



JONES DAY
COMMENTARY

TARP FUND RECIPIENTS SHOULD BE CAUTIOUS AND VIGILANT IN RESPONDING TO TARP INSPECTOR GENERAL REQUESTS

On October 3, 2008, then President Bush signed into law the Emergency Economic Stabilization Act of 2008 (“EESA”), which created the Office of the Special Inspector General for the Troubled Asset Relief Program (“SIGTARP”). On December 15, 2008, Neil M. Barofsky, a former federal prosecutor for the Southern District of New York, was confirmed as the first SIGTARP. The statute provides Mr. Barofsky with sweeping investigative authority, subpoena power, and the ability to refer misuse of Troubled Asset Relief Program (“TARP”) funds for criminal prosecution. Mr. Barofsky has made clear, in testimony before Congress as well as in other public statements, that he will approach his position in a prosecutorial fashion, building on his experience as a federal prosecutor.

Corporations that receive requests from Mr. Barofsky should proceed cautiously: Hastily prepared or unintentionally incomplete answers might raise questions that could give rise to an investigation. Further, all communications with SIGTARP are subject to 18 U.S.C. § 1001, which criminalizes false statements made to federal officials in connection with federal matters. Responses to Mr. Barofsky’s requests could also create liability under other criminal and civil statutes. In short, recipients of TARP funds should treat requests from SIGTARP in the same manner as a grand jury subpoena—with the highest level of attention, vigilance, and exacting accuracy.

This *Commentary* will briefly explain the statutory underpinnings of SIGTARP’s authority and provide some suggestions about responding to requests from his office and interacting with his staff.

DUTIES AND AUTHORITY

Section 121 of EESA defines the duties of SIGTARP to include conducting, supervising, and coordinating audits and investigations of the purchase, management, and sale of assets by the Treasury Secretary under TARP. Additionally, SIGTARP has the duties and authority of inspectors general under the Inspector General Act of 1978. This includes the power to subpoena all information necessary to the performance of these duties. SIGTARP reports directly to Congress. SIGTARP does not have the authority to bring civil or criminal charges on its own but has established relationships with federal and state law enforcement agencies.

SIGTARP oversees three divisions: Audit, Investigative, and Administration/Mission Support. The Investigative Division is led by the Deputy Special Inspector General for Investigations and is made up of special agents, investigators, analysts, and attorneys. This group supervises and conducts criminal and civil investigations to identify persons or entities that waste, steal, or abuse TARP funds. The Audit Division is led by the Deputy Special Investigator for Audit, and it designs and conducts programmatic audits with respect to Treasury's operation of TARP and the recipients' compliance with their obligations under relevant law and contract.

Since his appointment, Mr. Barofsky has established relationships with law enforcement agencies, including the Federal Bureau of Investigation, the Department of Justice, and the New York State Attorney General's Office. He also has reached out to and worked with the Enforcement staff of Securities and Exchange Commission (the "SEC") for civil enforcement matters. Based on Mr. Barofsky's experience and stated mission, there can be little doubt that his investigations will result in criminal prosecutions in some respect.

RESPONDING TO REQUESTS FROM SIGTARP

As part of an initial data collection, SIGTARP sent requests to each entity that received TARP funds, asking them to provide, within 30 days of the request:

- a narrative response outlining their use or expected use of TARP funds,
- copies of pertinent supporting documentation (financial or otherwise) to support the response,
- a description of their plans for complying with applicable executive compensation restrictions, and
- a certification by a duly authorized senior executive officer of each company as to the accuracy of all statements, representations, and supporting information provided.

When preparing a response to this request, TARP recipients should be mindful of 18 U.S.C. § 1001, which makes it a crime to knowingly and willfully make any materially false statement in any federal matter. This statute applies to every communication with Mr. Barofsky and his staff.

Corporations that have received TARP funds should:

- Be aware that the terms of your contract with the Department of Treasury, and possibly your requests for funds, may have been made public on the Department of Treasury web site (<http://www.treasury.gov/initiatives/eesa/>).
- Review and understand your contract and request for TARP funds to ensure that all use of such funds complies with these documents.
- Be prepared to receive requests for information from SIGTARP. Make your staff aware that such requests are likely and should be handled in a timely, thorough, and truthful manner.

- Read any SIGTARP request carefully. If necessary, engage SIGTARP staff for clarification (or engage counsel to assist with the interaction).
- Perform necessary and complete due diligence to be sure that you have fully answered SIGTARP requests. Vet any concerns or issues with in-house or outside legal counsel before responding to SIGTARP. It may be prudent to gather information with the assistance of counsel to ensure that any internal work is protected by the attorney-client privilege.
- Communicate with or make a presentation to SIGTARP only when you are satisfied that the information collected is fully accurate and accurately portrayed. Title 18 U.S.C. § 1001 applies and carries potential civil and criminal penalties for both individuals and corporations.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at www.jonesday.com.

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