; Financial Agency Agreement Between Treasury and Freddie Mac, *supra* note 122, at Exhibit F.

[341] Financial Agency Agreement Between Treasury and Freddie Mac, *supra* note 122, at Exhibit F; Written Testimony of Joy Cianci, *supra* note 330, at 3 (stating that "[i]t should be noted that Treasury does not pay, and Fannie Mae does not receive, incentives under the Program for modifications of Fannie Mae-owned loans.").

[342] FHFA conversations with Panel staff (Oct. 4, 2010).

[343] Financial Agency Agreement Between Treasury and Freddie Mac, *supra* note 122, at Exhibit F.

servicer audits to Treasury upon request.[344] In addition, Treasury retains the right under the financial agency agreements to oversee and audit their performance.[345]

With respect to issues concerning personal and organizational conflicts of interest, Fannie Mae and Freddie Mac, in entering into their financial agency agreements, agreed that all management officials and key individuals would be subject to a code of ethics and associated insider trading policy.[346] Furthermore, each must certify on a quarterly basis that it has no organizational or personal conflicts of interest.[347]

It could be argued that it is implausible and impractical for Fannie Mae and Freddie Mac to conduct modifications of mortgages they own or guarantee and maintain business relationships with servicers while simultaneously conducting independent contracting roles under HAMP. If Treasury selects contractors or financial agents with clear structural conflicts, or portfolios with interests adverse to Treasury's, that may raise an immitigable conflict because the interests are not aligned (regardless of whether mitigation procedures are implemented). Since a key objective of the conservatorship process is to minimize losses, it might appear that Treasury and FHFA have incentives to allow Fannie Mae and Freddie Mac to use material non-public information gained from their HAMP contracting roles that might ultimately be beneficial to the GSEs' bottom lines as they conduct their own mortgage modifications.[348] On the other hand, the financial agency agreements were set up in different ways and established to achieve different goals, suggesting the importance Treasury has given to mitigating conflicts of interest and implementing a rigorous set of mitigation procedures. Additionally, the GSEs appear to have taken their obligations to comply with Treasury's conflict of interest regulations in all required areas seriously, creating separate business units dedicated to carrying out their HAMP responsibilities (and accountable under their financial agency agreements to Treasury) and, as discussed above, deploying a variety of conflict mitigation techniques.[349]

As illustrated by the complexities described above, the fundamental issue with Fannie Mae and Freddie Mac in their roles as financial agents is whether they are simply extensions of the fed-

---

[344] Financial Agency Agreement Between Treasury and Freddie Mac, *supra* note 122, at Exhibit F. While this requirement likely limits the exercise of discretion in the audit process (and hence the latitude of Freddie Mac to treat certain servicers more favorably than others), it does not totally eliminate that discretion.

[345] Financial Agency Agreement Between Treasury and Freddie Mac, *supra* note 122, at § 17.

[346] Financial Agency Agreement Between Treasury and Freddie Mac, *supra* note 122, at Exhibit F.

[347] Financial Agency Agreement Between Treasury and Freddie Mac, *supra* note 122, at Exhibit F.

[348] From the perspective of the taxpayers (who became majority shareholders of Fannie Mae and Freddie Mac as a result of their placement into conservatorship), this conflict may not be as troubling as it may seem since the public may want the GSEs to use information gained as a result of their roles as financial agents to aid them in modifying their own mortgages, given that the taxpayers directly bear the costs of distressed mortgage loans owned or guaranteed by the GSEs (while not directly bearing the costs resulting from distressed non-GSE mortgages).

[349] For example, in conversations with Panel staff, Fannie Mae indicated that it has reported 18 incidents (or potential breaches of its obligations) to Treasury over the course of its financial agency agreement. Such reporting includes minor matters such as a carrier's temporary misplacement of a box containing the names and addresses of potential borrowers.

eral government itself.[350] This question is somewhat challenging to answer because, as discussed above, the GSEs are not legally government agencies and their employees are not civil servants, but they have been operating under conservatorship by the FHFA and would likely not have survived without the financial assistance provided by Treasury. If they are really private entities with their own financial interests independent of the federal government's, then the real and perceived conflicts of interest seem vast and unmanageable. If they are just arms of the federal government at this point, however, then any real or perceived conflicts likely evaporate. The manner in which Treasury is treating the GSEs (for example, they are being compensated at cost for the work they are doing—they are earning zero profit) in some ways gives the appearance that they are government entities, underlining the tension created by the anomalous position of Fannie Mae and Freddie Mac.

E. Evaluation of Small Business Contracting

The financial agency agreements for both Fannie Mae and Freddie Mac provide a floor for the GSEs' use of small business contractors, including minority- or women-owned contractors. In entering into their financial agency agreements with the Treasury Department, Fannie Mae and Freddie Mac agreed to "engage one or more small businesses as contractors, including minority- or women-owned businesses," in fulfilling their responsibilities.[351]

Fannie Mae and Freddie Mac have selected subcontractors and vendors to support their duties as HAMP program administrator and compliance agent, respectively, using the standard competitive bidding process (unless time-to-market pressures necessitate otherwise), and have complied with its obligation to engage women-owned and minority-owned small businesses.[352] In total, Fannie Mae has awarded contracts to "19 small and diverse companies" in furtherance of its duties as HAMP compliance agent for Treasury.[353] Freddie Mac has indicated that 25 percent of the subcontractors it has hired are minority- or women-owned.[354]

---

[350] In August 2009, the Congressional Budget Office (CBO) addressed these issues by noting that because of the "extraordinary degree of management and financial control now exercise[d] over them," along with their "unique legal status and a long history linking them closely to the federal government," they should be considered federal operations, even though they "had been considered private firms owned by their shareholders." Therefore, CBO concluded that it would be "appropriate and useful to policymakers to account for and display the GSEs' financial transactions alongside other federal activities in the budget." Congressional Budget Office, *The Budget and Economic Outlook: An Update,* at 8 (Aug. 2009) (online at www.cbo.gov/ftpdocs/105xx/doc10521/08-25-BudgetUpdate.pdf). For its part, however, the Office of Management and Budget (OMB) continues to treat the GSEs as "non-budgetary private entities in conservatorship rather than as Government agencies" because they "remain private companies with Boards of Directors and management responsible for their day-to-day operations." Analytical Perspectives: Budget of the U.S. Government, FY 2011, *supra* note 308, at 140.

[351] Financial Agency Agreement Between Treasury and Freddie Mac, *supra* note 122, at § 15 and § 16.

[352] Written Testimony of Joy Cianci, *supra* note 330, at 4; Treasury and Freddie Mac conversations with Panel staff (Sept. 27, 2010).

[353] Written Testimony of Joy Cianci, *supra* note 330, at 4.

[354] Treasury and Freddie Mac conversations with Panel staff (Sept. 27, 2010).

F. Evaluation of Treasury's Monitoring

1. Treasury's Monitoring of Performance and Compliance

OFS has developed a comprehensive regime of documents, standards, and continual reviews to assess performance and financial agency agreement compliance.

Treasury has a comprehensive oversight structure in place to oversee and monitor Fannie Mae's activities as Treasury's financial agent.[355] The Homeownership Preservation Office (HPO) has a collaborative relationship with the OFA, CFO, and OFS–Compliance teams. Five members of the OFS–Compliance staff work exclusively on conflicts of interest matters for all contractors and financial agents, and almost all staffers within HPO have regular and substantial interactions with Fannie Mae.[356] In addition to the Making Home Affordable program committee that meets weekly, Treasury has also established several working committees (centered on compliance, budgeting, and governance issues) to oversee Fannie Mae. These committees meet on a regular basis and include interlocking membership from each of the different Treasury offices (referenced above) that is tasked with monitoring and oversight responsibilities for Fannie Mae.[357]

Treasury's monitoring and supervision of the GSEs are closely coordinated with general oversight and risk assessment by FHFA as part of the conservatorship process. Members of the FHFA conservatorship team continuously oversee Fannie Mae's and Freddie Mac's financial agency agreements, monitor the tasks that Treasury asks the GSEs to perform as a risk assessment measure, and help ensure that they are compensated appropriately for their work.[358]

Senior-level officials within OFS direct and closely monitor Freddie Mac's activities as Treasury's financial agent, and OFS has four employees assigned to work full-time to oversee Freddie Mac, three of whom work full time on-site in Freddie Mac's office.[359] Additionally, Treasury's MHA Compliance Committee (composed of senior Treasury officials leading the MHA program and chaired by the director of compliance at OFS) meets weekly with Freddie Mac's MHA–C senior management team to discuss the program's status, issues and challenges.[360]

As with its other contractors and financial agents, there are several metrics that Treasury uses to evaluate and manage Fannie Mae's and Freddie Mac's performance and compliance with their financial agency agreements. Since financial agents have a fiduciary obligation to Treasury (and therefore serve as an extension of Treasury), OFS has developed specific processes to measure performance and ensure compliance. The process for monitoring the performance and compliance of these financial agents is contained in their respective financial agency agreements.

---

[355] Treasury and Fannie Mae conversations with Panel staff (Oct. 4, 2010).
[356] Treasury and Fannie Mae conversations with Panel staff (Oct. 4, 2010).
[357] Treasury and Fannie Mae conversations with Panel staff (Oct. 4, 2010).
[358] FHFA conversations with Panel staff (Oct. 4, 2010).
[359] Treasury conversations with Panel staff (Sept. 23, 2010); Testimony of Paul Heran, *supra* note 173, at 2.
[360] Treasury conversations with Panel staff (Sept. 23, 2010); Testimony of Paul Heran, *supra* note 173, at 2.

On the performance side, these include qualitative measures (such as assessments of cost containment, responsiveness, and nature of their business relationship with Treasury), and quantitative measures (such as how they process transactions, the timeliness and accuracy of their reports, and the number of servicer reviews conducted).[361] OFA collects quantitative measures on a quarterly or monthly basis to monitor the agents' performance, balancing "objective measurements (for example, quantitative counts of work products) and subjective measurements (for example, survey responses)."[362] Additionally, informal communications between Treasury and the GSEs are regular and continuous, which suggests that the level of interaction is best characterized as constant involvement.[363]

On the compliance side, the GSEs are required to report to Treasury on internal controls, risk assessments, information technology security, employee training, and how they have revisited their conflicts of interest mitigation plans.[364] The financial agency agreements also require that Fannie Mae and Freddie Mac self-certify annually that they are complying with 11 selected terms of the agreements and review the effectiveness of their internal controls on an annual basis.[365] On an annual basis, Treasury staff conduct on-site visits to review the processes and controls of each agent at their offices.[366] Treasury also requires agents to submit information regarding conflicts of interest, which it reviews on an on-going basis.[367]

2. Data Production and Verification

Some concerns have developed recently regarding the process underlying Fannie Mae's data generation and how rigorously Treasury is scrutinizing the HAMP data and metrics it receives from its financial agent. Under the terms of its financial agency agreement, Fannie Mae is required, among other tasks, to "[p]rovide detailed loan level reporting, as required, to the Treasury and the compliance agent."[368] Starting in the June 2010 Making Home Affordable public report, Treasury has included a table entitled "Performance of Permanent Modifications," which is produced by Fannie Mae and provides information on the number of borrowers in delinquency or re-default after their loans convert from trial modifications to permanent modifications. This information is designed to inform the public as to whether homeowners with HAMP modifications are being placed into sustainable mortgages. Initially, Treasury reported that just under 6 percent of HAMP homeowners were at

---

[361] Testimony of Gary Grippo, *supra* note 49.

[362] Prepared Statement of Gary Grippo and Ronald Backes, *supra* note 26, at 6.

[363] Treasury and Freddie Mac conversations with Panel staff (Sept. 27, 2010); Treasury and Fannie Mae conversations with Panel staff (Oct. 4, 2010).

[364] Financial Agency Agreement Between Treasury and Freddie Mac, *supra* note 122; Financial Agency Agreement Between Treasury and Freddie Mac, *supra* note 122.

[365] Financial Agency Agreement Between Treasury and Freddie Mac, *supra* note 122, at § 16, Exhibit D; Financial Agency Agreement Between Treasury and Freddie Mac, *supra* note 122, at § 16, Exhibit D.

[366] Prepared Statement of Gary Grippo and Ronald Backes, *supra* note 26, at 6.

[367] Treasury conversations with Panel staff (Sept. 16, 2010). For a more complete discussion of Treasury's monitoring of contractor and agent conflicts of interest, *see* Sections B.3 and H, *supra*.

[368] Financial Agency Agreement Between Treasury and Freddie Mac, *supra* note 122, at Exhibit A.

least 60 days late six months after their mortgages were modified. After the June 2010 table was published, however, analysts at Barclays Capital challenged the information reported in the table.[369] After Treasury and Fannie Mae reviewed the data, they found that the default rate that Fannie Mae provided in the original table appeared to be significantly lower than the actual default rate as indicated by the source data. The significant errors in the table were subsequently attributed to logic errors in the Fannie Mae code used to create the table.[370] As a result, Treasury had to correct the data and republish its June 2010 MHA report in early August 2010 after data validation efforts were undertaken by the MITRE Corporation and an independent third party consultant contracted by Fannie Mae's Internal Audit group.

The data error, which was highly visible and instrumental from a public policy perspective, suggests that there was a lack of adequate processes or systems in place (as well as personnel) at Fannie Mae to detect any mistakes, omissions, or discrepancies in data production, as well as insufficient scrutiny, verification and validation by the Home Ownership Preservation Office within Treasury of the HAMP data compilations it was receiving from its financial agent.[371] Treasury, with the support of FHFA, will require Fannie Mae to pay for the data validation services provided by the MITRE Corporation as a result of the data error.[372] Fannie Mae and Treasury express confidence that processes have been put in place to make sure that such errors in the data collection and generation cycle will not be repeated, and noted how the MITRE Corporation's mandate has been broadened to analyze and validate the data generation and production components of all public HAMP reports.[373]

The systems and resources that Treasury has committed to monitoring the performance and compliance of the GSEs have grown over time. In recent conversations with Treasury officials, however, OFS and OFA officials readily admit that Treasury lacked adequate controls with respect to the communication of program re-

---

[369] MITRE HAMP Re-Default Report, *supra* note 194, at 2–1.

[370] MITRE HAMP Re-Default Report, *supra* note 194, at 2–1.

[371] *See* MITRE, *Home Affordable Modification Program: Assessment of the HAMP July 2010 Public Report (Final)* (Sept. 3, 2010) (recommending that Treasury should engage in "manual cross-checking efforts" to "decrease the likelihood of errors."). According to Treasury officials, this occurrence demonstrated that Treasury lacked adequate controls with respect to how program and financial agency agreement requirements were being communicated from Treasury. In addition, the data error also highlighted inadequate testing being done by Fannie Mae and inadequate validation of that testing on the part of Treasury. Treasury conversations with Panel staff (Sept. 23, 2010).

[372] Treasury conversations with Panel staff (Sept. 23, 2010). Since Fannie Mae is under conservatorship, however, ultimately the fees will be paid for by taxpayers, regardless of whether Fannie Mae or Treasury pays the fees to MITRE.

[373] Treasury conversations with Panel staff (Sept. 23, 2010); Testimony of Joy Cianci, *supra* note 274.

According to Ms. Cianci, immediately upon discovering the data error, Fannie Mae notified Treasury and "took upon a three-phased remediation approach." The first phase focused on "recoding and validating a revised grid." Treasury engaged the MITRE Corporation to "independently code and validate the grid," and "Fannie Mae assigned four independent teams to recode and revalidate the grid." The MITRE Corporation "expressed strong confidence to Treasury regarding the revised table," resulting in the publication of the revised table on August 6, 2010. Phase two focused on the internal audit and MITRE Corporation performing a "root cause analysis" to help "identify some recommendations that would bolster controls regarding [Fannie Mae's] production of data in support of the public report." Currently, Fannie Mae is in the third phase which is focused on bolstering internal controls.

quirements and the validation of data.[374] This admission, based upon the data error described above, calls into question the level of independent scrutiny, verification, and oversight that Treasury has done with respect to the monitoring of its financial agents. While the Panel recognizes and appreciates that Treasury has dedicated more resources to the monitoring and oversight of the GSEs, proper implementation of the TARP and oversight of financial agents require rigorous monitoring and controls from the program's inception.

G. Performance Assessment Made Challenging by Insufficient Reporting

Under the terms of its financial agency agreement and responsibilities as HAMP compliance agent, Freddie Mac is required, among other tasks, to "conduct examinations and review servicer compliance with the published rules for the program and report results to the Treasury."[375] Based upon such examinations, Freddie is required to provide Treasury "with advice, guidance, and lessons learned to improve operation of the program."[376]

In mid-2009, the OFS compliance department observed that Freddie Mac (since the inception of HAMP) was having difficulty meeting the deadlines of its planned audits and delivering key compliance reports.[377] After evaluating the first Servicer Performance Reviews completed by Freddie Mac, OFS had several other areas of concern, including the use of unqualified staff to perform audits; inconsistent and incomplete audit documentation; and overreliance on contractors to perform the audits.[378] These difficulties led Treasury to meet with senior officials at Freddie Mac, develop a detailed remediation plan addressing many aspects of Freddie Mac's contractual obligations and place an OFS compliance official with Freddie Mac full-time.[379] According to Treasury, Freddie Mac was very proactive in addressing these concerns and made some key personnel changes to improve its compliance function, including the hiring of Mr. Heran, program executive for Making Home Affordable—Compliance, who came to Freddie Mac after a long auditing career in the financial services industry.[380] While OFS compliance acted prudently in recognizing the deficiencies at Freddie Mac early on and taking steps to remedy the situation, and although it is possible that Freddie Mac has completed all of the steps under its detailed remediation plan, it is difficult to monitor progress on these issues without additional information and more regular reporting.

H. Evaluation of Transparency

Beginning with the release of its Making Home Affordable Program Servicer Performance Report through May 2010, released in

---

[374] Treasury conversations with Panel staff (Sept. 23, 2010).
[375] Financial Agency Agreement Between Treasury and Freddie Mac, *supra* note 122, at Exhibit A.
[376] Financial Agency Agreement Between Treasury and Freddie Mac, *supra* note 122, at Exhibit A.
[377] July 2010 SIGTARP Report, *supra* note 299, at 102.
[378] July 2010 SIGTARP Report, *supra* note 299, at 102.
[379] July 2010 SIGTARP Report, *supra* note 299, at 102.
[380] Treasury conversations with Panel staff (Sept. 23, 2010).

June 2010, Treasury has included an appendix describing Freddie Mac's compliance activities.[381] The material in this appendix has become boilerplate language that Treasury now includes in each month's Servicer Performance Report. The appendix describes the four major activities that comprise the compliance program, including on-site reviews (to assess readiness and governance as well as implementation), loan file reviews, net present value (NPV) testing and assessments, and incentive payment reviews.[382] The appendix also discusses the frequency with which Freddie Mac conducts its reviews for each of the different types of compliance activities to assess servicer compliance with HAMP guidelines. In addition, the appendix discusses several areas of Freddie Mac's continued compliance focus, including borrower solicitation, underwriting documentation, NPV model usage, document processing and control, data maintenance, and governance. While this additional information is a step in the right direction with respect to transparency, the Panel is disappointed that the monthly MHA reports have offered little detail on Freddie Mac's activities as HAMP compliance agent. While it takes time to develop a large enough pool of servicer actions and trial conversions for Freddie Mac to review, whether the process has been aggressive, robust, and transparent enough remains unclear. Preliminary compliance results would have been most useful early in the life of HAMP in order to enable course corrections and help homeowners before it is too late.

Additionally, the May 2010 Making Home Affordable Program Servicer Performance Report marked the first occasion in which Treasury released the results of MHA–C's compliance "Second Look" reviews (detailing the December 2009 rotation for "Second Look" reviews).[383] Treasury again released this information in its August 2010 Making Home Affordable Program Servicer Performance Report (detailing the first quarter 2010 rotation for "Second Look" reviews).[384] Going forward, Treasury plans to make this information available on a monthly basis. According to Treasury, the reason why information on other compliance activities has not been made publicly available is because the "Second Look" compliance activities lend themselves to be given out in a benchmark manner, and other compliance activities do not.[385] Going forward, however, Treasury plans to continue to consult with MHA–C in efforts to determine what other types of compliance-related information can be made public and improve transparency.

The Panel has long been concerned about Treasury's data collection efforts under HAMP. In all of the Panel's prior reports on Treasury's foreclosure mitigation efforts, the Panel has expressly called for the collection of more data and greater public disclo-

---

[381] U.S. Department of the Treasury, *Making Home Affordable Program Servicer Performance Report Through May 2010,* at 11 (June 21, 2010) (online at www.financialstability.gov/docs/May%20MHA%20Public%20062110.pdf) (hereinafter "Making Home Affordable Program Servicer Performance Report Through May 2010").

[382] *See generally, Id.* at 11.

[383] *Id.* at 6. This information demonstrated that MHA–C disagreed with the servicers' actions in 3.9 percent of the cases it evaluated.

[384] Servicer Performance Report through August 2010, *supra* note 336, at 11. This information demonstrated that MHA–C disagreed with the servicers' actions in an average of 4.8 percent of the cases it evaluated.

[385] Treasury conversations with Panel staff (Sept. 27, 2010).

sure.[386] Treasury relies on Fannie Mae to act as record keeper for executed loan modifications and program administration. In this capacity, Fannie Mae is the primary collector of and gatekeeper for all information related to HAMP, including basic information such as the number of modifications, the rate of conversions from trial to permanent modifications, and the reasons for borrower failure. Such exclusive reliance creates significant risks to both effective program implementation and financial agent oversight.

In prior reports the Panel has noted the importance of a strong accountability regime and public disclosure to the credibility and effectiveness of HAMP.[387] Treasury should publicly release more data collected by Fannie Mae and Freddie Mac so that Congress, the TARP oversight bodies, and the public can better evaluate the effectiveness of HAMP. Review and analysis of the substantial amount of data being collected by Fannie Mae as program administrator and Freddie Mac as compliance agent are important in understanding the strengths and weaknesses of HAMP as well as particular areas in need of improvement. Because of Fannie Mae and Freddie Mac's crucial roles in administering and enforcing HAMP requirements, it is especially important that Treasury release data on the compliance audits done by Freddie Mac to show whether servicers are properly following HAMP guidelines or whether Treasury and Freddie Mac are ensuring that HAMP requirements are being enforced. Taxpayers should be able to see the consequences that result both from HAMP compliance and non-compliance.[388]

I. Conclusion

The Panel is very concerned that, over 19 months into its financial agency agreements with Fannie Mae and Freddie Mac, Treasury's expectations for them in their respective roles of financial agent/HAMP administrator and financial agent/compliance agent remain unclear. The Panel has previously called on Treasury to "clearly define and communicate its goals and requirements as well as its measurements for success. Without clear goals and measurements, Treasury and its agents and third parties (for example, oversight bodies, Congress, and the public) will not be able to evaluate the adequacy or success of its programs overall or of individual participants."[389] Not only has Treasury failed to articulate specific goals for the program, but the concerns raised in the discussion above suggest that Fannie Mae and Freddie Mac are not performing satisfactorily under their financial agency agreements. In addition, OFS has yet to develop written procedures for the oversight and monitoring of Fannie Mae and Freddie Mac's administrative and compliance activities, including internal controls over the existence, completeness and accuracy of data formulation and

[386] April 2010 Oversight Report, *supra* note 3; October 2009 Oversight Report, *supra* note 3; March 2009 Oversight Report, *supra* note 3.

[387] April 2010 Oversight Report, *supra* note 3, at 5; October 2009 Oversight Report, *supra* note 3, at 5.

[388] April 2010 Oversight Report, *supra* note 3, at 9.

[389] April 2010 Oversight Report, *supra* note 3, at 86.

input.[390] As GAO noted recently, "[w]ithout clearly documented guidance regarding the specific procedures OFS should follow to effectively oversee and monitor Fannie Mae and Freddie Mac, OFS faces an increased risk that the financial information related to HAMP may not be complete or correct, and OFS management's ability to identify key risks in this area may also be impaired."[391] It is exactly requirements such as these that Treasury should explicitly include in all procurements and financial agency agreements. Accordingly, GAO has recommended that OFS develop and implement written procedures detailing steps to be performed in overseeing and monitoring Fannie Mae and Freddie Mac.[392]

There are several important lessons that can be learned from analyzing Fannie Mae and Freddie Mac's roles as financial agents of Treasury.

- First, the lack of clarity surrounding Treasury's decision to select Fannie Mae and Freddie Mac suggests that Treasury should better explain its rationale and decision-making process behind choosing to enter into contracts or financial agency agreements with institutions that have been bailed out or are likely to be bailed out. Since Fannie Mae and Freddie Mac do not have a proven track record of success with respect to running their own businesses (as demonstrated by their being placed into conservatorship in September 2008), Treasury had, and has, an obligation to explain why it believes they would, and will, be successful with the administration and compliance enforcement of the $30 billion TARP-funded HAMP. Their selection without extensive consideration of alternative options has led inevitably to concerns as to whether their selection was part of an overall government rescue of the GSEs, and was not driven by concerns for the effectiveness of HAMP.
- Second, the recent data error by Fannie Mae indicates that Treasury was not sufficiently cognizant of the importance of clear communication and robust monitoring and supervision of performance and compliance as it developed and implemented large scale programs under the TARP like HAMP, particularly early on in the process.
- Third, the credibility and effectiveness of HAMP is undermined in the absence of sufficient and regular public disclosure of compliance and enforcement activities conducted by Treasury's contractors and financial agents. In order for compliance and enforcement to function as a deterrence mechanism and be exercised effectively, they must be sufficiently robust and transparent.

---

[390] According to documentation from Treasury, drafted "Program Implementation Guidelines" guidance for the Financial Agency Agreements for Fannie Mae and Freddie Mac are currently in final review with Fannie Mae, Freddie Mac, and their regulator, FHFA.

[391] June 2010 GAO Report on Internal Control Over Financial Reporting, *supra* note 257, at 13.

[392] June 2010 GAO Report on Internal Control Over Financial Reporting, *supra* note 257, at 14.

ANNEX II: TABLES

FIGURE 10: LIST OF PROCUREMENT CONTRACTS DETAILING VALUES UNDER THE CONTRACT [393]

Contract Number	Contractor	Description	Date of Award	Performance End Date	Obligated Value	Expended Value	Adjusted Potential Contract Value [394]	Type of Vehicle [395]	Contract Type
TOFS–10–D–0005	Alston & Bird LLP	Omnibus procurement for legal services.	8/6/2010	8/5/2015	$0	$0	$99,791,842	TODC	Fixed Price, Labor Hour, or Time and Materials
TOFS–09–D–0010	Anderson McCoy & Orta	Legal services for work under Treasury's Public Private Investment Funds (PPIF) program.	5/26/2009	11/24/2010	4,068,834	1,577,271	15,000,000	TODC	Fixed Price Time and Materials or Labor Hour
TOFS–10–O–0007	Association of Government Accountants.	CEAR Program Application.	1/15/2010	1/14/2011	5,000	5,000	5,000	DC	Fixed Price
TOFS–09–D–0005	Bingham McCutchen LLP.	SBA Initiative Legal Services—Contract Novated from TOFS–09–D–0005 with McKee Nelson.	3/30/2009	9/29/2010	422,355	270,776	1,850,651	TODC	Fixed Price or Time and Materials
TOFS–10–O–0021	Bingham McCutchen LLP.	SBA 7(a) Security Purchase Program.	9/17/2010	12/31/2010	19,975	0	19,975	DC	Time and Materials
TOFS–09–D–0006	Cadwalader Wickersham & Taft LLP.	Auto Investment Legal Services.	3/30/2009	8/31/2010	17,482,165	17,392,786	26,756,322	TODC	Fixed Price or Time and Materials
TOFS–09–D–0011	Cadwalader Wickersham & Taft LLP.	Restructuring Legal Services.	7/30/2009	1/6/2011	2,049,979	1,266,342	20,687,500	TODC	Fixed Price or Time and Materials
TOS09–020	Cadwalader Wickersham & Taft LLP.	Bankruptcy Legal Services.	1/27/2009	7/20/2009	409,955	409,955	409,955	DC	Labor Hour
TOFS–10–D–0006	Cadwalader Wickersham & Taft LLP.	Omnibus procurement for legal services.	8/6/2010	8/5/2015	1,997,820	0	99,791,842	TODC	Fixed Price, Labor Hour or Time and Materials
TOFS–10–G–0008	CCH Incorporated	GSA Task Order for procurement books—FAR, T&M, Government Contracts Reference, World Class Contracting.	9/30/2010	10/30/2010	2,430	0	2,430	DC	Fixed Price

TOS09–017	Colonial Parking Inc.	Lease of parking spaces	1/7/2009	9/30/2013	191,650	111,320	566,050	DC	Fixed Price
TOFS–10–O–0020	CQ–Roll Call Inc.	One year subscription (3 users) to the CQ Today Breaking News & Schedules, CQ Congressional & Financial Transcripts, CQ Custom Email Alerts.	9/1/2010	7/7/2011	7,500	7,500	7,500	DC	Fixed Price
TOS09–016	Cushman & Wakefield of VA Inc..	Painting Services for TARP Offices.	12/24/2008	1/3/2009	8,750	8,750	8,750	DC	Fixed Price
TOFS–10–D–0019	Davis Audrey Robinette	Program Operations Support Services to include project management, scanning and document management and correspondence.	9/27/2010	9/23/2015	50,000	0	6,000,000	TODC	Fixed Price or Labor Hour
TOFS–09–D–0012	Debevoise & Plimpton, LLP.	Restructuring Legal Services.	7/30/2009	1/28/2011	159,175	0	20,687,500	TODC	Fixed Price or Time and Materials
TOFS–10–B–0003	Digital Management Inc..	Data and Document Management Consulting Services.	4/22/2010	4/20/2015	0	0	100,000,000	TODC	Fixed Price, Labor Hour, or Time and Materials
TOFS–10–D–0004	Ennis Knupp & Associates Inc..	Investment Consulting Services.	4/12/2010	4/11/2015	83,050	82,050	6,000,000	TODC	Fixed Price, Time and Materials, or Labor Hour
TOS–09–008	Ennis Knupp & Associates Inc..	Investment and Advisory Services.	10/11/2008	4/10/2010	2,715,965	2,392,742	2,495,190	TODC	Fixed Price Level of Effort
TOFS–09–O–0013	Equilar Inc.	Executive Compensation Data Subscription.	9/10/2009	9/10/2010	59,990	59,990	59,990	DC	Fixed Price
T2009–TARP–0002	Ernst & Young LLP	Accounting Services	10/18/2008	9/30/2011	11,397,968	10,710,092	11,397,968	TODC	Fixed Price or Time and Materials
TOFS–10–B–0007	Ernst & Young LLP	Program Compliance Support Services.	7/22/2010	7/19/2015	0	0	21,993,424	TODC	Fixed Price or Labor Hour
TOFS–09–B–0001	FI Consulting Inc.	Credit Reform Modeling and Analysis.	3/31/2009	3/30/2014	1,935,866	1,461,560	1,935,866	TODC	Labor Hour
TOFS–09–D–0013	Fox Hefter Swibel Levin & Carol, LLP.	Restructuring Legal Services.	7/30/2009	1/28/2011	84,125	0	20,687,500	TODC	Fixed Price or Time and Materials

ANNEX II: TABLES—Continued

FIGURE 10: LIST OF PROCUREMENT CONTRACTS DETAILING VALUES UNDER THE CONTRACT [393]

Contract Number	Contractor	Description	Date of Award	Performance End Date	Obligated Value	Expended Value	Adjusted Potential Contract Value [394]	Type of Vehicle [395]	Contract Type
TOFS–10–D–0007	Fox Hefter Swibel Levin & Carol, LLP.	Omnibus procurement for legal services.	8/6/2010	8/5/2015	0	0	99,791,842	TODC	Fixed Price, Labor Hour or Time and Materials
TOFS–09–D–0007	Haynes and Boone LLP	Auto Investment Legal Services.	3/30/2009	3/10/2010	345,746	345,746	26,756,322	TODC	Fixed Price or Time and Materials
TOFS–10–D–0008	Haynes and Boone LLP	Omnibus procurement for legal services.	8/6/2010	8/5/2015	0	0	99,791,842	TODC	Fixed Price, Labor Hour, or Time and Materials
TOFS–09–O–0003	Herman Miller Inc.	Aeron Chairs	4/17/2009	5/31/2009	53,799	53,799	53,799	DC	Fixed Price
T09BPA–002	Hughes Hubbard & Reed LLP.	Legal services for the Capital Purchase Program.	10/29/2008	10/31/2010	3,060,921	2,828,688	5,645,162	TODC	Fixed Price or Time and Materials
TOFS–10–B–0001	Hughes Hubbard & Reed LLP.	Document Production services and Litigation Support.	12/22/2009	12/22/2014	601,890	601,890	13,464,607	TODC	Fixed Price or Labor Hour
TOFS–10–D–0009	Hughes Hubbard & Reed LLP.	Omnibus procurement for legal services.	8/6/2010	8/5/2015	0	0	99,791,842	TODC	Fixed Price, Labor Hour or Time and Materials
TOFS–09–O–0012	Knowledge Mosaic Inc.	SEC filings subscription service.	9/2/2009	8/31/2010	5,000	5,000	5,000	DC	Fixed Price
TDO10–F–249	Knowledge Mosaic Inc.	SEC filings subscription service.	8/12/2010	8/31/2011	5,000	5,000	5,000	DC	Fixed Price
TOFS–09–G–0002	Korn/Ferry International	Executive search services for the OFS Chief Investment Officer position.	7/17/2009	10/15/2009	75,017	75,017	75,017	DC	Fixed Price
TDO–TARP–2009–0003	Lindholm & Associates Inc.	Human resources services.	10/31/2008	9/30/2010	751,302	614,963	710,528	DC	Labor Hour
TDOX09–0040	Locke Lord Bissell & Liddell LLP.	Initiate Interim Legal Services in support of Treasury Investments under EESA.	2/12/2009	8/11/2009	272,243	272,243	2,000,000	DC	Labor Hour

TOFS–10–D–0010	Love & Long LLP	Omnibus procurement for legal services.	8/6/2010	8/5/2015	0	0	99,791,842	TODC	Fixed Price, Labor Hour, or Time and Materials
TOFS–09–O–0011	Mercer (US) Inc.	Executive Compensation Data Subscription.	8/18/2009	8/18/2010	3,000	3,000	3,000	DC	Fixed Price
TOFS–10–B–0004	Microlink LLC	Data and Document Management Consulting Services.	4/22/2010	4/20/2015	1,665,160	615,150	100,000,000	TODC	Fixed Price, Labor Hour, or Time and Materials
TOFS–10–B–0008	Navigant Consulting Inc	Program Compliance Support Services.	7/21/2010	7/19/2015	0	0	21,993,424	TODC	Fixed Price and Labor Hour
TOFS–10–O–0001	NNA Inc.	Newspaper delivery	9/30/2009	9/30/2010	8,479	8,220	7,765	DC	Fixed Price
TOFS–10–D–0011	Orrick Herrington Sutcliffe LLP.	Omnibus procurement for legal services.	8/6/2010	8/5/2015	0	0	99,791,842	TODC	Fixed Price, Labor Hour, or Time and Materials
TDOX09–0039	Pat Taylor and Associates, Inc.	Temporary Services for Document Production, FOIA Assistance, and Program Support.	2/9/2009	1/5/2010	692,108	692,108	692,108	DC	Labor Hour
TOFS–10–D–0012	Paul Weiss Rifkind Wharton & Garrison LLP.	Omnibus procurement for legal services.	8/6/2010	8/5/2015	0	0	99,791,842	TODC	Fixed Price, Labor Hour, or Time and Materials
TOFS–10–D–0013	Perkins Coie LLP	Omnibus procurement for legal services.	8/6/2010	8/5/2015	0	0	99,791,842	TODC	Fixed Price, Labor Hour, or Time and Materials
TOS–07–109	Phacil, Inc.	Freedom of Information Act (FOIA) Analysts to support the Disclosure Services, Privacy and Treasury Records.	5/15/2009	9/12/2009	103,425	90,301	103,425	Task Order	Fixed Price
T2009–TARP–0001	PricewaterhouseCoopers LLP.	Internal control services	10/16/2008	9/30/2011	24,541,437	22,410,694	25,361,407	TODC	Time and Materials
TOFS–09–B–0002	PricewaterhouseCoopers LLP.	PPIP compliance	9/11/2009	9/10/2014	1,240,037	1,114,937	2,897,400	TODC	Labor Hour
TOFS–10–B–0009	PricewaterhouseCoopers LLP.	Program Compliance Support Services.	7/22/2010	7/19/2015	0	0	21,993,424	TODC	Fixed Price and Labor Hour
TOFS–10–D–0003	Qualx Corporation	FOIA Support Services	3/8/2010	3/8/2015	230,438	192,032	14,000,000	TODC	Fixed Price
TOFS–10–B–0005	RDA Corporation	Data and Document Management Consulting Services.	4/23/2010	7/8/2015	1,277,134	393,861	100,000,000	TODC	Fixed Price, Labor Hour, or Time and Materials

ANNEX II: TABLES—Continued

FIGURE 10: LIST OF PROCUREMENT CONTRACTS DETAILING VALUES UNDER THE CONTRACT [393]

Contract Number	Contractor	Description	Date of Award	Performance End Date	Obligated Value	Expended Value	Adjusted Potential Contract Value [394]	Type of Vehicle [395]	Contract Type
TOFS–10–G–0005	Reed Elselvier Inc. (dba LexisNexis).	Accurint subscription services for one year—4 users.	6/24/2010	6/30/2011	8,208	1,539	8,208	DC	Fixed Price
TOFS–10–B–0010	Regis & Associates, PC	Program Compliance Support Services.	7/21/2010	7/19/2015	0	0	21,993,424	TODC	Fixed Price and Labor Hour
TOFS–10–G–0007	Schiff Hardin LLP	Housing Legal Services	7/22/2010	7/21/2011	537,375	87,464	537,375	DC	Labor Hour
TOFS–10–D–0014	Seyfarth Shaw LLP	Omnibus procurement for legal services.	8/6/2010	8/5/2015	0	0	99,791,842	TODC	Fixed Price, Labor Hour, or Time and Materials
TOFS–10–D–0015	Shulman Rogers Gandal Pordy & Ecker PA.	Omnibus procurement for legal services.	8/6/2010	8/5/2015	0	0	99,791,842	TODC	Fixed Price, Labor Hour, or Time and Materials
TOFS–09–D–0001	Simpson Thacher & Bartlett LLP.	Capital Assistance Program (I).	2/20/2009	10/31/2009	2,047,872	1,363,085	5,000,000	TODC	Fixed Price or Labor Hour
TOFS–09–D–0009	Simpson Thacher & Bartlett LLP.	Legal services for work under Treasury's Public Private Investment Funds (PPIF) program.	5/26/2009	5/24/2011	7,849,026	3,185,439	15,000,000	TODC	Fixed Price or Labor Hour
TOS09–007	Simpson Thacher & Bartlett LLP.	Legal services for the implementation of TARP.	10/10/2008	4/9/2009	931,090	931,090	1,025,000	TODC	Fixed Price or Time and Materials
TOFS–09–O–0016	SNL Financial LC	SNL Unlimited, a web-based financial analytics service.	9/30/2009	9/29/2012	260,000	110,000	460,000	DC	Fixed Price
TOFS–09–D–0004	Sonnenschein Nath & Rosenthal LLP.	Auto Investment Legal services.	3/30/2009	3/30/2010	1,834,193	1,834,193	26,756,322	TODC	Fixed Price or Time and Materials
TOS09–010A	Sonnenschein Nath & Rosenthal LLP.	Legal services related to auto industry loans.	11/7/2008	5/31/2009	2,722,326	2,722,326	233,663	DC	Labor Hour

TOS09–014C	Sonnenschein Nath & Rosenthal LLP.	Legal Services for the purchase of asset backed securities.	12/10/2008	6/9/2009	249,999	82,884	249,999	TODC	Fixed Price or Time and Materials
T09BPA–001	Squire Sanders & Dempsey LLP.	Legal services for the Capital Purchase Program.	10/29/2008	7/31/2010	5,787,939	2,687,999	5,520,000	TODC	Fixed Price or Time and Materials
TOFS–10–B–0002	Squire Sanders & Dempsey LLP.	Housing Legal Services	4/8/2010	4/7/2011	1,229,350	572,956	1,229,350	TODC	Fixed Price or Labor Hour
TOFS–10–D–0016	Sullivan Cove Reign Enterprises JV.	Omnibus procurement for legal services.	8/6/2010	8/5/2015	0	0	99,791,842	TODC	Fixed Price, Labor Hour, or Time and Materials
TOFS–09–D–0003	The Boston Consulting Group Inc.	Management Consulting relating to the Auto industry.	3/6/2009	9/5/2009	991,169	991,169	1,000,000	TODC	Labor Hour
TOFS–09–D–0008	The Boston Consulting Group Inc.	Management Consulting relating to the Auto industry.	4/3/2009	9/30/2010	4,100,195	4,099,923	7,000,000	TODC	Fixed Price or Labor Hour
TOFS–10–O–0017	The George Washington University.	Financial Institution Mgmt & Modeling—Training course (J.Talley).	6/30/2010	8/14/2010	5,000	5,000	5,000	DC	Fixed Price
TOFS–10–I–0001	The Mitre Corporation	FNMA IR2 Assessment—OFS task order on Treasury Mitre Contract.	2/16/2010	10/31/2010	740,526	656,276	740,526	DC	Cost Plus Fixed Fee
TOFS–09–D–0002	Venable LLP	Capital Assistance Program (II) Legal Services.	2/20/2009	2/19/2010	1,394,724	1,394,724	5,000,000	TODC	Fixed Price or Labor Hour
TOFS–10–D–0017	Venable LLP	Omnibus procurement for legal services.	8/6/2010	8/5/2015	0	0	99,791,842	TODC	Fixed Price, Labor Hour, or Time and Materials
TOFS–10–G–0006	West Publishing Corporation.	Subscription Service for 4 users.	7/27/2010	7/31/2011	5,972	747	5,972	DC	Fixed Price
TDOX09–0038	Whitaker Brothers Bus Machines Inc.	Paper Shredder	1/27/2009	2/26/2009	3,213	3,213	3,213	DC	Fixed Price

[393] Treasury documents provided to Panel staff (Oct. 8, 2010).
[394] Adjusted Potential Contract Value includes amounts from the base contract, task orders, and modifications.
[395] Adjusted Potential Contract Value includes amounts from the base contract, task orders, and modifications. A ''TDOC'' is a Task or Delivery Order Contract, while a ''DC'' is a Definitive Contract.

FIGURE 11: LIST OF PROCUREMENT CONTRACTS DETAILING COMPETITION AND SOCIOECONOMIC STATUS OF CONTRACTORS [396]

Contract Number	Contractor	Description	Original Potential Contract Value [397]	Adjusted Potential Contract Value [398]	Competition	Socio-economic Status	Offerors Solicited	Proposals Received	Program
TOFS–10–D–0005	Alston & Bird LLP.	Omnibus procurement for legal services.	$99,791,842	$99,791,842	Full and Open w/ Small Business Set-aside.	Large Business		81	Multiple Programs
TOFS–09–D–0010	Anderson McCoy & Orta.	Legal services for work under Treasury's Public Private Investment Funds (PPIF) program.	15,000,000	15,000,000	Limited Competition—Unusual and Compelling Urgency.	Small Business	8	3	PPIP
TOFS–10–O–0007	Association of Government Accountants.	CEAR Program Application	5,000	5,000	Sole Source—Only Responsible Source.	Large Business	1	1	Program Operations
TOFS–09–D—0005	Bingham McCutchen LLP.	SBA Initiative Legal Services—Contract Novated from TOFS–09–D–0005 with McKee Nelson.	1,850,651	1,850,651	Limited Competition—Unusual and Compelling Urgency.	Large Business	Novation	Novation	SBA
TOFS–10–O–0021	Bingham McCutchen LLP.	SBA 7(a) Security Purchase Program.	19,975	19,975	SAP—Competed	Large Business		3	SBA
TOFS–09–D–0006	Cadwalader Wickersham & Taft LLP.	Auto Investment Legal Services	8,590,000	26,756,322	Limited Competition—Unusual and Compelling Urgency.	Large Business	8	6	Auto Industry
TOFS–09–D–0011	Cadwalader Wickersham & Taft LLP.	Restructuring Legal Services	20,687,500	20,687,500	Limited Competition—Unusual and Compelling Urgency.	Large Business	10	5	Multiple Programs
TOS09–020	Cadwalader Wickersham & Taft LLP.	Bankruptcy Legal Services	417,563	409,955	Limited Competition—Unusual and Compelling Urgency.	Large Business	3	3	Auto Industry
TOFS–10–D–0006	Cadwalader Wickersham & Taft LLP.	Omnibus procurement for legal services.	99,791,842	99,791,842	Full and Open w/ Small Business Set-aside.	Large Business		81	Multiple Programs

TOFS–10–G–0008	CCH Incorporated	GSA Task Order for procurement books—FAR, T&M, Government Contracts Reference, World Class Contracting.	2,430	2,430	SAP—Not Competed.	Large Business	1	1	Program Operations
TOS09–017	Colonial Parking Inc.	Lease of parking spaces	566,050	566,050	Full and Open	Large Business	Full and Open Competition.		Program Operations
TOFS–10–O–0020	CQ–Roll Call Inc.	One year subscription (3 users) to the CQ Today Breaking News & Schedules, CQ Congressional & Financial Transcripts, CQ Custom Email Alerts.	7,500	7,500	SAP—Not Competed.	Large Business	1	1	HPO
TOS09–016	Cushman & Wakefield of VA Inc.	Painting Services for TARP Offices	8,750	8,750	Full and Open	Large Business	1	1	Program Operations
TOFS–10–D–0019	Davis Audrey Robinette.	Program Operations Support Services to include project management, scanning and document management and correspondence.	6,000,000	6,000,000	Full and Open after Exclusion of Sources (Total SB set-aside).	Woman and Minority Owned Small business.			Multiple Programs
TOFS–09–D–0012	Debevoise & Plimpton, LLP.	Restructuring Legal Services	20,687,500	20,687,500	Limited Competition—Unusual and Compelling Urgency.	Large Business	10	5	Multiple Programs
TOFS–10–B–0003	Digital Management Inc..	Data and Document Management Consulting Services.	100,000,000	100,000,000	GSA Schedule Competition.	Small Business	10	5	Program Operations
TOFS–10–D–0004	Ennis Knupp & Associates Inc.	Investment Consulting Services	6,000,000	6,000,000	Full and Open	Large Business			Multiple Programs
TOS–09–008	Ennis Knupp & Associates Inc.	Investment and Advisory Services	2,495,190	2,495,190	Limited Competition—Unusual and Compelling Urgency.	Large Business	6	3	Multiple Programs
TOFS–09–O–0013	Equilar Inc.	Executive Compensation Data Subscription.	59,990	59,990	Full and Open	Large Business	Full and Open	1	Multiple Programs
T2009–TARP–0002	Ernst & Young LLP.	Accounting Services	0	11,397,968	GSA Schedule Competition.	Large Business	7	6	Multiple Programs
TOFS–10–B–0007	Ernst & Young LLP.	Program Compliance Support Services.	21,993,424	21,993,424	GSA Schedule Competition.	Large Business			Multiple Programs
TOFS–09–B–0001	FI Consulting Inc.	Credit Reform Modeling and Analysis.	0	1,935,866	GSA Schedule Competition.	Small Business	6	2	Multiple Programs

FIGURE 11: LIST OF PROCUREMENT CONTRACTS DETAILING COMPETITION AND SOCIOECONOMIC STATUS OF CONTRACTORS [396]—Continued

Contract Number	Contractor	Description	Original Potential Contract Value [397]	Adjusted Potential Contract Value [398]	Competition	Socio-economic Status	Offerors Solicited	Proposals Received	Program
TOFS–09–D–0013	Fox Hefter Swibel Levin & Carol, LLP.	Restructuring Legal Services	20,687,500	20,687,500	Limited Competition—Unusual and Compelling Urgency.	Large Business	10	5	Multiple Programs
TOFS–10–D–0007	Fox Hefter Swibel Levin & Carol, LLP.	Omnibus procurement for legal services.	99,791,842	99,791,842	Full and Open w/ Small Business Set-aside.	Large Business		81	Multiple Programs
TOFS–09–D–0007	Haynes and Boone LLP.	Auto Investment Legal Services	8,590,000	26,756,322	Limited Competition—Unusual and Compelling Urgency.	Large Business	8	6	Auto Industry
TOFS–10–D–0008	Haynes and Boone LLP.	Omnibus procurement for legal services.	99,791,842	99,791,842	Full and Open w/ Small Business Set-aside.	Large Business		81	Multiple Programs
TOFS–09–O–0003	Herman Miller Inc.	Aeron Chairs	53,799	53,799	GSA Schedule Competition.	Large Business		GSA Competition	Program Operations
T09BPA–002	Hughes Hubbard & Reed LLP.	Legal services for the Capital Purchase Program.	5,645,162	5,645,162	GSA Schedule Competition.	Large Business	5	4	CPP
TOFS–10–B–0001	Hughes Hubbard & Reed LLP.	Document Production services and Litigation Support.	13,464,607	13,464,607	GSA Schedule Competition.	Large Business	5	3	Multiple Programs
TOFS–10–D–0009	Hughes Hubbard & Reed LLP.	Omnibus procurement for legal services.	99,791,842	99,791,842	Full and Open w/ Small Business Set-aside.	Large Business		81	Multiple Programs
TOFS–09–O–0012	Knowledge Mosaic Inc.	SEC filings subscription service	5,000	5,000	Full and Open	Large Business	3	3	Multiple Programs
TDO10–F–249	Knowledge Mosaic Inc.	SEC filings subscription service	5,000	5,000	Sole Source—Only Responsible Source.	Large Business	1	1	Multiple Programs
TOFS–09–G–0002	Korn/Ferry International.	Executive search services for the OFS Chief Investment Officer position.	75,017	75,017	GSA Schedule Competition.	Large Business	4	4	Program Operations

TDO–TARP–2009–0003	Lindholm & Associates Inc.	Human resources services	710,528	710,528	GSA Schedule Competition.	Woman Owned Small Business.	4	3	Program Operations
TDOX09–0040	Locke Lord Bissell & Liddell LLP.	Initiate Interim Legal Services in support of Treasury Investments under EESA.	2,000,000	2,000,000	Limited Competition—Unusual and Compelling Urgency.	Large Business	3	3	Multiple Programs
TOFS–10–D–0010	Love & Long LLP	Omnibus procurement for legal services.	99,791,842	99,791,842	Full and Open w/ Small Business Set-aside.	SDB Woman Owned Small Business.		81	Multiple Programs
TOFS–09–O–0011	Mercer (US) Inc.	Executive Compensation Data Subscription.	3,000	3,000	Full and Open	Large Business	3	1	Multiple Programs
TOFS–10–B–0004	Microlink LLC	Data and Document Management Consulting Services.	100,000,000	100,000,000	GSA Schedule Competition.	Large Business	10	5	Program Operations
TOFS–10–B–0008	Navigant Consulting Inc.	Program Compliance Support Services.	21,993,424	21,993,424	GSA Schedule Competition.	Large Business	9	6	Multiple Programs
TOFS–10–O–0001	NNA Inc.	Newspaper delivery	7,765	7,765	Full and Open	Large Business	Full and Open Competition.	1	Program Operations
TOFS–10–D–0011	Orrick Herrington Sutcliffe LLP.	Omnibus procurement for legal services.	99,791,842	99,791,842	Full and Open w/ Small Business Set-aside.	Large Business		81	Multiple Programs
TDOX09–0039	Pat Taylor and Associates, Inc.	Temporary Services for Document Production, FOIA Assistance, and Program Support.	461,956	692,108	GSA Schedule Competition.	Woman Owned Small Business.	3	3	Multiple Programs
TOFS–10–D–0012	Paul Weiss Rifkind Wharton & Garrison LLP.	Omnibus procurement for legal services.	99,791,842	99,791,842	Full and Open w/ Small Business Set-aside.	Large Business		81	Multiple Programs
TOFS–10–D–0013	Perkins Coie LLP	Omnibus procurement for legal services.	99,791,842	99,791,842	Full and Open w/ Small Business Set-aside.	Large Business		81	Multiple Programs
TOS–07–109	Phacil, Inc.	Freedom of Information Act (FOIA) Analysts to support the Disclosure Services, Privacy and Treasury Records.	103,425	103,425	Full and Open	Small Business			Program Operations
T2009–TARP–0001	Pricewaterhouse-Coopers LLP.	Internal control services	0	25,361,407	GSA Schedule Competition.	Large Business	6	6	Multiple Programs
TOFS–09–B–0002	Pricewaterhouse-Coopers LLP.	PPIP compliance	2,897,400	2,897,400	GSA Schedule Competition.	Large Business	7	4	PPIP

FIGURE 11: LIST OF PROCUREMENT CONTRACTS DETAILING COMPETITION AND SOCIOECONOMIC STATUS OF CONTRACTORS [396]—Continued

Contract Number	Contractor	Description	Original Potential Contract Value [397]	Adjusted Potential Contract Value [398]	Competition	Socio-economic Status	Offerors Solicited	Proposals Received	Program
TOFS–10–B–0009	Pricewaterhouse-Coopers LLP.	Program Compliance Support Services.	21,993,424	21,993,424	GSA Schedule Competition.	Large Business	9	6	Multiple Programs
TOFS–10–D–0003	Qualx Corporation	FOIA Support Services	14,000,000	14,000,000	Full and Open	Service Disabled Veteran Owned Small Business.	Unlimited to SDVOSB vendors.	15	Program Operations
TOFS–10–B–0005	RDA Corporation	Data and Document Management Consulting Services.	100,000,000	100,000,000	GSA Schedule Competition.	Small Business	10	5	Program Operations
TOFS–10–G–0005	Reed Elselvier Inc. (dba LexisNexis).	Accurint subscription services for one year—4 users.	8,208	8,208	GSA Schedule Competition.	Large Business	4	1	
TOFS–10–B–0010	Regis & Associates, PC.	Program Compliance Support Services.	21,993,424	21,993,424	GSA Schedule Competition.	8(a) and Small Disadvantaged Business.	9	6	Multiple Programs
TOFS–10–G–0007	Schiff Hardin LLP	Housing Legal Services	537,375	537,375	GSA Schedule Competition.	Large Business			HAMP
TOFS–10–D–0014	Seyfarth Shaw LLP.	Omnibus procurement for legal services.	99,791,842	99,791,842	Full and Open w/ Small Business Set-aside.	Large Business		81	Multiple Programs
TOFS–10–D–0015	Shulman Rogers Gandal Pordy & Ecker PA.	Omnibus procurement for legal services.	99,791,842	99,791,842	Full and Open w/ Small Business Set-aside.	Large Business		81	Multiple Programs
TOFS–09–D–0001	Simpson Thacher & Bartlett LLP.	Capital Assistance Program (I)	5,000,000	5,000,000	Limited Competition—Unusual and Compelling Urgency.	Large Business	6	3	Multiple Programs
TOFS–09–D–0009	Simpson Thacher & Bartlett LLP.	Legal services for work under Treasury's Public Private Investment Funds (PPIF) program.	15,000,000	15,000,000	Limited Competition—Unusual and Compelling Urgency.	Large Business	8	3	Multiple Programs
TOS09–007	Simpson Thacher & Bartlett LLP.	Legal services for the implementation of TARP.	500,000	1,025,000	GSA Schedule Competition.	Large Business	6	2	Multiple Programs

TOFS–09–O–0016	SNL Financial LC	SNL Unlimited, a web-based financial analytics service.	460,000	460,000	Full and Open	Large Business	Full and Open	3	Multiple Programs
TOFS–09–D–0004	Sonnenschein Nath & Rosenthal LLP.	Auto Investment Legal services	8,590,000	26,756,322	Limited Competition—Unusual and Compelling Urgency.	Large Business	8	6	Auto Industry
TOS09–010A	Sonnenschein Nath & Rosenthal LLP.	Legal services related to auto industry loans.	233,663	233,663	Limited Competition—Unusual and Compelling Urgency.	Large Business	4	4	Auto Industry
TOS09–014C	Sonnenschein Nath & Rosenthal LLP.	Legal Services for the purchase of asset backed securities.	249,999	249,999	Limited Competition—Unusual and Compelling Urgency.	Large Business	7	6	CPP
T09BPA–001	Squire Sanders & Dempsey LLP.	Legal services for the Capital Purchase Program.	5,520,000	5,520,000	GSA Schedule Competition.	Large Business	5	4	CPP
TOFS–10–B–0002	Squire Sanders & Dempsey LLP.	Housing Legal Services	1,229,350	1,229,350	GSA Schedule Competition.	Large Business	5	2	HAMP
TOFS–10–D–0016	Sullivan Cove Reign Enterprises JV.	Omnibus procurement for legal services.	99,791,842	99,791,842	Full and Open w/ Small Business Set-aside.	Service Disabled Veteran Owned Small Business.		81	Multiple Programs
TOFS–09–D–0003	The Boston Consulting Group Inc.	Management Consulting relating to the Auto industry.	1,000,000	1,000,000	Limited Competition—Unusual and Compelling Urgency.	Large Business	5	3	Auto Industry
TOFS–09–D–0008	The Boston Consulting Group Inc.	Management Consulting relating to the Auto industry.	7,000,000	7,000,000	Limited Competition—Unusual and Compelling Urgency.	Large Business	7	5	Auto Industry
TOFS–10–O–0017	The George Washington University.	Financial Institution Mgmt & Modeling—Training course (J. Talley).	5,000	5,000	SAP—Competed	Large Business		1	
TOFS–10–I–0001	The Mitre Corporation.	FNMA IR2 Assessment—OFS task order on Treasury Mitre Contract.	408,075	740,526	Sole Source—Only Responsible Source.	Large Business	1	1	HAMP
TOFS–09–D–0002	Venable LLP	Capital Assistance Program (II) Legal Services.	5,000,000	5,000,000	Limited Competition—Unusual and Compelling Urgency.	Large Business	6	3	Multiple Programs

FIGURE 11: LIST OF PROCUREMENT CONTRACTS DETAILING COMPETITION AND SOCIOECONOMIC STATUS OF CONTRACTORS [396]—Continued

Contract Number	Contractor	Description	Original Potential Contract Value [397]	Adjusted Potential Contract Value [398]	Competition	Socio-economic Status	Offerors Solicited	Proposals Received	Program
TOFS–10–D–0017	Venable LLP	Omnibus procurement for legal services.	99,791,842	99,791,842	Full and Open w/ Small Business Set-aside.	Large Business		81	Multiple Programs
TOFS–10–G–0006	West Publishing Corporation.	Subscription Service for 4 users	5,972	5,972	GSA Schedule Competition.	Large Business			Anti-Fraud
TDOX09–0038	Whitaker Brothers Bus Machines Inc.	Paper Shredder	3,213	3,213	GSA Schedule—Sole Source.	Small Business	1	1	Program Operations

[396] Treasury documents provided to Panel staff (Oct. 8, 2010).
[397] Original Potential Contract Value is the amount listed in the base contract.
[398] Adjusted Potential Contract Value includes amounts from the base contract, task orders and modifications.

FIGURE 12: LIST OF SUBCONTRACTS UNDER THE PROCUREMENT CONTRACTS [399]

Contract Number	Contractor	Subcontractor Name	Subcontract Value	Socioeconomic Status	Category	Program
TOFS–09–D–0010	Anderson McCoy & Orta	Cadwalader Wickersham & Taft LLP	$3,940,925	Large Business	Legal Advisory	PPIP
TOFS–09–D–0006	Cadwalader Wickersham & Taft LLP	Driven	15,452	Small Business	Legal Advisory	Auto Industry
TOS–09–008	Ennis Knupp & Associates Inc	Korn Ferry	375,000	Large Business	Financial Advisory	Multiple Programs
TOS–09–008	Ennis Knupp & Associates Inc	Spencer Stuart	275,000	Large Business	Financial Advisory	Multiple Programs
TOS–09–008	Ennis Knupp & Associates Inc	FirstAdvantage	117,500	Large Business	Financial Advisory	Multiple Programs
TOS–09–008	Ennis Knupp & Associates Inc	Bishops Services	19,850	Large Business	Financial Advisory	Multiple Programs
TOS–09–008	Ennis Knupp & Associates Inc	Delves Group	26,000	Large Business	Financial Advisory	Multiple Programs
TOS–09–008	Ennis Knupp & Associates Inc	FedEx-Courier	58	Large Business	Financial Advisory	Multiple Programs
TOS–09–008	Ennis Knupp & Associates Inc	ABS–IT services (2%)	7,000	Woman Owned Small Business.	Financial Advisory	Multiple Programs
TOS–09–008	Ennis Knupp & Associates Inc	Vedder Price-Legal	2,106	Small Business	Financial Advisory	Multiple Programs
T2009–TARP–0002	Ernst & Young LLP	Emax Financial	358,300	Woman and Minority Owned Small Business.	Accounting/Internal Controls	Multiple Programs
T2009–TARP–0002	Ernst & Young LLP	James K Hess	303,880	Small Business	Accounting/Internal Controls	Multiple Programs
T2009–TARP–0002	Ernst & Young LLP	Morgan Franklin	814,984	Large Business	Accounting/Internal Controls	Multiple Programs
T2009–TARP–0002	Ernst & Young LLP	R Moran Co	19,291	Service Disabled Veteran Owned Small Business.	Accounting/Internal Controls	Multiple Programs

T2009–TARP–0002	Ernst & Young LLP	Misha Libman	194,508	Small Business	Accounting/Internal Controls	Multiple Programs
T2009–TARP–0002	Ernst & Young LLP	T Curtis Co	1,082,558	Woman and Minority Owned Small Business.	Accounting/Internal Controls	Multiple Programs
T2009–TARP–0002	Ernst & Young LLP	Peggy Kuhn	108,000	Woman Owned Small Business.	Accounting/Internal Controls	Multiple Programs
T2009–TARP–0002	Ernst & Young LLP	Tom Horton	18,750	Small Business	Accounting/Internal Controls	Multiple Programs
T2009–TARP–0002	Ernst & Young LLP	Lani Ecko	60,939	Small Disadvantaged Business.	Accounting/Internal Controls	Multiple Programs
TOFS–09–B–0001	FI Consulting Inc.	Internet Security Corp	17,241	Small Business	Accounting/Internal Controls	Multiple Programs
T09BPA–002	Hughes Hubbard & Reed LLP	Leftwich & Ludaway, LLC	158,835	Woman Owned Small Business.	Legal Advisory	CPP
TOFS–09–D–0005	McKee Nelson LLP	American Detail Cleaning Corp	500	Small Business	Legal Advisory	SBA
TOFS–09–D–0005	McKee Nelson LLP	Document Technologies, Inc.	3,100	Large Business	Legal Advisory	SBA
TOFS–09–D–0005	McKee Nelson LLP	Great Performances	400	Woman Owned Small Business.	Legal Advisory	SBA
TOFS–09–D–0005	McKee Nelson LLP	Merrill Communications LLC	2,600	Large Business	Legal Advisory	SBA
TOFS–09–D–0005	McKee Nelson LLP	Miller's Office Products	1,200	Woman Owned Small Business.	Legal Advisory	SBA
TOFS–09–D–0005	McKee Nelson LLP	Total Document Solutions, Inc.	2,100	Woman Owned Small Business.	Legal Advisory	SBA
TOFS–09–D–0005	McKee Nelson LLP	Washington Express	100	Small Business	Legal Advisory	SBA
TOFS–10–B–0004	Microlink LLC	I3 Solutions	65,520	Small Business	Information Technology	Program Operations
T2009–TARP–0001	PricewaterhouseCoopers LLP	A11 Services Corporation	3,025	Woman Owned Small business.	Accounting/Internal Controls	Multiple Programs
T2009–TARP–0001	PricewaterhouseCoopers LLP	Bert Smith	324,904	Large Business	Accounting/Internal Controls	Multiple Programs
T2009–TARP–0001	PricewaterhouseCoopers LLP	DP George	168,552	Service Disabled Veteran Owned Small Business.	Accounting/Internal Controls	Multiple Programs
T2009–TARP–0001	PricewaterhouseCoopers LLP	Evergreen Associates of Virginia	65,230	Woman Owned Small Business.	Accounting/Internal Controls	Multiple Programs
T2009–TARP–0001	PricewaterhouseCoopers LLP	GRC Assurance	326,565	Small Business	Accounting/Internal Controls	Multiple Programs
T2009–TARP–0001	PricewaterhouseCoopers LLP	JH2 Risk Advisors	422,499	Woman Owned Small Disadvantaged Business.	Accounting/Internal Controls	Multiple Programs
T2009–TARP–0001	PricewaterhouseCoopers LLP	Synergy Services	1,617,819	Woman Owned Small Business.	Accounting/Internal Controls	Multiple Programs
TOFS–10–D–0003	Qualx Corporation	McNeil Technologies	103,000	Large Business	Administrative Support	Program Operations
TOFS–09–D–0008	The Boston Consulting Group Inc.	Oxnard MB LLC	25,437	Small Business	Financial Advisory	Auto Industry
TOFS–09–D–0008	The Boston Consulting Group Inc.	PR & Associates	113,544	Small Business	Financial Advisory	Auto Industry
TOFS–09–D–0002	Venable LLP	Brown Sheehan LLP	130,429	Small Disadvantaged Business.	Legal Advisory	CAP

[399] Treasury documents provided to Panel staff (Oct. 8, 2010).

FIGURE 13: LIST OF FINANCIAL AGENCY AGREEMENTS[400]

Financial Agency Agreement Number	Financial Agent	Description	Date of Award	Performance End Date	Obligated Value	Expended Value	Socio-economic Category[401]	Program
TOFA–09–FAA–0005	AllianceBernstein L.P.	Asset Management Services.	4/21/2009	4/20/2018	$22,399,943	$21,207,253	Large Business	Multiple Programs
TOFA–10–FAA–0001	Avondale Investments, LLC	Asset Management Services.	12/22/2009	4/20/2019	750,000	562,500	Minority Owned Business.	CPP
TOFA–09–FAA–0001	The Bank of New York Mellon Corporation.	Custodian	10/14/2008	10/14/2015	28,495,412	23,777,002	Large Business	Multiple Programs
TOFA–10–FAA–0002	Bell Rock Capital, LLC	Asset Management Services.	12/22/2009	4/20/2019	750,000	575,000	Woman Owned Business.	CPP
TOFA–09–FAA–0004	Earnest Partners	Asset Management Services.	3/16/2009	3/15/2013	4,050,000	1,955,000	Minority Owned Business.	SBA7(a)
TOFA–09–FAA–0002	Fannie Mae	HAMP Administration.	2/18/2009	2/17/2019	126,712,000	111,339,451	Large Business	HAMP
TOFA–09–FAA–0003	Freddie Mac	HAMP Compliance	2/18/2009	2/17/2019	88,850,000	79,296,499	Large Business	HAMP
TOFA–09–FAA–0006	FSI Group LLC	Asset Management Services.	4/21/2009	4/20/2018	11,102,500	10,770,000	Large Business	Multiple Programs
TOFA–10–FAA–0003	Howe Barnes Hoefer & Arnett, Inc.	Asset Management Services.	12/22/2009	4/20/2019	1,250,000	950,000	Small Business	CPP
TOFA–10–FAA–0004	KBW Asset Management, Inc.	Asset Management Services.	12/22/2009	4/20/2019	3,803,333	3,279,167	Small Business	Multiple Programs
TOFA–10–FAA–0009	Lazard Freres & Co. LLC	Transaction Structuring.	5/17/2010	2/16/2012	7,500,000	2,166,667	Large Business	AIFP
TOFA–10–FAA–0005	Lombardia Capital Partners, LLC	Asset Management Services.	12/22/2009	4/20/2019	1,250,000	937,500	Minority Owned Business.	CPP
TOFA–10–FAA–0008	Morgan Stanley & Co.	Disposition Services.	3/29/2010	3/29/2012	23,577,000	13,175,423	Large Business	CPP
TOFA–10–FAA–0006	Paradigm Asset Management Co., LLC.	Asset Management Services.	12/22/2009	4/20/2019	1,250,000	925,000	Minority Owned Business.	CPP
TOFA–09–FAA–0007	Piedmont Investment Advisors LLC	Asset Management Services.	4/21/2009	4/20/2018	5,615,000	5,120,000	Minority Owned Business.	CPP

[400] Treasury documents provided to Panel staff (Oct. 8, 2010).
[401] Treasury documents provided to Panel staff (Oct. 5, 2010).

FIGURE 14: LIST OF SUBCONTRACTS UNDER FINANCIAL AGENT AGREEMENTS [402]

Financial Agent	Contractor	Socioeconomic Status	Reported Contract Value [403]	Category
AllianceBernstein	Altura Capital Group LLC	Minority and Woman Owned Business.	$816,664	Financial Advisory Services
AllianceBernstein	Deutsche Bank Securities Inc.	Large Business	250,000	Financial Advisory Services
AllianceBernstein	Jeremy Bulow, Jon Levin, Paul Milgrom and Paul Klemperer.	Large Business	48,920	Financial Advisory Services
The Bank of New York Mellon.	American Cybersystems	Minority Owned Business.	80,168	Temporary Staffing Services
The Bank of New York Mellon.	Diversant, Inc.	Minority Owned Business.	539,371	Temporary Staffing Services
The Bank of New York Mellon.	Foxx-Pitt Kelton	Large Business	1,175,000	Financial Advisory Services
The Bank of New York Mellon.	Gifford Fong Associates	Small Business	268,828	Financial Advisory Services
The Bank of New York Mellon.	Information Integration Inc. (I–3)	Woman Owned Business.	275,501	Technical Writing Support
The Bank of New York Mellon.	International Market Recruiters	Large Business	67,793	Temporary Staffing Services
The Bank of New York Mellon.	New York Staffing Services, Inc.	Minority Owned Business.	256,257	Temporary Staffing Services
The Bank of New York Mellon.	RangeMark (f/k/a Structured Credit Solutions (NSM)).	Small Business	3,738,524	Financial Advisory Services
The Bank of New York Mellon.	Robert Jarrow	Small Business	30,987	Financial Advisory Services
The Bank of New York Mellon.	TTI of New York, Inc.	Woman Owned Business.	31,163	Temporary Staffing Services
The Bank of New York Mellon.	Williams, Adley & Company, LLP	Minority and Woman Owned Business.	276,227	Audit and Accounting Services
The Bank of New York Mellon.	Wilshire Associates Incorporated	Large Business	1,223,750	Portfolio Analystic Services
Fannie Mae [404]	Accenture	Large Business	4,587,626	Project Management & Reporting Support
Fannie Mae	Beers & Cutler	Large Business	103,225	Business Process Support
Fannie Mae	Bloomfield Knoble, Inc.	Large Business	100,310	Web Development Support
Fannie Mae	Cap Gemini	Large Business	154,307	Records Retention Support
Fannie Mae	Ernst & Young LLP	Large Business	3,777,188	Business Process Support
Fannie Mae	Homeownership Preservation Foundation.	Small Business	8,049,969	Call Center Support
Fannie Mae	Iron Mountain	Large Business	7,141	Data Storage Services
Fannie Mae	LPS/McDash	Large Business	6,117,500	Data Management Services
Fannie Mae	Newbold, LLC	Small Business	204,057	Project Management Support
Fannie Mae	Pace Harmon, LLC	Small Business	82,094	Call Center Support
Fannie Mae	PERC	Large Business	135,927	Information Protection Support
Fannie Mae	PricewaterhouseCoopers LLP	Large Business	3,371,008	Phone Bank Support
Fannie Mae	Robbins Gioia	Minority Owned Business.	349,619	MHA Operating Model Support
Fannie Mae	The Ad Council	Large Business	1,042,716	Marketing Support
Fannie Mae	The Oakleaf Group LLC	Small Business	842,967	Program Support (Reporting)

FIGURE 14: LIST OF SUBCONTRACTS UNDER FINANCIAL AGENT AGREEMENTS [402]—Continued

Financial Agent	Contractor	Socioeconomic Status	Reported Contract Value [403]	Category
Freddie Mac	AllonHill, LLC	Woman Owned Business.	4,442,955	Program Support
Freddie Mac	American Research Institute	Large Business	269,019	Training Support
Freddie Mac	Celerity IT, LLC	Large Business	23,364	Staff Augmentation
Freddie Mac	Clayton Holdings	Large Business	3,864,205	Compliance Support (File Reviews)
Freddie Mac	Collaberra	Minority Owned Business.	409,240	Professional Training
Freddie Mac	Comsys Info Tech Services, Inc.	Large Business	450,509	Staff Augmentation
Freddie Mac	Edge Professional Services	Large Business	437,968	Staff Augmentation
Freddie Mac	Ernst & Young LLP	Large Business	17,761,258	Business Process Support
Freddie Mac	Esolution First, LLC	Woman Owned Business.	997,566	Staff Augmentation
Freddie Mac	Grant Thornton	Large Business	1,115,161	Governance Audit Support
Freddie Mac	Helen Thompson	Woman Owned Business.	171,100	Training Support
Freddie Mac	Idea Integration	Large Business	57,295	IT Support Services
Freddie Mac	Inscope Solutions	Minority Owned Business.	982,193	Project Management Support
Freddie Mac	Kforce		87,360	Staff Augmentation
Freddie Mac	Lender Processing Services	Large Business	1,458,143	Compliance Program Support
Freddie Mac	MODIS, Inc.	Large Business	435,253	Project Management Support
Freddie Mac	Mortgage Analytics & Consulting	Woman Owned Business.	10,983	Financial Support Services
Freddie Mac	Oliver Wyman	Large Business	5,930,308	Data Validation Support
Freddie Mac	Pace Harmon, LLC	Large Business	466,830	Procurement Support
Freddie Mac	Protiviti	Large Business	28,341	Governance Audit Support
Freddie Mac	Sapphire Government Technologies	Large Business	301,577	Staff Augmentation
Freddie Mac	Spectrum Technology Services	Large Business	1,130,031	IT Support Services
Freddie Mac	Syapps	Minority Owned Business.	1,223,175	IT Support Services
Freddie Mac	VisionIT	Minority Owned Business.	52,848	Staff Augmentation
Freddie Mac	Williams, Adley & Company, LLP	Minority and Woman Owned Business.	933,231	Governance Audit Support
Freddie Mac	Willmott & Associates	Large Business	200,875	Recruitment Support
FSI Group	Elizabeth Park Capital Management, Ltd..	Minority Owned Business.	106,250	Recruitment Support
Piedmont Investment Advisors.	N/A [405]	Small Business	320,000	Financial Advisory Services

[402] Data on contractors to financial agents is current through August 31, 2010. Reports are based on representations by the financial agents, as Treasury does not have contractual privity with contractors to financial agents. Treasury documents provided to Panel staff (Oct. 8, 2010).

[403] Contract value refers to the amount payable from the agent to the contractor. Not all contractor costs are compensated by Treasury on a pass-through basis.

[404] Fannie Mae also engages numerous marketing, site hosting and IT vendors that are not individually reported on an due to the quantity of these contractors, their low average dollar-value and that the associated costs of these contracts are included in the fixed fee we pay Fannie Mae under their FAA with the Treasury.

[405] This subcontractor was a sole proprietor and Treasury requested that the name be withheld.

SECTION TWO: TARP UPDATES SINCE LAST REPORT

A. Community Development Capital Initiative

Treasury completed funding for the Community Development Capital Initiative (CDCI) on September 30, 2010. Although Treasury committed to spend up to $780 million in TARP funds for the CDCI, only $570 million was allocated to 84 Community Development Financial Institutions (CDFIs). Among these institutions were 28 banks and thrifts that issued preferred shares through CPP and later exchanged these securities for an equivalent investment amount under the CDCI. The number of participating CDFIs grew more than six times in September, with 73 banks, thrifts, and credit unions entering the program. More than half of the final investment amount ($312 million) came during the final round of funding on September 29 and 30, 2010.

B. Citigroup AGP TruPS and Common Stock Sales

On September 30, 2010, Treasury completed a third round of sales for Citigroup common stock, which it received in July 2009 as part of an exchange for preferred shares issued under CPP. A total of 1.5 billion shares were sold between July 30 and September 30, 2010, at $3.91 per share. Gross proceeds from the three disposition periods completed thus far total $16.4 billion. Approximately $13.4 billion of this amount represents a repayment for Citigroup's CPP funding, while the remaining $3 billion represents a net profit for taxpayers. Treasury still holds 3.1 billion common shares, which represents 12.4 percent of Citigroup's outstanding common equity.

Treasury also completed a public offering for $2.2 billion in trust preferred securities (TruPS) issued under the Asset Guarantee Program (AGP). These securities were a premium for Treasury's $5 billion guarantee on a $301 billion pool of Citigroup ring-fenced assets. Treasury initially received a $4 billion premium; however, $1.8 billion was cancelled upon the December 2009 termination of the guarantee. All proceeds from the TruPS sale constitute further profits for taxpayers since Treasury did not make any payments associated with the loss-share agreement during the life of the program.

Treasury also plans to sell $800 million in AGP TruPS currently held by the FDIC. The FDIC will transfer these securities to Treasury upon Citigroup's exit from the Temporary Liquidity Guarantee Program (TLGP), provided that there are no losses from the company's participation in TLGP.

C. AIG Repayment Plan

On September 30, 2010, American International Group Inc. (AIG) announced that it had entered an agreement-in-principle with Treasury, the Federal Reserve Bank of New York (FRBNY), and the AIG Credit Facility Trust that would allow the company to repay its outstanding obligations to the federal government. AIG's repayment plan involves three components:

- AIG will repay its balance on the revolving credit facility (RCF) with FRBNY. As of September 29, 2010, the amount of funds outstanding from the facility was $18.9 billion. To repay

the RCF, AIG plans to use proceeds from the initial public offering for American International Assurance Company Ltd. (AIA) and the pending sale of American Life Insurance Company (ALICO) to MetLife, Inc. AIG will also use funds from the parent company to pay down and, ultimately, terminate the facility.

- AIG will draw down up to $22.3 billion in Series F funds available through the TARP to help purchase FRBNY's $25.7 billion preferred equity interests in the AIA Aurora LLC and ALICO Holdings LLC special purpose vehicles (SPVs). The company will also use proceeds from two future asset sales (AIG Star Life Insurance Co. and AIG Edison Life Insurance) to purchase the remaining shares held in the SPVs. AIG will then transfer the preferred interests to Treasury as part of its consideration for the Series F preferred shares. In order to repay Treasury for the equity interest in the SPVs, AIG will use proceeds from future sales of AIA and MetLife equity, which AIG will own upon completion of the ALICO sale.
- Upon full repayment of the RCF, AIG will issue approximately 1.655 billion shares of common stock to Treasury in exchange for $49.1 billion of Series E and Series F preferred equity issued under the TARP and Series C preferred convertible stock held by the AIG Credit Facility Trust. AIG will also issue up to 75 million warrants for common equity to all existing common shareholders. Once the exchange is complete, Treasury will have a 92.1 percent common equity stake in AIG.

D. FHA Short Refinance Program

On September 7, 2010, the U.S. Department of Housing and Urban Development (HUD) began offering an additional refinance option for borrowers in negative equity positions through the Federal Housing Administration (FHA) Short Refinance Program. For a homeowner to qualify for a new FHA-insured loan under the program, the borrower must be current on their mortgage payments, and the first-lien mortgage holder must write down at least 10 percent of the loan's principal. The loan-to-value ratio can be no higher than 97.75 percent after the refinancing, and the combined loan-to-value ratio on the refinanced mortgage (which would also include any junior liens) can be no greater than 115 percent.

Treasury has allocated approximately $3 billion in TARP funds for this program to support existing second-lien holders who agree to full or partial extinguishment of the liens.

On September 3, 2010, Treasury purchased an $8 billion, 10-year letter of credit facility from Citibank, N.A. to cover losses on new FHA loans. Treasury will incrementally increase the amount available under the facility in proportion to the dollar value of mortgages refinanced under the FHA Short Refinance Program. After the first two-and-a-half years, the amount available under the credit facility will be capped at the level of draws up to that point in time. As part of the purchase agreement with Citibank, N.A., Treasury will pay up to $117 million in fees for the availability and usage of the credit facility.

E. Treasury Releases Two-Year Retrospective Report on the TARP

Two days following the expiration of the TARP on October 3, 2010, Treasury released a *Two-Year Retrospective* report assessing the program. The report cites a number of key accomplishments Treasury attributes to the TARP. Treasury also estimates that the total cost of the TARP will be $51 billion. The total cost to Treasury would be $29 billion after factoring in an estimated profit of $22 billion associated with its investments in AIG outside of the TARP. Treasury expects most of the residual cost to come from losses from the TARP's investments in the automotive industry as well as expenditures for foreclosure mitigation initiatives.

F. Metrics

Each month, the Panel's report highlights a number of metrics that the Panel and others, including Treasury, the Government Accountability Office (GAO), the Special Inspector General for the Troubled Asset Relief Program (SIGTARP), and the Financial Stability Oversight Board, consider useful in assessing the effectiveness of the Administration's efforts to restore financial stability and accomplish the goals of EESA. This section discusses changes that have occurred in several indicators since the release of the Panel's September report.

1. Macroeconomic Indices

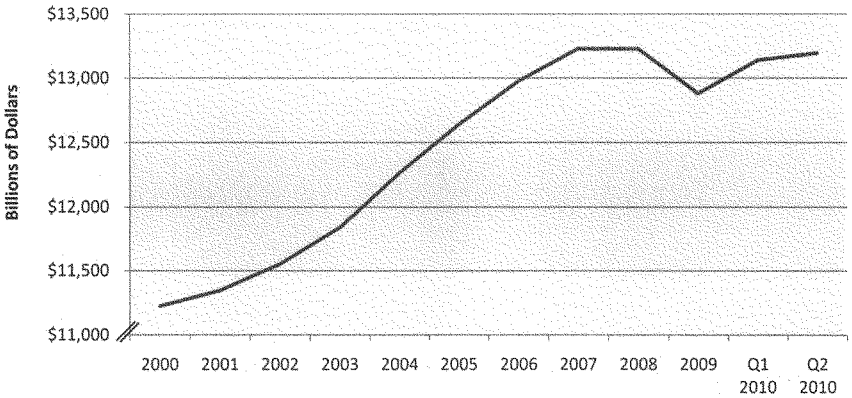
Real GDP growth quarter-over-quarter peaked at an annual rate of 5 percent in the fourth quarter of 2009 and has decreased during 2010. Real GDP increased at rates of 3.7 and 1.6 percent in the first and second quarters of 2010, respectively.[406] These growth rates were also affected by the spike in employment resulting from the 2010 U.S. Census.[407]

---

[406] Bureau of Economic Analysis, *Table 1.1.6.: Real Gross Domestic Product, Chained Dollars* (online at www.bea.gov/national/nipaweb/TableView.asp?SelectedTable=6&Freq=Qtr&FirstYear=2008&LastYear=2010) (hereinafter "Bureau of Economic Analysis, Table 1.1.6"). Until the year-over-year decrease from 2007 to 2008, nominal GDP had not decreased on an annual basis since 1949. Bureau of Economic Analysis, *Table 1.1.5.: Gross Domestic Product* (online at www.bea.gov/national/nipaweb/TableView.asp?SelectedTable=5&Freq=Qtr&FirstYear=2008&LastYear=2010) (accessed Oct. 12, 2010).

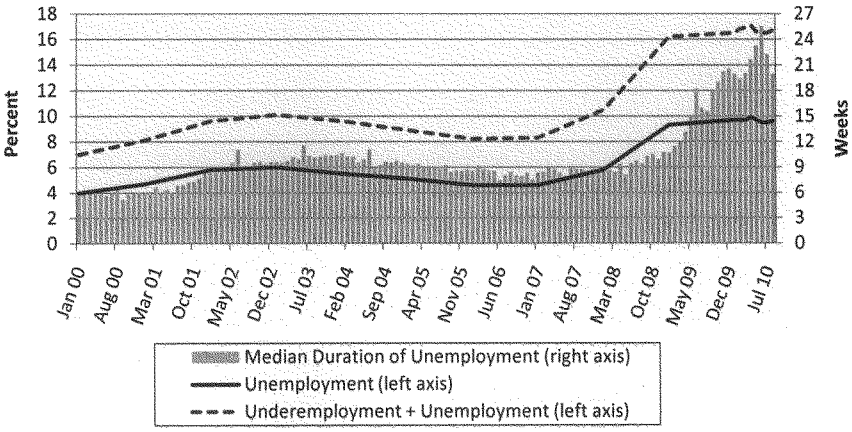
[407] The Economics and Statistics Administration within the U.S. Department of Commerce estimated that the spending associated with the 2010 Census would peak in the second quarter of 2010 and could boost annualized nominal and real GDP growth by 0.1 percentage point in the first quarter of 2010 and 0.2 percentage point in the second quarter of 2010. As the boost from the Census is a one-time occurrence, continuing increases in private investment and personal consumption expenditures as well as in exports will be needed to sustain the resumption of growth that has occurred in the U.S. economy over the past year. Economics and Statistics Administration, U.S. Department of Commerce, *The Impact of the 2010 Census Operations on Jobs and Economic Growth,* at 8 (Feb. 2010) (online at www.esa.doc.gov/02182010.pdf).

FIGURE 15: REAL GDP [408]



Since our September report, both underemployment and unemployment have increased marginally. Median duration of unemployment has decreased by 10 percent.

FIGURE 16: UNEMPLOYMENT, UNDEREMPLOYMENT, AND MEDIAN DURATION OF UNEMPLOYMENT [409]



[408] Bureau of Economic Analysis, Table 1.1.6, *supra* note 406.

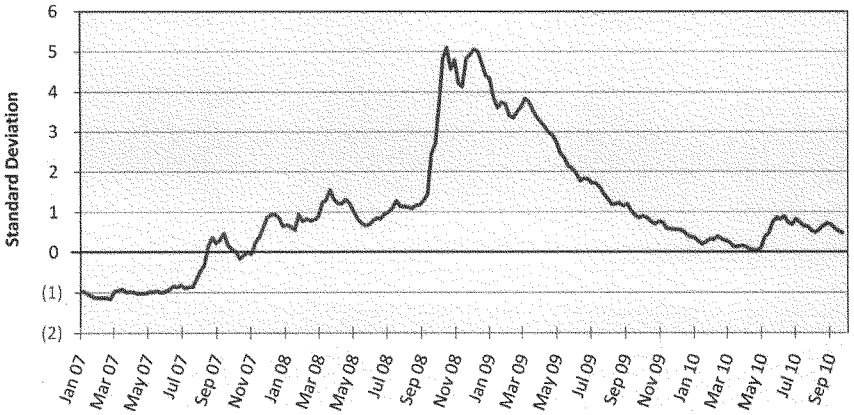
[409] It is important to note that the measures of unemployment and underemployment do not include people who have stopped actively looking for work altogether. While the Bureau of Labor Statistics (BLS) does not have a distinct metric for "underemployment," the U–6 category of Table A–15 "Alternative Measures of Labor Underutilization" is used here as a proxy. BLS defines this measure as: "Total unemployed, plus all persons marginally attached to the labor force, plus total employed part time for economic reasons, as a percent of the civilian labor force plus all persons marginally attached to the labor force." U.S. Department of Labor, *International Comparisons of Annual Labor Force Statistics* (online at www.bls.gov/webapps/legacy/cpsatab15.htm) (accessed Oct. 12, 2010).

2. Financial Indices

a. Overview

Since its post-crisis trough in April 2010, the St. Louis Federal Reserve Financial Stress Index has increased over elevenfold, although it has fallen by nearly half since the post-crisis peak in June 2010. The recent trend suggests that financial stress continues moving towards its long-run norm. The index has decreased over three standard deviations since October 2008, the month when the TARP was initiated.

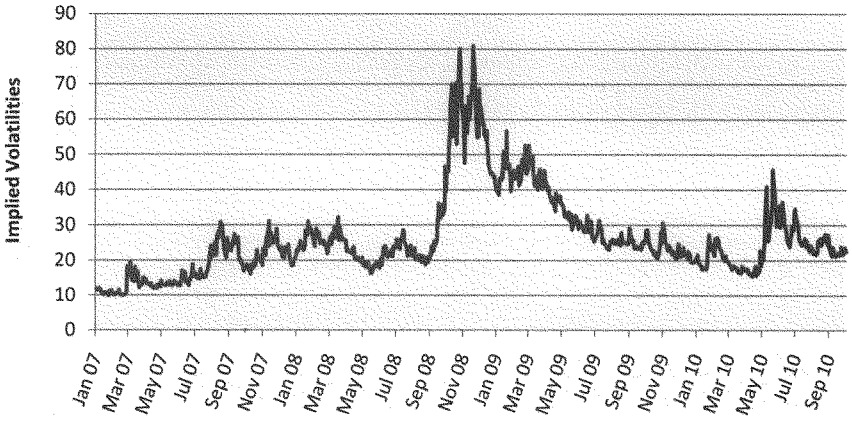
FIGURE 17: ST. LOUIS FEDERAL RESERVE FINANCIAL STRESS INDEX [410]



Volatility has decreased recently. The Chicago Board Options Exchange Volatility Index (VIX) has fallen about half since the post-crisis peak in May 2010 and has fallen nearly 15 percent since its slightly elevated level in August. However, volatility is still nearly 50 percent higher than its post-crisis low on April 12, 2010.

[410] Federal Reserve Bank of St. Louis, *Series STLFSI: Business/Fiscal: Other Economic Indicators* (Instrument: St. Louis Financial Stress Index, Frequency: Weekly) (online at research.stlouisfed.org/fred2/categories/98) (accessed Oct. 12, 2010). The index includes 18 weekly data series, beginning in December 1993 to the present. The series are: effective federal funds rate, 2-year Treasury, 10-year Treasury, 30-year Treasury, Baa-rated corporate, Merrill Lynch High Yield Corporate Master II Index, Merrill Lynch Asset-Backed Master BBB-rated, 10-year Treasury minus 3-month Treasury, Corporate Baa-rated bond minus 10-year Treasury, Merrill Lynch High Yield Corporate Master II Index minus 10-year Treasury, 3-month LIBOR–OIS spread, 3-month TED spread, 3-month commercial paper minus 3-month Treasury, the J.P. Morgan Emerging Markets Bond Index Plus, Chicago Board Options Exchange Market Volatility Index, Merrill Lynch Bond Market Volatility Index (1-month), 10-year nominal Treasury yield minus 10-year Treasury Inflation Protected Security yield, and Vanguard Financials Exchange-Traded Fund (equities). The index is constructed using principal components analysis after the data series are de-meaned and divided by their respective standard deviations to make them comparable units. The standard deviation of the index is set to 1. For more details on the construction of this index, *see* Federal Reserve Bank of St. Louis, *National Economic Trends Appendix: The St. Louis Fed's Financial Stress Index* (Jan. 2010) (online at research.stlouisfed.org/publications/net/NETJan2010Appendix.pdf).

FIGURE 18: CHICAGO BOARD OPTIONS EXCHANGE VOLATILITY INDEX[411]



b. Interest Rates, Spreads, and Issuance

As of October 4, 2010, the 3-Month and 1-Month London Interbank Offer Rates (LIBOR), the prices at which banks lend and borrow from each other, were 0.291 and 0.257, respectively. Rates have fallen by nearly half since post-crisis highs in June 2010 and have remained nearly constant since our September report. Over the longer term, however, interest rates remain extremely low relative to pre-crisis levels.[412]

FIGURE 19: 3-MONTH AND 1-MONTH LIBOR RATES (AS OF OCTOBER 6, 2010)

Indicator	Current Rates (as of 10/4/2010)	Percent Change from Data Available at Time of Last Report (9/6/2010)
3-Month LIBOR[413]	0.291	(0.01)%
1-Month LIBOR[414]	0.257	(0.00)%

[413] Data accessed through Bloomberg data service on October 4, 2010.
[414] Data accessed through Bloomberg data service on October 4, 2010.

However, in spite of extremely low interest rates, the non-Agency U.S. mortgage-backed securities (MBS) market remains moribund, with August issuance below $1 billion, and a 77-percent decrease in issuance year to date between 2010 and 2009.[415]

Since the Panel's September report, interest rate spreads have stayed fairly constant. Thirty-year mortgage interest rates and 10-year Treasury bond yields have both remained relatively unchanged as well. The conventional mortgage spread, which measures the 30-year fixed mortgage rate over 10-year Treasury bond yields, has risen very slightly since late August.[416]

[411] Data accessed through Bloomberg data service on October 4, 2010. The CBOE VIX is a key measure of market expectations of near-term volatility. CBOE, *The CBOE Volatility Index—VIX 2009* (online at www.cboe.com/micro/vix/vixwhite.pdf) (accessed Oct. 12, 2010).
[412] Data accessed through Bloomberg data service on October 4, 2010.
[415] SIFMA, *US Mortgage-Related Securities Issuance* (online at www.sifma.org/uploadedFiles/Research/Statistics/SIFMA_USMortgageRelatedIssuance.xls) (accessed Oct. 7, 2010).
[416] Board of Governors of the Federal Reserve System, *Federal Reserve Statistical Release H.15: Selected Interest Rates: Historical Data* (Instrument: Conventional Mortgages, Frequency: Weekly) (online at www.federalreserve.gov/releases/h15/data/Weekly_Thursday_/

The TED spread, which serves as an indicator for perceived risk in the financial markets, has been falling since June, and is currently lower than pre-crisis levels.[417] The LIBOR–OIS spread reflects the health of the banking system. While it increased over threefold from early April to July, it has been falling since mid-July and is now averaging pre-crisis levels.[418] Decreases in the LIBOR–OIS spread and the TED spread suggest that hesitation among banks to lend to counterparties has recently declined.

FIGURE 20: TED SPREAD [419]

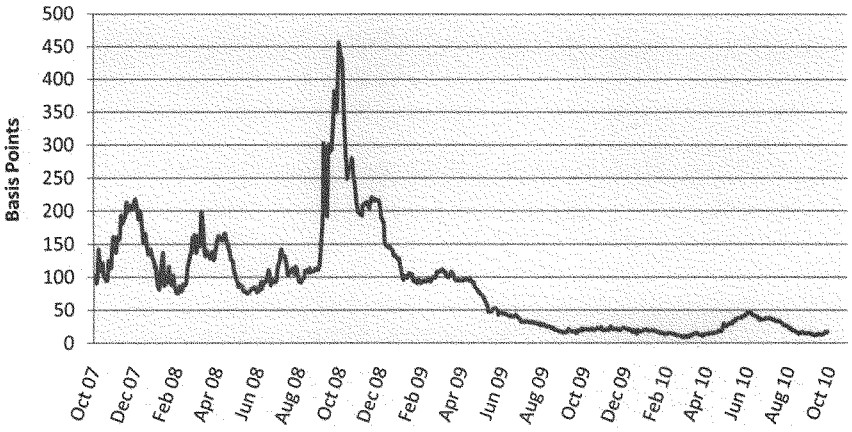
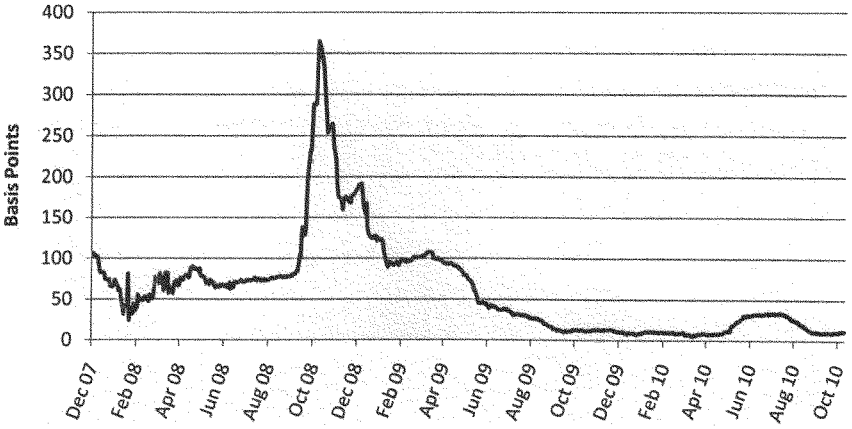


FIGURE 21: LIBOR–OIS SPREAD [420]



H15_MORTG_NA.txt) (accessed Oct. 5, 2010) (hereinafter "Federal Reserve Statistical Release H.15").

[417] Federal Reserve Bank of Minneapolis, *Measuring Perceived Risk—The TED Spread* (Dec. 2008) (online at www.minneapolisfed.org/publications_papers/pub_display.cfm?id=4120).

[418] Data accessed through Bloomberg data service on Oct. 5, 2010.

[419] Data accessed through Bloomberg data service on Oct. 4, 2010.

[420] Data accessed through Bloomberg data service on Oct. 4, 2010.

The interest rate spread for AA asset-backed commercial paper, which is considered mid-investment grade, has fallen by about 4 percent since the Panel's September report. The interest rate spread on A2/P2 commercial paper, a lower grade investment than AA asset-backed commercial paper, has fallen by nearly 6 percent since the Panel's September report. This indicates healthier fund-raising conditions.

FIGURE 22: INTEREST RATE SPREADS

Indicator	Current Spread (as of 9/30/2010)	Percent Change Since Last Report (9/2/2010) (Percent)
Conventional mortgage rate spread [421] (percentage points)	1.8	4.0
TED spread (basis points)	13.06	(15.4)
Overnight AA asset-backed commercial paper interest rate spread [422] (percentage points)	0.08	(4.1)
Overnight A2/P2 nonfinancial commercial paper interest rate spread [423] (percentage points)	0.16	(6.2)

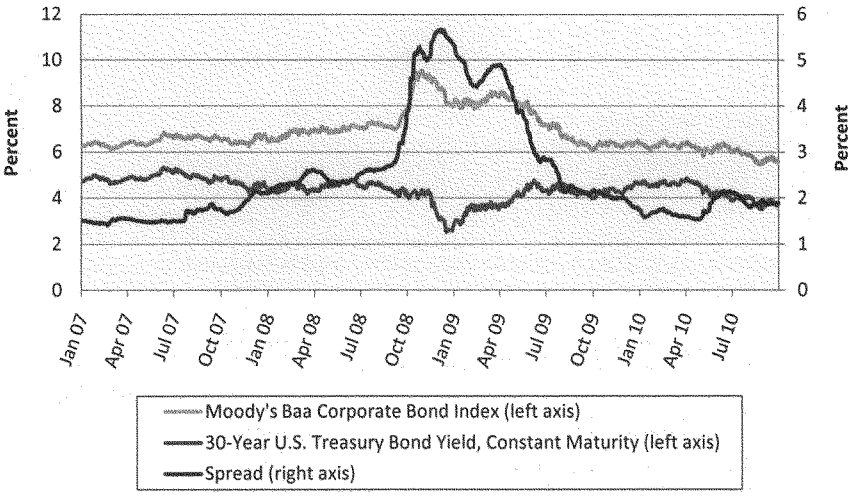
[421] Federal Reserve Statistical Release H.15, *supra* note 416; Board of Governors of the Federal Reserve System, *Federal Reserve Statistical Release H.15: Selected Interest Rates: Historical Data* (Instrument: U.S. Government Securities/Treasury Constant Maturities/Nominal 10-Year, Frequency: Weekly) (online at www.federalreserve.gov/releases/h15/data/Weekly_Friday_/H15_TCMNOM_Y10.txt) (accessed Oct. 5, 2010).

[422] Board of Governors of the Federal Reserve System, *Federal Reserve Statistical Release: Commercial Paper Rates and Outstandings: Data Download Program* (Instrument: AA Asset-Backed Discount Rate, Frequency: Daily) (online at www.federalreserve.gov/DataDownload/Choose.aspx?rel=CP) (accessed Oct. 5, 2010); Board of Governors of the Federal Reserve System, *Federal Reserve Statistical Release: Commercial Paper Rates and Outstandings: Data Download Program* (Instrument: AA Nonfinancial Discount Rate, Frequency: Daily) (online at www.federalreserve.gov/DataDownload/Choose.aspx?rel=CP) (accessed Oct. 5, 2010). In order to provide a more complete comparison, this metric utilizes the average of the interest rate spread for the last five days of the month.

[423] Board of Governors of the Federal Reserve System, *Federal Reserve Statistical Release: Commercial Paper Rates and Outstandings: Data Download Program* (Instrument: A2/P2 Nonfinancial Discount Rate, Frequency: Daily) (online at www.federalreserve.gov/DataDownload/Choose.aspx?rel=CP) (accessed Oct. 5, 2010). In order to provide a more complete comparison, this metric utilizes the average of the interest rate spread for the last five days of the month.

The spread between Moody's Baa Corporate Bond Yield Index and 30-year constant maturity U.S. Treasury Bond yields doubled from late April to mid-June. The spread has leveled-off since a spike in mid-June to its current level of approximately 2 percent. This spread indicates the difference in perceived risk between corporate and government bonds, and a declining spread could indicate waning concerns about the riskiness of corporate bonds.

FIGURE 23: MOODY'S BAA CORPORATE BOND INDEX AND 30-YEAR U.S. TREASURY BOND YIELD [424]



Corporate bond market issuance data corroborate this analysis, with a near doubling in fixed-rate callable issuance between July and August 2010.[425]

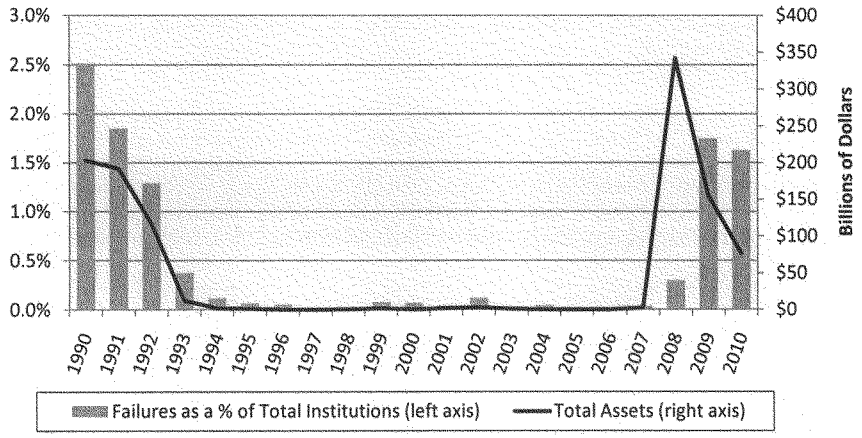
c. Condition of the Banks

Since the Panel's last report, 11 additional banks have failed, with an approximate total asset value of $2.5 billion. The number of failures from January through August 2010 has nearly reached the level for all of calendar year 2009. In general, banks failing in 2009 and 2010 have been small and medium-sized institutions; while they are failing in high numbers, their aggregate asset size has been relatively small.

[424] Federal Reserve Bank of St. Louis, *Series DGS30: Selected Interest Rates* (Instrument: 30-Year Treasury Constant Maturity Rate, Frequency: Daily) (online at research.stlouisfed.org/fred2/) (accessed Oct. 5, 2010) (hereinafter "Series DGS30: Selected Interest Rates"). Corporate Baa rate data accessed through Bloomberg data service on Oct. 5, 2010.

[425] SIFMA, *US Corporate Bond Issuance* (online at www.sifma.org/uploadedFiles/Research/Statistics/SIFMA_USCorporateBondIssuance.xls) (accessed Oct. 7, 2010).

FIGURE 24: BANK FAILURES AS A PERCENTAGE OF TOTAL BANKS AND BANK FAILURES BY TOTAL ASSETS (1990–2010)[426]



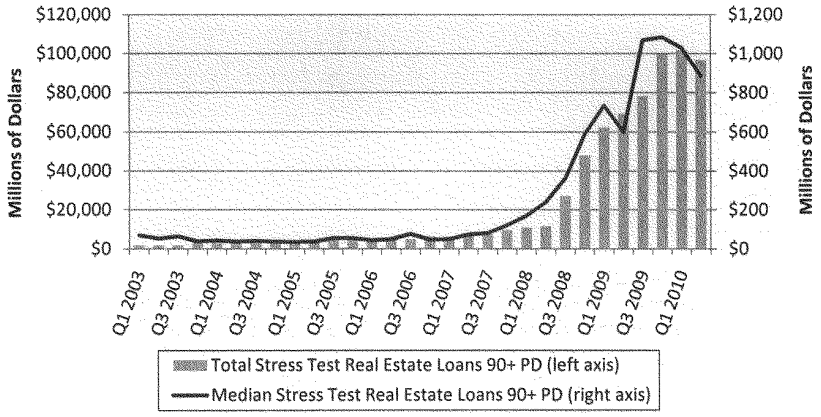
In its September 2010 report,[427] the Panel analyzed in detail the condition of the so-called "too big to fail" banks: the 19 institutions stress-tested under the Supervisory Capital Assessment Program. While in the aggregate these banks have improved their net income and capital ratios significantly since the crisis, they still remain vulnerable to problems in the residential and commercial real estate markets. Nearly $97 billion in real estate loans are at least 90 days past due as of the second quarter of 2010.

[426] The disparity between the number of and total assets of failed banks in 2008 is driven primarily by the failure of Washington Mutual Bank, which held $307 billion in assets. The 2010 year-to-date percentage of bank failures includes failures through August. The total number of FDIC-insured institutions as of March 31, 2010, is 7,932 commercial banks and savings institutions. As of October 7, 2010, there have been 129 failed institutions. Federal Deposit Insurance Corporation, *Failures and Assistance Transactions* (online at www2.fdic.gov/hsob/SelectRpt.asp?EntryTyp=30) (accessed Oct. 7, 2010). Asset totals adjusted for deflation into 2005 dollars using the GDP implicit price deflator. The quarterly values were averaged into a yearly value. Series DGS30: Selected Interest Rates, *supra* note 424.

[427] Congressional Oversight Panel, *September Oversight Report: Assessing the TARP on the Eve of its Expiration,* at 81 (Sept. 16, 2010) (online at cop.senate.gov/documents/cop-091610-report.pdf).

[428] SNL Financial. All loans secured by real estate, for the fully consolidated bank (includes loans secured by real estate with original maturities of 60 months or less made to finance land development or construction, loans secured by farmland, loans secured by 1–4 family residential

FIGURE 25: TOTAL REAL ESTATE LOANS 90+ DAYS PAST DUE AT STRESS-TESTED BANKS [428]



3. Housing Indices

Foreclosure actions, which consist of default notices, scheduled auctions, and bank repossessions, increased 4 percent in August to 338,836. This metric is over 21 percent above the foreclosure action level at the time of the EESA enactment. Five states accounted for more than 50 percent of the national total, with California alone accounting for 20 percent.[429] Sales of new homes stayed constant at 288,000, but remain extremely low.[430] The Case-Shiller 20-City Composite as well as the FHFA Housing Price Index decreased slightly in July 2010. The Case-Shiller and FHFA indices are respectively 6 percent and 5 percent below their levels in October 2008.[431]

Additionally, Case-Shiller futures prices indicate a market expectation that home-price values for the major Metropolitan Statistical Areas [432] ("MSAs") will generally decrease through the end of 2010

[429] RealtyTrac, *Foreclosure Activity Press Releases, Foreclosure Activity Increases 4 Percent in August* (Sept. 16, 2010) (online at www.realtytrac.com/content/press-releases/foreclosure-activity-increases-4-percent-in-august-6041).

[430] Sales of new homes in May 2010 were 276,000, the lowest rate since 1963. It should be noted that this number likely reflects a shifting of sales from May to April prompted by the April expiration of tax credits designed to boost home sales. U.S. Census Bureau and U.S. Department of Housing and Urban Development, *New Residential Sales in June 2010* (July 26, 2010) (online at www.census.gov/const/newressales.pdf); U.S. Census Bureau, *New Residential Sales—New One-Family Houses Sold* (online at www.census.gov/ftp/pub/const/sold_cust.xls) (accessed Oct. 5, 2010).

[431] Most recent data available for July 2010. *See* Standard and Poor's, *S&P/Case-Shiller Home Price Indices* (Instrument: Case-Shiller 20–City Composite Seasonally Adjusted, Frequency: Monthly) (accessed Oct. 5, 2010) (online at www.standardandpoors.com/indices/sp-case-shiller-home-price-indices/en/us/?indexId=spusa-cashpidff--p-us----) (hereinafter "S&P/Case-Shiller Home Price Indices"); Federal Housing Finance Agency, *U.S. and Census Division Monthly Purchase Only Index* (Instrument: USA, Seasonally Adjusted) (online at www.fhfa.gov/Default.aspx?Page=87) (accessed Oct. 5, 2010) (hereinafter "U.S. and Census Division Monthly Purchase Only Index"). S&P has cautioned that the seasonal adjustment is probably being distorted by irregular factors. These distortions could include distressed sales and the various government programs. *See* Standard and Poor's, *S&P/Case-Shiller Home Price Indices and Seasonal Adjustment,* S&P Indices: Index Analysis (Apr. 2010).

[432] The general concept of a Metropolitan Statistical Area is that of a core area containing a substantial population nucleus, together with adjacent communities having a high degree of economic and social integration with the core. U.S. Census Bureau, *About Metropolitan and*

Continued

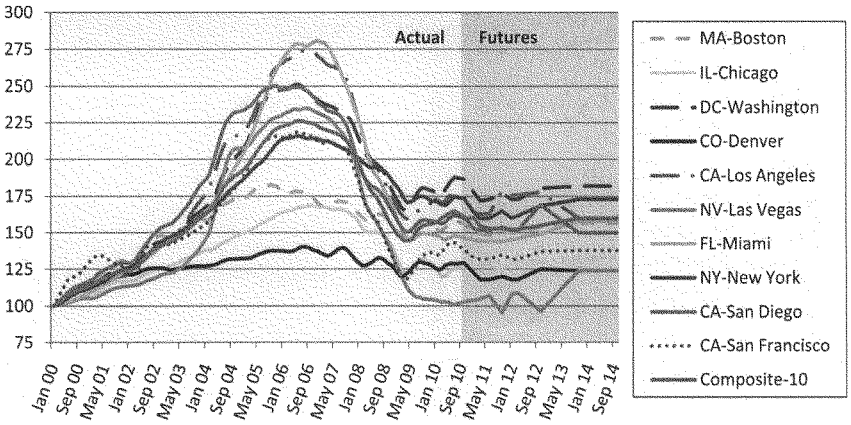
and beginning of 2011.[433] These futures are cash-settled to a weighted composite index of U.S. housing prices in the top 10 MSAs, as well as to those specific markets, and are used both to hedge by businesses whose profits and losses are related to any area of the housing industry and to balance portfolios by businesses seeking exposure to an uncorrelated asset class. As such, futures prices are a composite indicator of market information known to date and can be used to indicate market expectations for future home prices.

FIGURE 26: HOUSING INDICATORS

Indicator	Most Recent Monthly Data	Percent Change from Data Available at Time of Last Report	Percent Change Since October 2008
Monthly foreclosure actions[434]	338,836	4.2%	21.2%
S&P/Case-Shiller Composite 20 Index[435]	147.6	(0.1)	(5.6)
FHFA Housing Price Index[436]	192.4	(0.5)	(4.8)

[434] RealtyTrac, *Foreclosures* (online at www.realtytrac.com/home/) (accessed Oct. 12, 2010). Most recent data available for August 2010.
[435] *See* S&P/Case-Shiller Home Price Indices, *supra* note 431. Most recent data available for July 2010.
[436] U.S. and Census Division Monthly Purchase Only Index, *supra* note 431. Most recent data available for July 2010.

FIGURE 27: CASE-SHILLER HOME PRICE INDEX AND FUTURES VALUES[437]



G. Financial Update

Each month, the Panel summarizes the resources that the federal government has committed to the rescue and recovery of the financial system. The following financial update provides: (1) an

Micropolitan Statistical Areas (online at www.census.gov/population/www/metroareas/aboutmetro.html) (accessed Oct. 7, 2010).

[433] Data accessed through Bloomberg data service on Oct. 5, 2010. The Case-Shiller Futures contract is traded on the CME and is settled to the Case-Shiller Index two months after the previous calendar quarter. For example, the February contract is settled against the spot value of the S&P Case-Shiller Home Price Index values representing the fourth calendar quarter of the previous year, which is released in February one day after the settlement of the contract. Note that most close observers believe that the accuracy of these futures contracts as forecasts diminishes the farther out one looks.

[437] All data normalized to 100 at January 2000. Futures data accessed through Bloomberg data service on October 5, 2010. S&P/Case-Shiller Home Price Indices, *supra* note 431.

updated accounting of the TARP, including a tally of dividend income, repayments, and warrant dispositions that the program has received as of August 31, 2010; and (2) an updated accounting of the full federal resource commitment as of September 29, 2010.

1. The TARP

a. Program Updates [438]

Treasury's spending authority under the TARP officially expired on October 3, 2010. Though it can no longer make new funding commitments, Treasury can continue to provide funding for programs with which it has existing contracts and previous commitments. As of September 30, 2010, $396.5 billion had been spent under the TARP's $475 billion ceiling.[439] Of the amount outstanding, $209.4 billion has been repaid, while Treasury has incurred $6.1 billion in losses associated with its CPP and AIFP investments. There are currently $181 billion in funds outstanding.

CPP Repayments

As of September 30, 2010, 110 banks have fully redeemed their CPP preferred shares either through capital repayment or exchanges for investments under the CDCI. These institutions have repaid a total of $152.8 billion of the $204.9 billion committed to CPP. The amount of funds currently outstanding in the program is $49.6 billion.

During the month of September, Treasury's CPP investment amount was reduced by $5.3 billion. A significant portion of this amount ($4.9 billion) came from proceeds earned from the third round of sales of Citigroup common stock. As of September 30, 2010, Treasury still holds 3.6 billion shares of Citigroup common equity with a face value of $11.7 billion. In addition, Treasury received $220 million in repayments for its preferred and subordinated debt investments in 12 participating institutions. Another 17 institutions also exchanged $253 million of CPP funds for an equivalent investment under the CDCI.

The reduction in outstanding CPP funds also includes a net loss from Treasury's investments in South Financial Group, Inc. and TIB Financial Corp. These two institutions received a total of $384 million through CPP. On September 30, 2010, Treasury sold the preferred stock and warrants issued by South Financial to Toronto-Dominion Bank (TD Bank) for $130.6 million as part of the com-

---

[438] U.S. Department of the Treasury, *Cumulative Dividends, Interest and Distributions Report as of August 31, 2010* (Sept. 10, 2010) (online at financialstability.gov/docs/dividends-interest-reports/August%202010%20Dividends%20and%20Interest%20Report.pdf) (hereinafter "Cumulative Dividends, Interest and Distributions Report as of August 31, 2010"); Treasury Transactions Report, *supra* note 128.

[439] The original $700 billion TARP ceiling was reduced by $1.26 billion as part of the Helping Families Save Their Homes Act of 2009. 12 U.S.C. § 5225(a)-(b); *Helping Families Save Their Homes Act of 2009,* Pub. L. No. 111–22 § 40. On June 30, 2010, the House-Senate Conference Committee agreed to reduce the amount authorized under the TARP from $700 billion to $475 billion as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act that was signed into law on July 21, 2010. *See Dodd-Frank Wall Street Reform and Consumer Protection Act,* Pub. L. No. 111–203 (2010); The White House, *Remarks by the President at Signing of Dodd-Frank Wall Street Reform and Consumer Protection Act* (July 21, 2010) (online at www.whitehouse.gov/the-press-office/remarks-president-signing-dodd-frank-wall-street-reform-and-consumer-protection-act).

pany's acquisition of South Financial.[440] Treasury also sold the preferred shares and warrants it received from TIB Financial for $12.2 million to North American Financial Holdings, Inc.[441] As a result of these sales, Treasury incurred a loss of $241.7 million, bringing total losses on CPP investments to $2.6 billion.

b. Income: Dividends, Interest, and Warrant Sales

As of September 30, 2010, 45 institutions have repurchased their warrants for common shares that Treasury received in conjunction with its preferred stock investments. Treasury received $19.7 million from six banks that agreed to repurchase their warrants in September. Treasury has also sold the warrants for common shares for 15 other institutions at auction. On September 16, 2010, Treasury held an auction for 13 million warrants to purchase common shares of Lincoln National Corporation. The offering yielded $213.7 million in net proceeds to Treasury. On September 21, 2010, Treasury also auctioned off 52 million warrants issued by the Hartford Financial Services Group, Inc. for $706.3 million in proceeds.

In addition to warrant disposition proceeds, Treasury also receives dividend payments on the preferred shares that it holds, usually 5 percent per annum for the first five years and 9 percent per annum thereafter.[442] In total, Treasury has received approximately $25.3 billion in net income from warrant repurchases, dividends, interest payments, and other proceeds deriving from TARP investments (after deducting losses).[443] For further information on TARP profit and loss, see Figure 29.

c. TARP Accounting

FIGURE 28: TARP ACCOUNTING (AS OF SEPTEMBER 30, 2010)

[billions of dollars][i]

Program	Maximum Amount Allotted	Actual Funding	Total Repayments/ Reduced Exposure	Total Losses	Funding Currently Outstanding	Funding Available
Capital Purchase Program (CPP)	$204.9	$204.9	[ii] ($152.8)	[iii] ($2.6)	$49.6	$0
Targeted Investment Program (TIP)	40.0	40.0	(40.0)	0	0	0
Asset Guarantee Program (AGP)	5.0	[iv] 5.0	[v] (5.0)	0	0	0
AIG Investment Program (AIGIP)	69.8	[vi] 49.1	0	0	49.1	20.7
Auto Industry Financing Program (AIFP)	81.3	81.3	(10.8)	[vii] (3.5)	[viii] 67.1	0

[440] Treasury Transactions Report, *supra* note 128; TD Bank Financial Group, *TD Bank Marks Another Important Milestone in Expansion of U.S. Footprint* (Oct. 1, 2010) (online at td.mediaroom.com/index.php?s=43&item=1045).

[441] As part of its $175 billion investment in TIB Financial Corp., North American Financial Holdings, Inc. also agreed to purchase 37,000 shares of CPP preferred stock, along with related warrants, from Treasury. TIB Financial Corp., *TIB Financial Corp. Announces Closing of $175 Million Investment From North American Financial Holdings, Inc.* (Sept. 30, 2010) (online at www.tibfinancialcorp.com/file.aspx?IID=108287&FID=10162725).

[442] U.S. Department of the Treasury, *Securities Purchase Agreement for Public Institutions* (online at www.financialstability.gov/docs/CPP/spa.pdf) (accessed Oct. 12, 2010).

[443] Cumulative Dividends, Interest and Distributions Report as of August 31, 2010, *supra* note 438; Treasury Transactions Report, *supra* note 128. Treasury also received an additional $1.2 billion in participation fees from its Guarantee Program for Money Market Funds. U.S. Department of the Treasury, *Treasury Announces Expiration of Guarantee Program for Money Market Funds* (Sept. 18, 2009) (online at www.ustreas.gov/press/releases/tg293.htm).

FIGURE 28: TARP ACCOUNTING (AS OF SEPTEMBER 30, 2010)—Continued

[billions of dollars] [i]

Program	Maximum Amount Allotted	Actual Funding	Total Repayments/ Reduced Exposure	Total Losses	Funding Currently Outstanding	Funding Available
Auto Supplier Support Program (ASSP) [ix]	0.4	0.4	(0.4)	0	0	0
Term Asset-Backed Securities Loan Facility (TALF)	[x] 4.3	[xi] 0.1	0	0	0.1	4.2
Public-Private Investment Program (PPIP) [xii]	22.4	[xiii] 14.2	[xiv] (0.4)	0	13.8	8.2
SBA 7(a) Securities Purchase	0.4	[xv] 0.36	0	0	0.36	0
Home Affordable Modification Program (HAMP)	29.9	0.5	0	0	0.5	29.4
Hardest Hit Fund (HHF)	[xvi] 7.6	[xvii] 0.06	0	0	0.06	7.5
FHA Refinance Program	8.1	0	0	0	0	8.1
Community Development Capital Initiative (CDCI)	0.8	[xviii] 0.57	0	0	0.57	0
Total	**$475**	**396.48**	**(209.4)**	**(6.1)**	**181.07**	**78.2**

[i] Figures affected by rounding. Unless otherwise noted, data in this table are from the following source: U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending September 30, 2010* (Oct. 4, 2010) (online at financialstability.gov/docs/transaction-reports/10-4-10%20Transactions%20Report%20as%20of%209-30-10.pdf).

[ii] Total amount repaid under CPP includes $13.4 billion Treasury received as part of its sales of Citigroup common stock. As of September 30, 2010, Treasury had sold 4.1 billion Citigroup common shares for $16.4 billion in gross proceeds. Treasury has received $3 billion in net profit from the sale of Citigroup common stock. In June 2009, Treasury exchanged $25 billion in Citigroup preferred stock for 7.7 billion shares of the company's common stock at $3.25 per share. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending September 30, 2010,* at 13, 14 (Oct. 4, 2010) (online at financialstability.gov/docs/transaction-reports/10-4-10%20Transactions%20Report%20as%20of%209-30-10.pdf); U.S. Department of the Treasury, *Troubled Asset Relief Program: Two-Year Retrospective,* at 25 (Oct. 2010) (online at www.financialstability.gov/docs/TARP%20Two%20Year%20Retrospective_10%2005%2010_transmittal%20letter.pdf).

Total CPP repayments also include amounts repaid by institutions that exchanged their CPP investments for investments under the CDCI, as well as proceeds earned from the sale of preferred stock and warrants issued by South Financial Group, Inc. and TIB Financial Corp.

[iii] On the TARP Transactions Report, Treasury has classified the investments it made in two institutions, CIT Group ($2.3 billion) and Pacific Coast National Bancorp ($4.1 million), as losses. In addition, Treasury sold its preferred ownership interests, along with warrants, in South Financial Group, Inc. and TIB Financial Corp. to non-TARP participating institutions. These shares were sold at prices below the value of the original CPP investment. Therefore, Treasury's net current CPP investment is $49.6 billion due to the $2.6 billion in losses thus far. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending September 30, 2010,* at 13, 14 (Oct. 4, 2010) (online at financialstability.gov/docs/transaction-reports/10-4-10%20Transactions%20Report%20as%20of%209-30-10.pdf).

[iv] The $5 billion AGP guarantee for Citigroup was unused since Treasury was not required to make any guarantee payments during the life of the program. U.S. Department of the Treasury, *Troubled Asset Relief Program: Two-Year Retrospective,* at 31 (Oct. 2010) (online at www.financialstability.gov/docs/TARP%20Two%20Year%20Retrospective_10%2005%2010_transmittal%20letter.pdf).

[v] Although this $5 billion is no longer exposed as part of the AGP, Treasury did not receive a repayment in the same sense as with other investments. Treasury did receive other income as consideration for the guarantee, which is not a repayment and is accounted for in Figure 29.

[vi] AIG has completely utilized the $40 billion that was made available on November 25, 2008 in exchange for the company's preferred stock. It has also drawn down $7.5 billion of the $29.8 billion made available on April 17, 2009. This figure also reflects $1.6 billion in accumulated but unpaid dividends owed by AIG to Treasury due to the restructuring of Treasury's investment from cumulative preferred shares to non-cumulative shares. AIG expects to draw down up to $22.3 billion in outstanding funds from the TARP as part of its plan to repay the revolving credit facility provided by the Federal Reserve Bank of New York. American International Group, Inc., *Form 10–K for the Fiscal Year Ended December 31, 2009,* at 45 (Feb. 26, 2010) (online at www.sec.gov/Archives/edgar/data/5272/000104746910001465/a2196553z10-k.htm); American International Group, Inc., *AIG Announces Plan to Repay U.S. Government* (Sept. 30, 2010) (online at www.aigcorporate.com/newsroom/2010_September/AIGAnnouncesPlantoRepay30Sept2010.pdf); U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending September 30, 2010,* at 21 (Oct. 4, 2010) (online at financialstability.gov/docs/transaction-reports/10-4-10%20Transactions%20Report%20as%20of%209-30-10.pdf).

[vii] On May 14, 2010, Treasury accepted a $1.9 billion settlement payment for its $3.5 billion loan to Chrysler Holding. The payment represented a $1.6 billion loss from the termination of the debt obligation. U.S. Department of the Treasury, *Chrysler Financial Parent Company Repays $1.9 Billion in Settlement of Original Chrysler Loan* (May 17, 2010) (online at www.financialstability.gov/latest/pr_05172010c.html). Also, following the bankruptcy proceedings for Old Chrysler, which extinguished the $1.9 billion debtor-in-possession (DIP) loan provided to Old Chrysler, Treasury retained the right to recover the proceeds from the liquidation of specified collateral. To date, Treasury has collected $40.2 million in proceeds from the sale of collateral, and it does not expect a significant recovery from the liquidation proceeds. Treasury includes these proceeds as part of the $10.8 billion repaid under the AIFP. U.S. Department of the Treasury, *Troubled Assets Relief Program Monthly 105(a) Report—August 2010* (Sept. 10, 2010) (online at financialstability.gov/docs/105CongressionalReports/August%202010%20105(a)%20Report_final_9%2010%2010.pdf); Treasury conversations with Panel staff (Aug. 19, 2010); U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending September 30, 2010,* at 18 (Oct. 4, 2010) (online at financialstability.gov/docs/transaction-reports/10-4-10%20Transactions%20Report%20as%20of%209-30-10.pdf).

[viii] On the TARP Transactions Report, the $1.9 billion Chrysler debtor-in-possession loan, which was extinguished April 30, 2010, was deducted from Treasury's AIFP investment amount. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending September 30, 2010,* at 18 (Oct. 4, 2010) (online at financialstability.gov/docs/transaction-reports/10-4-10%20Transactions%20Report%20as%20of%209-30-10.pdf). See note vii, *supra,* for details on losses from Treasury's investment in Chrysler.

[ix] On April 5, 2010, Treasury terminated its commitment to lend to the GM SPV under the ASSP. On April 7, 2010, it terminated its commitment to lend to the Chrysler SPV. In total, Treasury received $413 million in repayments from loans provided by this program ($290 million from the GM SPV and $123 million from the Chrysler SPV). Further, Treasury received $101 million in proceeds from additional notes associated with this program. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending September 30, 2010,* at 19 (Oct. 4, 2010) (online at financialstability.gov/docs/transaction-reports/10-4-10%20Transactions%20Report%20as%20of%209-30-10.pdf).

[x] For the TALF program, one dollar of TARP funds was committed for every $10 of funds obligated by the Federal Reserve. The program was intended to be a $200 billion initiative, and the TARP was responsible for the first $20 billion in loan-losses, if any were incurred. The loan is incrementally funded. When the program closed in June 2010, a total of $43 billion in loans was outstanding under the TALF program, and the TARP's commitments constituted $4.3 billion. The Federal Reserve Board of Governors agreed that it was appropriate for Treasury to reduce TALF credit protection from TARP to $4.3 billion. Board of Governors of the Federal Reserve System, *Federal Reserve Announces Agreement with the Treasury Department Regarding a Reduction of Credit Protection Provided for the Term Asset-Backed Securities Loan Facility (TALF)* (July 20, 2010) (online at www.federalreserve.gov/newsevents/press/monetary/20100720a.htm).

[xi] As of September 30, 2010, Treasury had provided $105 million to TALF LLC. This total includes accrued payable interest. Federal Reserve Bank of New York, *Factors Affecting Reserve Balances (H.4.1),* at 5 (Sept. 30, 2010) (online at www.federalreserve.gov/releases/h41/20100930/h41.pdf).

[xii] On July 19, 2010, Treasury released its third quarterly report on the Legacy Securities Public-Private Investment Partnership (PPIP). As of June 30, 2010, the total value of assets held by the PPIP managers was $16 billion. Non-agency Residential Mortgage-Backed Securities represented 85 percent of the total; CMBS represented the balance. U.S. Department of the Treasury, *Legacy Securities Public-Private Investment Program, Program Update—Quarter Ended June 30, 2010,* at 3, 4 (July 19, 2010) (online at www.financialstability.gov/docs/111.pdf).

[xiii] U.S. Department of the Treasury, *Troubled Asset Relief Program: Two-Year Retrospective,* at i (Oct. 2010) (online at www.financialstability.gov/docs/TARP%20Two%20Year%20Retrospective_10%2005%2010_transmittal%20letter.pdf).

[xiv] As of September 30, 2010, Treasury has received $428 million in capital repayments from two PPIP fund managers. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending September 30, 2010,* at 23 (Oct. 4, 2010) (online at financialstability.gov/docs/transaction-reports/10-4-10%20Transactions%20Report%20as%20of%209-30-10.pdf).

[xv] Treasury made $64 million in purchases under the SBA 7(a) Securities Purchase Program in September. As of September 30, 2010, Treasury's purchases totaled $322.9 million. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending September 30, 2010,* at 22 (Oct. 4, 2010) (online at financialstability.gov/docs/transaction-reports/10-4-10%20Transactions%20Report%20as%20of%209-30-10.pdf). Treasury will not make additional purchases pursuant to the expiration of its purchasing authority under EESA. U.S. Department of the Treasury, *Troubled Asset Relief Program: Two-Year Retrospective,* at 43 (Oct. 2010) (online at www.financialstability.gov/docs/TARP%20Two%20Year%20Retrospective_10%2005%2010_transmittal%20letter.pdf).

[xvi] As part of its revisions to TARP allocations upon enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Treasury allocated an additional $2 billion in TARP funds to mortgage assistance for unemployed borrowers through the Hardest Hit Fund (HHF). U.S. Department of the Treasury, *Obama Administration Announces Additional Support for Targeted Foreclosure-Prevention Programs to Help Homeowners Struggling with Unemployment* (Aug. 11, 2010) (online at www.ustreas.gov/press/releases/tg823.htm). Another $3.5 billion was allocated among the 18 states and the District of Columbia currently participating in HHF. The amount each state received during this round of funding is proportional to its population. U.S. Department of the Treasury, *Troubled Asset Relief Program: Two Year Retrospective,* at 72 (Oct. 2010) (online at www.financialstability.gov/docs/TARP%20Two%20Year%20Retrospective_10%2005%2010_transmittal%20letter.pdf). Additional information provided by Treasury staff (Sept. 28, 2010).

[xvii] This figure represents the total amount paid to date to state Housing Finance Agencies (HFAs). As of October 12, 2010, six state HFAs have drawn down funds from their total investment amount. Data provided by Treasury (Oct. 12, 2010).

[xviii] Seventy-three Community Development Financial Institutions (CDFIs) entered the CDCI in September. Among these institutions, 17 banks exchanged their CPP investments for an equivalent investment amount under the CDCI. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending September 30, 2010,* at 1–13, 16–17 (Oct. 4, 2010) (online at financialstability.gov/docs/transaction-reports/10-4-10%20Transactions%20Report%20as%20of%209-30-10.pdf). Treasury closed the program on September 30, 2010, after investing $570 million in 84 CDFIs. U.S. Department of the Treasury, *Treasury Announces Special Financial Stabilization Initiative Investments of $570 Million in 84 Community Development Financial Institutions in Underserved Areas* (Sept. 30, 2010) (online at financialstability.gov/latest/pr_09302010b.html).

FIGURE 29: TARP PROFIT AND LOSS

[millions of dollars]

TARP Initiative[xix]	Dividends[xx] (as of 8/31/2010)	Interest[xxi] (as of 8/31/2010)	Warrant Disposition Proceeds[xxii] (as of 9/30/2010)	Other Proceeds (as of 8/31/2010)	Losses[xxiii] (as of 9/30/2010)	Total
Total	**$16,540**	**$912**	**$8,160**	**$5,768**	**($6,034)**	**$25,346**
CPP	9,754	49	6,904	[xxiv] 3,015	(2,576)	17,194
TIP	3,004	—	1,256	—	—	4,260
AIFP	[xxv] 3,371	802	—	[xxvi] 15	(3,458)	730
ASSP	—	15	—	[xxvii] 101	—	116
AGP	411	—	0	[xxviii] 2,246	—	2,657
PPIP	—	46	—	[xxix] 115	—	161
SBA 7(a)	—	1	—	—	—	1
Bank of America Guarantee	—	—	—	[xxx] 276	—	276

[xix] AIG is not listed on this table because no profit or loss has been recorded to date for AIG. Its missed dividends were capitalized as part of the issuance of Series E preferred shares and are not considered to be outstanding. Treasury currently holds non-cumulative preferred shares, meaning AIG is not penalized for non-payment. Therefore, no profit or loss has been realized on Treasury's AIG investment to date.

[xx] U.S. Department of the Treasury, *Cumulative Dividends, Interest and Distributions Report as of August 31, 2010* (Sept. 10, 2010) (online at financialstability.gov/docs/dividends-interest-reports/August%202010%20Dividends%20and%20Interest%20Report.pdf).

[xxi] U.S. Department of the Treasury, *Cumulative Dividends, Interest and Distributions Report as of August 31, 2010* (Sept. 10, 2010) (online at financialstability.gov/docs/dividends-interest-reports/August%202010%20Dividends%20and%20Interest%20Report.pdf).

[xxii] U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending September 30, 2010,* at 13, 20 (Oct. 4, 2010) (online at financialstability.gov/docs/transaction-reports/10-4-10%20Transactions%20Report%20as%20of%209-30-10.pdf).

[xxiii] In the TARP Transactions Report, Treasury classified the investments it made in two institutions, CIT Group ($2.3 billion) and Pacific Coast National Bancorp ($4.1 million), as losses. Treasury has also sold its preferred ownership interests and warrants from South Financial Group, Inc. and TIB Financial Corp. This represents a $241.7 million loss on its CPP investments in these two banks. Two TARP recipients, UCBH Holdings, Inc. ($298.7 million) and a banking subsidiary of Midwest Banc Holdings, Inc. ($89.4 million), are currently in bankruptcy proceedings. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending September 30, 2010* (Oct. 4, 2010) (online at financialstability.gov/docs/transaction-reports/10-4-10%20Transactions%20Report%20as%20of%209-30-10.pdf). Finally, Sonoma Valley Bancorp, which received $8.7 million in CPP funding, was placed into receivership on August 20, 2010. Federal Deposit Insurance Corporation, *Westamerica Bank, San Rafael, California, Assumes All of the Deposits of Sonoma Valley Bank, Sonoma, California* (Aug. 20, 2010) (online at www.fdic.gov/news/news/press/2010/pr10196.html).

[xxiv] This figure represents net proceeds to Treasury from the sale of Citigroup common stock to date. For details on Treasury's sales of Citigroup common stock, *see* Section Two and note ii, *supra.* U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending September 30, 2010* (Oct. 4, 2010) (online at financialstability.gov/docs/transaction-reports/10-4-10%20Transactions%20Report%20as%20of%209-30-10.pdf).

[xxv] This figure includes $815 million in dividends from GMAC preferred stock, trust preferred securities, and mandatory convertible preferred shares. The dividend total also includes a $748.6 million senior unsecured note from Treasury's investment in General Motors. Data provided by Treasury.

[xxvi] Treasury received proceeds from an additional note connected with the loan made to Chrysler Financial on January 16, 2009. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending September 30, 2010,* at 18 (Oct. 4, 2010) (online at financialstability.gov/docs/transaction-reports/10-4-10%20Transactions%20Report%20as%20of%209-30-10.pdf).

[xxvii] This represents the total proceeds from additional notes connected with Treasury's investments in GM Supplier Receivables LLC and Chrysler Receivables SPV LLC. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending September 30, 2010,* at 19 (Oct. 4, 2010) (online at financialstability.gov/docs/transaction-reports/10-4-10%20Transactions%20Report%20as%20of%209-30-10.pdf).

[xxviii] As a fee for taking a second-loss position of up to $5 billion on a $301 billion pool of ring-fenced Citigroup assets as part of the AGP, Treasury received $4.03 billion in Citigroup preferred stock and warrants. Treasury exchanged these preferred stocks for trust preferred securities in June 2009. Following the early termination of the guarantee in December 2009, Treasury cancelled $1.8 billion of the trust preferred securities, leaving Treasury with a premium of $2.23 billion in Citigroup trust preferred securities. On September 30, 2010, Treasury sold these securities for $2.25 billion in total proceeds. At the end of Citigroup's participation in the FDIC's TLGP, the FDIC may transfer $800 million of $3.02 billion in Citigroup Trust Preferred Securities it received in consideration for its role in the AGP to Treasury. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending September 30, 2010,* at 20 (Oct. 4, 2010) (online at financialstability.gov/docs/transaction-reports/10-4-10%20Transactions%20Report%20as%20of%209-30-10.pdf); U.S. Department of the Treasury, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and Citigroup Inc., *Termination Agreement,* at 1 (Dec. 23, 2009) (online at www.financialstability.gov/docs/Citi%20AGP%20Termination%20Agreement%20-%20Fully%20Executed%20Version.pdf); U.S. Department of the Treasury, *Treasury Announces Further Sales of Citigroup Securities and Cumulative Return to Taxpayers of $41.6 Billion* (Sept. 30, 2010) (online at financialstability.gov/latest/pr_09302010c.html); Federal Deposit Insurance Corporation, *2009 Annual Report,* at 87 (June 30, 2010) (online at www.fdic.gov/about/strategic/report/2009annualreport/AR09final.pdf).

[xxix] As of August 31, 2010, Treasury has earned $93.9 million in membership interest distributions from the PPIP. Additionally, Treasury has earned $20.6 million in total proceeds following the termination of the TCW fund. *See* U.S. Department of the Treasury, *Cumulative Dividends, Interest and Distributions Report as of August 31, 2010,* at 12–13 (Sept. 10, 2010) (online at financialstability.gov/docs/dividends-interest-reports/August%202010%20Dividends%20and%20Interest%20Report.pdf); *see* U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending September 30, 2010,* at 23 (Oct. 4, 2010) (online at financialstability.gov/docs/transaction-reports/10-4-10%20Transactions%20Report%20as%20of%209-30-10.pdf).

[xxx] Although Treasury, the Federal Reserve, and the FDIC negotiated with Bank of America regarding a similar guarantee, the parties never reached an agreement. In September 2009, Bank of America agreed to pay each of the prospective guarantors a fee as though the guarantee had been in place during the negotiations period. This agreement resulted in payments of $276 million to Treasury, $57 million to the Federal Reserve, and $92 million to the FDIC. U.S. Department of the Treasury, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and Bank of America Corporation, *Termination Agreement,* at 1–2 (Sept. 21, 2009) (online at www.financialstability.gov/docs/AGP/BofA%20-%20Termination%20Agreement%20-%20executed.pdf).

d. CPP Unpaid Dividend and Interest Payments [444]

As of August 31, 2010, 123 institutions have at least one outstanding dividend payment on preferred stock issued under CPP.[445] Among these institutions, 98 are not current on cumulative dividends, which amount to $129.8 million in missed payments, while another 25 banks have not paid $8 million in non-cumulative dividends. Of the $49.6 billion currently outstanding in CPP funding, Treasury's investments in banks with non-current dividend payments total $3.6 billion. A majority of the banks that remain delinquent on dividend payments have under $1 billion in total assets on their balance sheets. Also, there are 16 institutions that previously deferred dividend payments, but have since repaid all accrued and unpaid dividends.[446]

There are six banks that have failed to make six dividend payments, while one bank has missed all seven quarterly payments. These institutions have received a total of $207.1 million in CPP funding. Under the terms of the CPP, after a bank fails to pay dividends for six periods, Treasury has the right to elect two individ-

[444] Cumulative Dividends, Interest and Distributions Report as of August 31, 2010, *supra* note 438.

[445] Does not include banks with missed dividend payments that have either repaid all delinquent dividends, exited TARP, gone into receivership, or filed for bankruptcy.

[446] Among the institutions with no outstanding dividend payments is Sterling Financial Corporation (WA). On April 29, 2010, Sterling Financial exchanged its original $303 million preferred equity investment for an equivalent amount in mandatory convertible preferred stock. This investment was subsequently converted to 379 million shares of common stock. Following the exchange, no dividend payments remained outstanding with respect to the preferred investment. Treasury Transactions Report, *supra* note 128; Cumulative Dividends, Interest and Distributions Report as of August 31, 2010, *supra* note 438, at 18.

uals to the company's board of directors.[447] Figure 30 below provides further details on the distribution and the number of institutions that have missed dividend payments.

In addition, eight CPP participants have missed at least one interest payment, totaling $3.6 million in non-current interest payments. Treasury's total investments in these non-public institutions represent less than $1 billion in CPP funding.

FIGURE 30: CPP MISSED DIVIDEND PAYMENTS (AS OF AUGUST 31, 2010)[448]

Number of Missed Payments	1	2	3	4	5	6	7	Total
Cumulative Dividends:								
Number of Banks, by asset size	30	19	18	18	10	3	0	98
Under $1B	21	15	12	11	5	1	0	65
$1B–$10B	8	4	4	7	5	2	0	30
Over $10B	1	0	2	0	0	0	0	3
Non-Cumulative Dividends:								
Number of Banks, by asset size	2	5	6	3	5	3	1	25
Under $1B	1	5	5	3	5	3	1	23
$1B–$10B	1	0	1	0	0	0	0	2
Over $10B	0	0	0	0	0	0	0	0
Total Missed Payments								**123**

e. Rate of Return

As of September 2, 2010, the average internal rate of return for all public financial institutions that participated in the CPP and fully repaid the U.S. government (including preferred shares, dividends, and warrants) was 10.3 percent. The internal rate of return is the annualized effective compounded return rate that can be earned on invested capital.

Treasury received $713.7 million and $216.6 million from auctions for Hartford Financial Services Group, Inc. and Lincoln National Corporation warrants, respectively. These proceeds represent 151 and 119 percent of the Panel's best valuation estimate at the disposition date. As of September 30, 2010, Treasury has received $8.1 billion in total proceeds from warrant repurchases and auctions.

The Panel's estimates on individual rates of return also indicate negative values for the two CPP investments that were sold in September. The internal rates of return for South Financial Group and TIB Financial Corp. were –34.2 percent and –38 percent as Treasury sold its CPP preferred equity in these two companies for an aggregate loss of $241.7 million.

[447] U.S. Department of the Treasury, *Frequently Asked Questions Capital Purchase Program (CPP): Related to Missed Dividend (or Interest) Payments and Director Nomination* (online at *www.financialstability.gov/docs/CPP/CPP%20Directors%20FAQs.pdf*) (accessed Oct. 12, 2010).

[448] Cumulative Dividends, Interest and Distributions Report as of August 31, 2010, *supra* note 438. Data on total bank assets compiled using SNL Financial data service (accessed Oct. 5, 2010).

f. Warrant Disposition

FIGURE 31: WARRANT REPURCHASES/AUCTIONS FOR FINANCIAL INSTITUTIONS WHO HAVE FULLY REPAID CPP FUNDS (AS OF OCTOBER 5, 2010)

Institution	Investment Date	Warrant Repurchase Date	Warrant Repurchase/ Sale Amount	Panel's Best Valuation Estimate at Disposition Date	Price/ Estimate Ratio	IRR (Percent)
Old National Bancorp	12/12/2008	5/8/2009	$1,200,000	$2,150,000	0.558	9.3
Iberiabank Corporation	12/5/2008	5/20/2009	1,200,000	2,010,000	0.597	9.4
Firstmerit Corporation	1/9/2009	5/27/2009	5,025,000	4,260,000	1.180	20.3
Sun Bancorp, Inc.	1/9/2009	5/27/2009	2,100,000	5,580,000	0.376	15.3
Independent Bank Corp.	1/9/2009	5/27/2009	2,200,000	3,870,000	0.568	15.6
Alliance Financial Corporation	12/19/2008	6/17/2009	900,000	1,580,000	0.570	13.8
First Niagara Financial Group	11/21/2008	6/24/2009	2,700,000	3,050,000	0.885	8.0
Berkshire Hills Bancorp, Inc.	12/19/2008	6/24/2009	1,040,000	1,620,000	0.642	11.3
Somerset Hills Bancorp	1/16/2009	6/24/2009	275,000	580,000	0.474	16.6
SCBT Financial Corporation	1/16/2009	6/24/2009	1,400,000	2,290,000	0.611	11.7
HF Financial Corp	11/21/2008	6/30/2009	650,000	1,240,000	0.524	10.1
State Street	10/28/2008	7/8/2009	60,000,000	54,200,000	1.107	9.9
U.S. Bancorp	11/14/2008	7/15/2009	139,000,000	135,100,000	1.029	8.7
The Goldman Sachs Group, Inc.	10/28/2008	7/22/2009	1,100,000,000	1,128,400,000	0.975	22.8
BB&T Corp.	11/14/2008	7/22/2009	67,010,402	68,200,000	0.983	8.7
American Express Company	1/9/2009	7/29/2009	340,000,000	391,200,000	0.869	29.5
Bank of New York Mellon Corp	10/28/2008	8/5/2009	136,000,000	155,700,000	0.873	12.3
Morgan Stanley	10/28/2008	8/12/2009	950,000,000	1,039,800,000	0.914	20.2
Northern Trust Corporation	11/14/2008	8/26/2009	87,000,000	89,800,000	0.969	14.5
Old Line Bancshares Inc.	12/5/2008	9/2/2009	225,000	500,000	0.450	10.4
Bancorp Rhode Island, Inc.	12/19/2008	9/30/2009	1,400,000	1,400,000	1.000	12.6
Centerstate Banks of Florida Inc.	11/21/2008	10/28/2009	212,000	220,000	0.964	5.9
Manhattan Bancorp	12/5/2008	10/14/2009	63,364	140,000	0.453	9.8
CVB Financial Corp	12/5/2008	10/28/2009	1,307,000	3,522,198	0.371	6.4
Bank of the Ozarks	12/12/2008	11/24/2009	2,650,000	3,500,000	0.757	9.0
Capital One Financial	11/14/2008	12/3/2009	148,731,030	232,000,000	0.641	12.0
JPMorgan Chase & Co.	10/28/2008	12/10/2009	950,318,243	1,006,587,697	0.944	10.9
TCF Financial Corp	1/16/2009	12/16/2009	9,599,964	11,825,830	0.812	11.0
LSB Corporation	12/12/2008	12/16/2009	560,000	535,202	1.046	9.0
Wainwright Bank & Trust Company	12/19/2008	12/16/2009	568,700	1,071,494	0.531	7.8
Wesbanco Bank, Inc.	12/5/2008	12/23/2009	950,000	2,387,617	0.398	6.7
Union First Market Bankshares Corporation (Union Bankshares Corporation)	12/19/2008	12/23/2009	450,000	1,130,418	0.398	5.8
Trustmark Corporation	11/21/2008	12/30/2009	10,000,000	11,573,699	0.864	9.4
Flushing Financial Corporation	12/19/2008	12/30/2009	900,000	2,861,919	0.314	6.5
OceanFirst Financial Corporation	1/16/2009	2/3/2010	430,797	279,359	1.542	6.2
Monarch Financial Holdings, Inc.	12/19/2008	2/10/2010	260,000	623,434	0.417	6.7
Bank of America	[449] 10/28/2008 [450] 1/9/2009 [451] 1/14/2009	3/3/2010	1,566,210,714	1,006,416,684	1.533	6.5

FIGURE 31: WARRANT REPURCHASES/AUCTIONS FOR FINANCIAL INSTITUTIONS WHO HAVE FULLY REPAID CPP FUNDS (AS OF OCTOBER 5, 2010)—Continued

Institution	Investment Date	Warrant Repurchase Date	Warrant Repurchase/ Sale Amount	Panel's Best Valuation Estimate at Disposition Date	Price/ Estimate Ratio	IRR (Percent)
Washington Federal Inc./ Washington Federal Savings & Loan Association	11/14/2008	3/9/2010	15,623,222	10,166,404	1.537	18.6
Signature Bank	12/12/2008	3/10/2010	11,320,751	11,458,577	0.988	32.4
Texas Capital Bancshares, Inc.	1/16/2009	3/11/2010	6,709,061	8,316,604	0.807	30.1
Umpqua Holdings Corp.	11/14/2008	3/31/2010	4,500,000	5,162,400	0.872	6.6
City National Corporation	11/21/2008	4/7/2010	18,500,000	24,376,448	0.759	8.5
First Litchfield Financial Corporation	12/12/2008	4/7/2010	1,488,046	1,863,158	0.799	15.9
PNC Financial Services Group Inc.	12/31/2008	4/29/2010	324,195,686	346,800,388	0.935	8.7
Comerica Inc.	11/14/2008	5/4/2010	183,673,472	276,426,071	0.664	10.8
Valley National Bancorp	11/14/2008	5/18/2010	5,571,592	5,955,884	0.935	8.3
Wells Fargo Bank	10/28/2008	5/20/2010	849,014,998	1,064,247,725	0.798	7.8
First Financial Bancorp	12/23/2008	6/2/2010	3,116,284	3,051,431	1.021	8.2
Sterling Bancshares, Inc./ Sterling Bank	12/12/2008	6/9/2010	3,007,891	5,287,665	0.569	10.8
SVB Financial Group	12/12/2008	6/16/2010	6,820,000	7,884,633	0.865	7.7
Discover Financial Services	3/13/2009	7/7/2010	172,000,000	166,182,652	1.035	17.1
Bar Harbor Bancshares	1/16/2009	7/28/2010	250,000	518,511	0.482	6.2
Citizens & Northern Corporation	1/16/2009	8/4/2010	400,000	468,164	0.854	5.9
Columbia Banking System, Inc.	11/21/2008	8/11/2010	3,301,647	3,291,329	1.003	7.3
Hartford Financial Services Group, Inc.	6/26/2009	9/21/2010	713,687,430	472,221,996	1.511	30.3
Lincoln National Corporation	7/10/2009	9/16/2010	216,620,887	181,431,182	1.194	27.1
Fulton Financial Corporation	12/23/2008	9/8/2010	10,800,000	15,616,013	0.692	6.7
The Bancorp, Inc./The Bancorp Bank	12/12/2008	9/8/2010	4,753,985	9,947,683	0.478	12.8
South Financial Group, Inc./Carolina First Bank	12/5/2008	9/30/2010	400,000	1,164,486	0.343	(34.2)
TIB Financial Corp./TIB Bank	12/5/2008	9/30/2010	40,000	235,757	0.170	(38.0)
Total [452]			**$8,148,332,166**	**$7,999,280,713**	**1.019**	**10.3**

[449] Investment date for Bank of America in CPP.
[450] Investment date for Merrill Lynch in CPP.
[451] Investment date for Bank of America in TIP.
[452] Total warrant repurchase/sale amount does not include $11.5 million in proceeds from private institutions whose warrants for preferred stock were immediately exercised.

FIGURE 32: VALUATION OF CURRENT HOLDINGS OF WARRANTS (AS OF OCTOBER 5, 2010)

[Dollars in millions]

Financial Institutions with Warrants Outstanding	Warrant Valuation		
	Low Estimate	High Estimate	Best Estimate
Citigroup, Inc.[453]	$15.90	$1,134.42	$84.61
SunTrust Banks, Inc.	18.90	375.09	141.10
Regions Financial Corporation	11.62	213.46	99.85
Fifth Third Bancorp	83.86	377.93	170.00
KeyCorp	21.91	176.85	81.47
AIG	282.18	1,824.23	783.69

FIGURE 32: VALUATION OF CURRENT HOLDINGS OF WARRANTS (AS OF OCTOBER 5, 2010)—Continued

[Dollars in millions]

Financial Institutions with Warrants Outstanding	Warrant Valuation		
	Low Estimate	High Estimate	Best Estimate
All Other Banks	845.40	3,832.34	1,794.84
Total	**$1,279.77**	**$7,934.32**	**$3,155.56**

[453] Includes warrants issued under CPP, AGP, and TIP.

2. Federal Financial Stability Efforts

a. Federal Reserve and FDIC Programs

In addition to the direct expenditures Treasury has undertaken through the TARP, the federal government has engaged in a much broader program directed at stabilizing the U.S. financial system. Many of these initiatives explicitly augment funds allocated by Treasury under specific TARP initiatives, such as FDIC and Federal Reserve asset guarantees for Citigroup, or operate in tandem with Treasury programs, such as the interaction between PPIP and TALF. Other programs, like the Federal Reserve's extension of credit through its Section 13(3) facilities and SPVs and the FDIC's Temporary Liquidity Guarantee Program, operate independently of the TARP.

b. Total Financial Stability Resources

Beginning in its April 2009 report, the Panel broadly classified the resources that the federal government has devoted to stabilizing the economy through myriad new programs and initiatives as outlays, loans, or guarantees. With the reductions in funding for certain TARP programs, the Panel calculates the total value of these resources to be over $2.5 trillion. However, this would translate into the ultimate "cost" of the stabilization effort only if: (1) assets do not appreciate; (2) no dividends are received, no warrants are exercised, and no TARP funds are repaid; (3) all loans default and are written off; and (4) all guarantees are exercised and subsequently written off.

With respect to the FDIC and Federal Reserve programs, the risk of loss varies significantly across the programs considered here, as do the mechanisms providing protection for the taxpayer against such risk. As discussed in the Panel's November 2009 report, the FDIC assesses a premium of up to 100 basis points on TLGP debt guarantees.[454] In contrast, the Federal Reserve's liquidity programs are generally available only to borrowers with good credit, and the loans are over-collateralized and with recourse to other assets of the borrower. If the assets securing a Federal Reserve loan realize a decline in value greater than the "haircut," the Federal Reserve is able to demand more collateral from the borrower. Similarly, should a borrower default on a recourse loan, the Federal Reserve can turn to the borrower's other assets to make

[454] Congressional Oversight Panel, *November Oversight Report: Guarantees and Contingent Payments in TARP and Related Programs,* at 36 (Nov. 6, 2009) (online at cop.senate.gov/documents/cop-110609-report.pdf).

the Federal Reserve whole. In this way, the risk to the taxpayer on recourse loans only materializes if the borrower enters bankruptcy.

c. Credit Union Assistance

Apart from the assistance credit unions have recently received through the CDCI, the National Credit Union Administration (NCUA), the federal agency charged with regulating federal credit unions (FCUs), has also made efforts to stabilize the corporate credit union (CCU) system. Corporate credit unions provide correspondent services, as well as liquidity and investment services to retail (or consumer) credit unions.[455] Since March 2009, the NCUA has placed five CCUs into conservatorship due to their exposure to underperforming private-label mortgage-backed securities. The NCUA estimates that these five institutions, which have $72 billion in assets and provide services for 4,600 retail credit unions, hold more than 90 percent of the MBS in the corporate credit union system.[456]

To assist in the NCUA's stabilization efforts, the Temporary Corporate Credit Union Stabilization Fund ("Stabilization Fund") was created to help cover costs associated with CCU conservatorships and liquidations. The Stabilization Fund was established on May 20, 2009, as part of the Helping Families Save Their Homes Act of 2009, and allows the NCUA to borrow up to $6 billion from the Treasury on a revolving basis.[457] As of August 2010, the NCUA had drawn $1.5 billion from the Stabilization Fund, and had planned to repay this balance by the end of September.[458]

d. Mortgage Purchase Programs

On September 7, 2008, Treasury announced the GSE Mortgage Backed Securities Purchase Program. The Housing and Economic Recovery Act of 2008 provided Treasury with the authority to purchase MBS guaranteed by government-sponsored enterprises (GSEs) through December 31, 2009. Treasury purchased approximately $225 billion in GSE MBS by the time its authority expired.[459] As of September 2010, there was approximately $159.6 billion in MBS still outstanding under this program.[460]

In March 2009, the Federal Reserve authorized purchases of $1.25 MBS guaranteed by Fannie Mae, Freddie Mac, and Ginnie Mae, and $200 billion of agency debt securities from Fannie Mae,

---

[455] National Credit Union Administration, *Corporate System Resolution: Corporate Credit Unions Frequently Asked Questions (FAQs),* at 1 (online at www.ncua.gov/Resources/CorporateCU/CSR/CSR-6.pdf).

[456] National Credit Union Administration, *Corporate System Resolution: National Credit Union Administration Virtual Town Hall,* at 14 (Sept. 27, 2010) (online at www.ncua.gov/Resources/CorporateCU/CSR/10-0927WebinarSlides.pdf); National Credit Union Administration, *Fact Sheet: Corporate Credit Union Conservatorships* (Sept. 14, 2010) (online at www.ncua.gov/Resources/CorporateCU/CSR/CSR-14.pdf).

[457] National Credit Union Administration, *Board Action Memorandum* (June 15, 2010) (online at www.ncua.gov/GenInfo/BoardandAction/DraftBoardActions/2010/Jun/Item6aBAMSFAssessmentJune2010(1%20billion)FINAL.pdf).

[458] *Id.*

[459] U.S. Department of the Treasury, *FY2011 Budget in Brief*, at 138 (Feb. 2010) (online at www.treas.gov/offices/management/budget/budgetinbrief/fy2011/FY%202011%20BIB%20(2).pdf).

[460] U.S. Department of the Treasury, *MBS Purchase Program: Portfolio by Month* (online at www.financialstability.gov/docs/September%202010%20Portfolio%20by%20month.pdf) (accessed Oct. 12, 2010).

Freddie Mac, and the Federal Home Loan Banks.[461] The intended purchase amount for agency debt securities was subsequently decreased to $175 billion.[462] All purchasing activity was completed on March 31, 2010. As of September 29, 2010, the Federal Reserve holds $1.08 trillion of agency MBS and $154 billion of agency debt.[463]

FIGURE 33: FEDERAL GOVERNMENT FINANCIAL STABILITY EFFORT (AS OF SEPTEMBER 29, 2010)[xxxi]

[Dollars in billions]

Program	Treasury (TARP)	Federal Reserve	FDIC	Total
Total	**$475**	**$1,414.6**	**$694.9**	**$2,584.5**
Outlays[xxxii]	234.9	1,258.3	188.9	1,682.1
Loans	23.4	156.3	0	179.7
Guarantees[xxxiii]	4.3	0	506	510.3
Repaid and Unavailable TARP Funds	212.4	0	0	212.4
AIG[xxxiv]	**69.8**	**84.7**	**0**	**154.5**
Outlays	[xxxv] 69.8	[xxxvi] 25.7	0	95.5
Loans	0	[xxxvii] 59	0	59
Guarantees	0	0	0	0
Citigroup	**11.6**	**0**	**0**	**11.6**
Outlays	[xxxviii] 11.6	0	0	11.6
Loans	0	0	0	0
Guarantees	0	0	0	0
Capital Purchase Program (Other)	**40.5**	**0**	**0**	**40.5**
Outlays	[xxxix] 40.5	0	0	40.5
Loans	0	0	0	0
Guarantees	0	0	0	0
Capital Assistance Program	**N/A**	**0**	**0**	[xl] **N/A**
TALF	**4.3**	**38.7**	**0**	**43**
Outlays	0	0	0	0
Loans	0	[xlii] 38.7	0	38.7
Guarantees	[xli] 4.3	0	0	4.3
PPIP (Loans)[xliii]	**0**	**0**	**0**	**0**
Outlays	0	0	0	0
Loans	0	0	0	0
Guarantees	0	0	0	0
PPIP (Securities)	[xliv] **22.4**	**0**	**0**	**22.4**
Outlays	7.5	0	0	7.5
Loans	14.9	0	0	14.9
Guarantees	0	0	0	0
Making Home Affordable Program/Foreclosure Mitigation	**45.6**	**0**	**0**	**45.6**
Outlays	[xlv] 45.6	0	0	45.6
Loans	0	0	0	0
Guarantees	0	0	0	0
Automotive Industry Financing Program	[xlvi] **67.1**	**0**	**0**	**67.1**
Outlays	59.0	0	0	59.0
Loans	8.1	0	0	8.1
Guarantees	0	0	0	0
Automotive Supplier Support Program	**0.4**	**0**	**0**	**0.4**
Outlays	0	0	0	0
Loans	[xlvii] 0.4	0	0	0.4
Guarantees	0	0	0	0
SBA 7(a) Securities Purchase	[xlviii] **0.36**	**0**	**0**	**0.36**
Outlays	0.36	0	0	0.36

[461] Board of Governors of the Federal Reserve System, *Federal Reserve System Monthly Report on Credit and Liquidity Programs and the Balance Sheet,* at 5 (Sept. 2010) (online at www.federalreserve.gov/monetarypolicy/files/monthlyclbsreport201009.pdf).

[462] *Id.* at 5.

[463] Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1)* (Sept. 30, 2010) (online at www.federalreserve.gov/releases/h41/) (accessed Oct. 12, 2010).

FIGURE 33: FEDERAL GOVERNMENT FINANCIAL STABILITY EFFORT (AS OF SEPTEMBER 29, 2010)[xxxi]—Continued

[Dollars in billions]

Program	Treasury (TARP)	Federal Reserve	FDIC	Total
Loans	0	0	0	0
Guarantees	0	0	0	0
Community Development Capital Initiative	[xlix]**0.57**	**0**	**0**	**0.57**
Outlays	0	0	0	0
Loans	0.57	0	0	0.57
Guarantees	0	0	0	0
Temporary Liquidity Guarantee Program	**0**	**0**	**506**	**506**
Outlays	0	0	0	0
Loans	0	0	0	0
Guarantees	0	0	[l]506	506
Deposit Insurance Fund	**0**	**0**	**188.9**	**188.9**
Outlays	0	0	[li]188.9	188.9
Loans	0	0	0	0
Guarantees	0	0	0	0
Other Federal Reserve Credit Expansion	**0**	**1,291.2**	**0**	**1,291.2**
Outlays	0	[liii]1,232.6	0	1,232.6
Loans	0	[liii]58.6	0	58.6
Guarantees	0	0	0	0

[xxxi] All data in this figure are as of September 29, 2010, except for information regarding the FDIC's Temporary Liquidity Guarantee Program (TLGP). Those data figures are as of August 31, 2010.

[xxxii] The term ''outlays'' is used here to describe the use of Treasury funds under the TARP, which are broadly classifiable as purchases of debt or equity securities (e.g., debentures, preferred stock, exercised warrants, etc.). These values were calculated using (1) Treasury's actual reported expenditures, and (2) Treasury's anticipated funding levels as estimated by a variety of sources, including Treasury statements and GAO estimates. Anticipated funding levels are set at Treasury's discretion, have changed from initial announcements, and are subject to further change. Outlays used here represent investment and asset purchases—as well as commitments to make investments and asset purchases—and are not the same as budget outlays, which under section 123 of EESA are recorded on a ''credit reform'' basis.

[xxxiii] Although many of the guarantees may never be exercised or will be exercised only partially, the guarantee figures included here represent the federal government's greatest possible financial exposure.

[xxxiv] AIG received an $85 billion credit facility from the Federal Reserve Bank of New York (FRBNY) (reduced to $60 billion in November 2008, to $35 billion in December 2009, and then to $30 billion in September 2010). A Treasury trust received Series C preferred convertible stock in exchange for the facility and $0.5 million. The Series C shares amount to 79.9 percent ownership of common stock, minus the percentage of common shares acquired through warrants. U.S. Government Accountability Office, *Troubled Asset Relief Program: Status of Government Assistance Provided to AIG* (Sept. 2009) (GAO–09–975) (online at www.gao.gov/new.items/d09975.pdf). On September 30, 2010, AIG announced its plans to repay its outstanding obligations to Treasury, FRBNY, and the trust. For details on AIG's repayment plans, *see* Section Two. *See also* American International Group, *AIG Announces Plan to Repay U.S. Government* (Sept. 30, 2010) (online at www.aigcorporate.com/newsroom/2010_September/AIGAnnouncesPlantoRepay30Sept2010.pdf). For information regarding Treasury's TARP investments in AIG, *see* note vi, *supra*. U.S. Government Accountability Office, *Troubled Asset Relief Program: Status of Government Assistance Provided to AIG* (Sept. 2009) (GAO–09–975) (online at www.gao.gov/new.items/d09975.pdf). Additional information was also provided by Treasury in response to a Panel inquiry.

[xxxv] This number includes investments under the AIGIP/SSFI Program: a $40 billion investment made on November 25, 2008, and a $30 billion investment made on April 17, 2009 (less a reduction of $165 million representing bonuses paid to AIG Financial Products employees). As of August 31, 2010, AIG had utilized $47.5 billion of the available $69.8 billion under the AIGIP/SSFI. U.S. Department of the Treasury, *Troubled Assets Relief Program Monthly 105(a) Report—August 2010,* at 5, 24 (Sept. 10, 2010) (online at www.financialstability.gov/docs/105CongressionalReports/August%202010%20105(a)%20Report_final_9%2010%2010.pdf).

[xxxvi] As part of the restructuring of the U.S. government's investment in AIG announced on March 2, 2009, the amount available to AIG through the Revolving Credit Facility was reduced by $25 billion in exchange for preferred equity interests in two special purpose vehicles, AIA Aurora LLC and ALICO Holdings LLC. These SPVs were established to hold the common stock of two AIG subsidiaries: American International Assurance Company Ltd. (AIA) and American Life Insurance Company (ALICO). As of September 29, 2010, the book value of the Federal Reserve Bank of New York's holdings in AIA Aurora LLC and ALICO Holdings LLC is $25.7 billion in preferred equity ($16.5 billion in AIA and $9.3 billion in ALICO). Federal Reserve Bank of New York, *Factors Affecting Reserve Balances (H.4.1)* (Sept. 30, 2010) (online at www.federalreserve.gov/releases/h41/20100930/).

[xxxvii] This number represents the full $30 billion that is available to AIG through its Revolving Credit Facility (RCF) with FRBNY ($18.9 billion had been drawn down as of September 29, 2010) and the outstanding principal of the loans extended to the Maiden Lane II and III SPVs to buy AIG assets (as of September 29, 2010, $13.7 billion and $14.6 billion, respectively). The maximum amount available through the RCF decreased from $34 billion over the past two months, as a result of the sale of two AIG subsidiaries, as well as the company's sale of CME Group, Inc. common stock. The reduced ceiling also reflects a $3.95 billion repayment to the RCF from proceeds earned from a debt offering by the International Lease Finance Corporation (ILFC), an AIG subsidiary.

The amounts outstanding under the Maiden Lane II and III facilities do not reflect the accrued interest payable to FRBNY. Income from the purchased assets is used to pay down the loans to the SPVs, reducing the taxpayers' exposure to losses over time. Federal Reserve Bank of New York, *Factors Affecting Reserve Balances (H.4.1)* (Sept. 30, 2010) (online at www.federalreserve.gov/releases/h41/20100930/Board of Governors of the Federal Reserve System, *Federal Reserve System Monthly Report on Credit and Liquidity Programs and the Balance Sheet,* at 15 (July 2010) (online at www.federalreserve.gov/monetarypolicy/files/monthlyclbsreport201007.pdf); Board of Governors of the Federal Reserve System, *Federal Reserve System Monthly Report on Credit and Liquidity Programs and the Balance Sheet,* at 16 (Aug. 2010) (online at www.federalreserve.gov/monetarypolicy/files/monthlyclbsreport201008.pdf); Board of Governors of the Federal Reserve System, *Federal Reserve System Monthly Report on Credit and Liquidity Programs and the Balance Sheet,* at 15 (Sept. 2010) (online at www.federalreserve.gov/monetarypolicy/files/monthlyclbsreport201009.pdf).

[xxxviii] This figure represents Treasury's $25 billion investment in Citigroup, minus $13.4 billion applied as a repayment for CPP funding. The amount repaid comes from the $16.4 billion in gross proceeds Treasury received from the sale of 4.1 billion Citigroup common shares. *See* note ii, *supra* (discussing the details of the sales of Citigroup common stock to date). U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending September 30, 2010,* at 13 (Oct. 4, 2010) (online at financialstability.gov/docs/transaction-reports/10-4-10%20Transactions%20Report%20as%20of%209-30-10.pdf).

[xxxix] This figure represents the $204.9 billion Treasury disbursed under the CPP, minus the $25 billion investment in Citigroup identified above, $139.4 billion in repayments (excluding the amount repaid for the Citigroup investment) that are in ''repaid and unavailable'' TARP funds, and losses under the program. This figure does not account for future repayments of CPP investments and dividend payments from CPP investments. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending September 30, 2010,* at 13 (Oct. 4, 2010) (online at financialstability.gov/docs/transaction-reports/10-4-10%20Transactions%20Report%20as%20of%209-30-10.pdf).

[xl] On November 9, 2009, Treasury announced the closing of the CAP and that only one institution, GMAC, was in need of further capital from Treasury. GMAC, however, received further funding through the AIFP. Therefore, the Panel considers CAP unused and closed. U.S. Department of the Treasury, *Treasury Announcement Regarding the Capital Assistance Program* (Nov. 9, 2009) (online at www.financialstability.gov/latest/tg_11092009.html).

[xli] This figure represents the $4.3 billion adjusted allocation to the TALF SPV. However, as of September 29, 2010, TALF LLC had drawn only $105 million of the available $4.3 billion. Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1)* (Sept. 30, 2010) (online at www.federalreserve.gov/releases/h41/20100930/); U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending September 30, 2010* (Oct. 4, 2010) (online at financialstability.gov/docs/transaction-reports/10-4-10%20Transactions%20Report%20as%20of%209-30-10.pdf). On June 30, 2010, the Federal Reserve ceased issuing loans collateralized by newly issued CMBS. As of this date, investors had requested a total of $73.3 billion in TALF loans ($13.2 billion in CMBS and $60.1 billion in non-CMBS) and $71 billion in TALF loans had been settled ($12 billion in CMBS and $59 billion in non-CMBS). Earlier, it ended its issues of loans collateralized by other TALF-eligible newly issued and legacy ABS (non-CMBS) on March 31, 2010. Federal Reserve Bank of New York, *Term Asset-Backed Securities Loan Facility: Terms and Conditions* (online at www.newyorkfed.org/markets/talf_terms.html) (accessed Oct. 12, 2010); Federal Reserve Bank of New York, *Term Asset-Backed Securities Loan Facility: CMBS* (online at www.newyorkfed.org/markets/cmbs_operations.html) (accessed Oct. 12, 2010); *see* Federal Reserve Bank of New York, *Term Asset-Backed Securities Loan Facility: CMBS* (online at www.newyorkfed.org/markets/CMBS_recent_operations.html) (accessed Oct. 12, 2010); Federal Reserve Bank of New York, *Term Asset-Backed Securities Loan Facility: non-CMBS* (online at www.newyorkfed.org/markets/talf_operations.html) (accessed Oct. 12, 2010); *see* Federal Reserve Bank of New York, *Term Asset-Backed Securities Loan Facility: non-CMBS* (online at www.newyorkfed.org/markets/TALF_recent_operations.html) (accessed Oct. 12, 2010).

[xlii] This number is derived from the unofficial 1:10 ratio of the value of Treasury loan guarantees to the value of Federal Reserve loans under the TALF. U.S. Department of the Treasury, *Fact Sheet: Financial Stability Plan,* at 4 (Feb. 10, 2009) (online at www.financialstability.gov/docs/fact-sheet.pdf) (describing the initial $20 billion Treasury contribution tied to $200 billion in Federal Reserve loans and announcing potential expansion to a $100 billion Treasury contribution tied to $1 trillion in Federal Reserve loans). Since only $43 billion in TALF loans remained outstanding when the program closed, Treasury is currently responsible for reimbursing the Federal Reserve Board only up to $4.3 billion in losses from these loans. Thus, the Federal Reserve's maximum potential exposure under the TALF is $38.7 billion. *See* Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1)* (Sept. 30, 2010) (online at www.federalreserve.gov/releases/h41/20100930/).

[xliii] It is unlikely that resources will be expended under the PPIP Legacy Loans Program in its original design as a joint Treasury-FDIC program to purchase troubled assets from solvent banks. In several sales described in FDIC press releases, it appears that there is no Treasury participation, and FDIC activity is accounted for here as a component of the FDIC's Deposit Insurance Fund outlays. *See, e.g.,* Federal Deposit Insurance Corporation, *FDIC Statement on the Status of the Legacy Loans Program* (June 3, 2009) (online at www.fdic.gov/news/news/press/2009/pr09084.html).

[xliv] This figure represents Treasury's final adjusted investment amount in PPIP. As of September 30, 2010, Treasury reported commitments of $14.9 billion in loans and $7.5 billion in membership interest associated with PPIP. On January 4, 2010, Treasury and one of the nine fund managers, TCW Senior Management Securities Fund, L.P. (TCW), entered into a ''Winding-Up and Liquidation Agreement.'' Treasury's final investment amount in TCW totaled $356 million. Following the liquidation of the fund, Treasury's initial $3.3 billion obligation to TCW was reallocated among the eight remaining funds on March 22, 2010. *See* U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending September 30, 2010,* at 23 (Oct. 4, 2010) (online at financialstability.gov/docs/transaction-reports/10-4-10%20Transactions%20Report%20as%20of%209-30-10.pdf).

[xlv] Of the $29.9 billion in TARP funding for HAMP, $28.8 billion has been allocated as of September 30, 2010. However, as of September 30, 2010, only $484.9 million in non-GSE payments has been disbursed under HAMP. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending September 30, 2010* (Oct. 4, 2010) (online at financialstability.gov/docs/transaction-reports/10-4-10%20Transactions%20Report%20as%20of%209-30-10.pdf). Data provided to Panel staff by Treasury staff (Oct. 13, 2010).

[xlvi] A substantial portion of the total $81.3 billion in loans extended under the AIFP has since been converted to common equity and preferred shares in restructured companies. $8.1 billion has been retained as first lien debt (with $1 billion committed to old GM and $7.1 billion to Chrysler). This figure ($67.1 billion) represents Treasury's current obligation under the AIFP after repayments and losses. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending September 30, 2010,* at 18 (Oct. 4, 2010) (online at financialstability.gov/docs/transaction-reports/10-4-10%20Transactions%20Report%20as%20of%209-30-10.pdf).

[xlvii] This figure represents Treasury's total adjusted investment amount in the ASSP. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending September 30, 2010,* at 19 (Oct. 4, 2010) (online at financialstability.gov/docs/transaction-reports/10-4-10%20Transactions%20Report%20as%20of%209-30-10.pdf).

[xlviii] U.S. Department of the Treasury, *Troubled Asset Relief Program: Two Year Retrospective,* at 43 (Oct. 2010) (online at www.financialstability.gov/docs/TARP%20Two%20Year%20Retrospective_10%2005%2010_transmittal%20letter.pdf).

[xlix] U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending September 30, 2010,* at 17 (Oct. 4, 2010) (online at financialstability.gov/docs/transaction-reports/10-4-10%20Transactions%20Report%20as%20of%209-30-10.pdf).

[l] This figure represents the current maximum aggregate debt guarantees that could be made under the program, which is a function of the number and size of individual financial institutions participating. $292.6 billion of debt subject to the guarantee is currently outstanding, which represents approximately 57.8 percent of the current cap. Federal Deposit Insurance Corporation, *Monthly Reports on Debt Issuance Under the Temporary Liquidity Guarantee Program: Debt Issuance Under Guarantee Program* (Aug. 31, 2010) (online at www.fdic.gov/regulations/resources/TLGP/total_issuance08-10.html). The FDIC has collected $10.4 billion in fees and surcharges from this program since its inception in the fourth quarter of 2008. Federal Deposit Insurance Corporation, *Monthly Reports Related to the Temporary Liquidity Guarantee Program: Fees Under Temporary Liquidity Guarantee Debt Program* (Aug. 31, 2010) (online at www.fdic.gov/regulations/resources/tlgp/fees.html).

[li] This figure represents the FDIC's provision for losses to its deposit insurance fund attributable to bank failures in the third and fourth quarters of 2008, the first, second, third, and fourth quarters of 2009, and the first quarter of 2010. Federal Deposit Insurance Corporation, *Chief Financial Officer's (CFO) Report to the Board: DIF Income Statement—Second Quarter 2010* (online at www.fdic.gov/about/strategic/corporate/cfo_report_2ndqtr_10/income.html). For earlier reports, *see* Federal Deposit Insurance Corporation, *Chief Financial Officer's (CFO) Report to the Board* (online at www.fdic.gov/about/strategic/corporate/index.html) (accessed Oct. 12, 2010). This figure includes the FDIC's estimates of its future losses under loss-sharing agreements that it has entered into with banks acquiring assets of insolvent banks during these eight quarters. Under a loss-sharing agreement, as a condition of an acquiring bank's agreement to purchase the assets of an insolvent bank, the FDIC typically agrees to cover 80 percent of an acquiring bank's future losses on an initial portion of these assets and 95 percent of losses on another portion of assets. *See, e.g.,* Federal Deposit Insurance Corporation, *Purchase and Assumption Agreement—Whole Bank, All Deposits—Among FDIC, Receiver of Guaranty Bank, Austin, Texas, Federal Deposit Insurance Corporation and Compass Bank,* at 65–66 (Aug. 21, 2009) (online at www.fdic.gov/bank/individual/failed/guaranty-tx_p_and_a_w_addendum.pdf).

[lii] Outlays are comprised of the Federal Reserve Mortgage Related Facilities. The Federal Reserve balance sheet accounts for these facilities under Federal agency debt securities and mortgage-backed securities held by the Federal Reserve. Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1)* (Sept. 30, 2010) (online at www.federalreserve.gov/releases/h41/20100930/). Although the Federal Reserve does not employ the outlays, loans, and guarantees classification, its accounting clearly separates its mortgage-related purchasing programs from its liquidity programs. *See, e.g.,* Board of Governors of the Federal Reserve System, *Credit and Liquidity Programs and the Balance Sheet,* at 2 (Nov. 2009) (online at www.federalreserve.gov/monetarypolicy/files/monthlyclbsreport200911.pdf).

As of September 2010, there was $159.6 billion still outstanding under Treasury's GSE Mortgage Backed Securities Purchase Program. *See* U.S. Department of the Treasury, *MBS Purchase Program: Portfolio by Month* (online at www.financialstability.gov/docs/September%202010%20Portfolio%20by%20month.pdf) (accessed Oct. 5, 2010). Treasury has received $61.1 billion in principal repayments and $13.9 billion in interest payments from these securities. U.S. Department of the Treasury, *MBS Purchase Program Principal and Interest Received* (online at www.financialstability.gov/docs/September%202010%20MBS%20Principal%20and%20Interest%20Monthly%20Breakout.pdf) (accessed Oct. 5, 2010).

[iii] Federal Reserve Liquidity Facilities classified in this table as loans include primary credit, secondary credit, central bank liquidity swaps, Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility, loans outstanding to Commercial Paper Funding Facility LLC, seasonal credit, term auction credit, the Term Asset-Backed Securities Loan Facility, and loans outstanding to Bear Stearns (Maiden Lane LLC). Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1)* (Sept. 30, 2010) (online at www.federalreserve.gov/releases/h41/20100930/).

SECTION THREE: OVERSIGHT ACTIVITIES

The Congressional Oversight Panel was established as part of the Emergency Economic Stabilization Act (EESA) and formed on November 26, 2008. Since then, the Panel has produced 23 oversight reports, as well as a special report on regulatory reform, issued on January 29, 2009, and a special report on farm credit, issued on July 21, 2009. Since the release of the Panel's September oversight report, the following developments pertaining to the Panel's oversight of the TARP took place:

- The Panel held a hearing in Washington, DC on September 22, 2010, discussing Treasury's use of its exceptional contracting authority under EESA. The Panel heard testimony from Treasury officials, representatives from the firms that had received the three largest TARP-related contracts, as well as independent academic and industry experts.

Upcoming Reports and Hearings

The Panel will release its next oversight report in November. The report will provide a progress update on Treasury's foreclosure mitigation programs, the Panel's fourth full-length report on the topic.

The Panel is planning a hearing in Washington, DC on October 21, 2010, to discuss the standards and restrictions on executive compensation for recipients of TARP funds, as outlined in Section 111 of EESA.[464] The Panel will hear testimony from Kenneth Feinberg, former Special Master for TARP Executive Compensation, as well as various academic and industry experts.

The Panel is planning a hearing in Washington, DC on October 27, 2010, to discuss the topic of the upcoming November report.

[464] 12 U.S.C. § 5221. *See also* U.S. Department of the Treasury, *Executive Compensation* (Aug. 3, 2010) (online at www.financialstability.gov/about/executivecompensation.html).

SECTION FOUR: ABOUT THE CONGRESSIONAL OVERSIGHT PANEL

In response to the escalating financial crisis, on October 3, 2008, Congress provided Treasury with the authority to spend $700 billion to stabilize the U.S. economy, preserve home ownership, and promote economic growth. Congress created the Office of Financial Stability (OFS) within Treasury to implement the TARP. At the same time, Congress created the Congressional Oversight Panel to "review the current state of financial markets and the regulatory system." The Panel is empowered to hold hearings, review official data, and write reports on actions taken by Treasury and financial institutions and their effect on the economy. Through regular reports, the Panel must oversee Treasury's actions, assess the impact of spending to stabilize the economy, evaluate market transparency, ensure effective foreclosure mitigation efforts, and guarantee that Treasury's actions are in the best interests of the American people. In addition, Congress instructed the Panel to produce a special report on regulatory reform that analyzes "the current state of the regulatory system and its effectiveness at overseeing the participants in the financial system and protecting consumers." The Panel issued this report in January 2009. Congress subsequently expanded the Panel's mandate by directing it to produce a special report on the availability of credit in the agricultural sector. The report was issued on July 21, 2009.

On November 14, 2008, Senate Majority Leader Harry Reid and the Speaker of the House Nancy Pelosi appointed Richard H. Neiman, Superintendent of Banks for the State of New York, Damon Silvers, Director of Policy and Special Counsel of the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO), and Elizabeth Warren, Leo Gottlieb Professor of Law at Harvard Law School, to the Panel. With the appointment on November 19, 2008, of Congressman Jeb Hensarling to the Panel by House Minority Leader John Boehner, the Panel had a quorum and met for the first time on November 26, 2008, electing Professor Warren as its chair. On December 16, 2008, Senate Minority Leader Mitch McConnell named Senator John E. Sununu to the Panel. Effective August 10, 2009, Senator Sununu resigned from the Panel, and on August 20, 2009, Senator McConnell announced the appointment of Paul Atkins, former Commissioner of the U.S. Securities and Exchange Commission, to fill the vacant seat. Effective December 9, 2009, Congressman Jeb Hensarling resigned from the Panel and House Minority Leader John Boehner announced the appointment of J. Mark McWatters to fill the vacant seat. Senate Minority Leader Mitch McConnell appointed Kenneth Troske, Sturgill Professor of Economics at the University of Kentucky, to fill the vacancy created by the resignation of Paul Atkins on May 21, 2010. Effective September 17, 2010, Elizabeth Warren resigned from the Panel, and on September 30, 2010, Senate Majority Leader Harry Reid announced the appointment of Senator Ted Kaufman to fill the vacant seat. On October 4, 2010, the Panel elected Senator Kaufman as its chair.