



JONES DAY
COMMENTARY

MONITORING THE SIGTARP: CONTINUING LESSONS FOR PARTICIPANTS IN THE TARP PROGRAM

Companies participating in the federal government's TARP program should be aware that the role of the Special Inspector General for the Troubled Assets Relief Program ("SIGTARP") in monitoring and investigating the use of TARP funds—and recommending criminal prosecution for allegedly improper use of such funds—has continued to expand. As discussed in an earlier *Jones Day Commentary*, "TARP Fund Recipients Should Be Cautious and Vigilant in Responding to TARP Inspector General Requests" (March 2009),¹ Congress provided SIGTARP with wide (and, in many ways, unchecked) statutory authority to probe and investigate companies that receive federal monies through TARP. Recent public comments, written reports, and official acts of the SIGTARP make clear that Neil M. Barofsky, the Special Inspector

General, is functioning and acting as "a cop on the beat,"² with the goal of unearthing and seeking punishment for allegedly improper TARP fund usage or other misconduct on the part of TARP participants.

LEARNING FROM THE WORDS AND CONDUCT OF THE SIGTARP

Disclosure Letters. In February of 2009, the SIGTARP sent a letter to every institution that received TARP funds as of January 31, 2009, asking for the following information: (1) a narrative response outlining the use or expected use of TARP funds; (2) copies of supporting documentation (financial or otherwise); (3) a description of plans for complying with the executive

1. Available at http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S6001.

2. "The Need for Increased Fraud Enforcement in the Wake of the Economic Downturn: Hearing Before the U.S. Judiciary Comm.," 111th Cong. 7 (2009) (statement of Neil M. Barofsky, Special Inspector General for the Troubled Assets Relief Program), available at http://www.sig tarp.gov/reports/testimony/2009/Hearing_Transcript_Senate_Committee_on_the_Judiciary.pdf.

compensation restrictions; and (4) a certification by a duly authorized senior executive officer as to the accuracy of all statements, representations, and supporting information provided.³ SIGTARP requests are subject to 18 U.S.C. § 1001, the federal statute that criminalizes false statements made to government officials, and the SIGTARP may recommend for criminal prosecution any fund recipient who makes a false statement in a SIGTARP review.⁴

Use of Criminal Investigators and Referral for Criminal Prosecution. On January 28, 2009, the first fraud charges in connection with the TARP program were brought as a result of an investigation conducted by the SIGTARP and the SEC.⁵ On March 31, 2009, Mr. Barofsky described in testimony before Congress some of the investigations that the SIGTARP is pursuing, including: (1) a probe into allegations of “inappropriate external influences over the [TARP] application process” and (2) an examination of American International Group (“AIG”) bonuses. Mr. Barofsky also testified that he is investigating AIG’s payments to counterparties and related issues.

In a report dated April 21, 2009, the SIGTARP stated that it is working closely with the Department of Justice, the Securities and Exchange Commission (the “SEC”), and the Internal Revenue Service Criminal Investigation division in conducting numerous fraud investigations relating to the TARP program.⁶ The SIGTARP reported that there were nearly 20 fraud investigations under way as of April 2009: “large corporate and securities fraud matters affecting TARP investments, tax matters, insider trading, public corruption, and mortgage-modification fraud.”⁷ In addition to coordinating his efforts with federal agencies, according to public reports, the SIGTARP also has worked with and conducted interviews with

state authorities, including New York State Attorney General Andrew Cuomo.

EXPANSIVE VIEW OF AUTHORITY

The TARP program sprang to life quickly and has changed and evolved over a mere few months. Originally created to allow the federal government to purchase the troubled mortgage assets held by struggling banks, the TARP fund has been used for such diverse purposes as funding the acquisition of weak banks by strong ones and propping up the nation’s struggling automotive industry. Because the use of TARP funds has been so expansive and so mutable, the authors of the legislation did not anticipate or define in any meaningful detail how or where the SIGTARP’s investigative authority would be limited. Earlier this year, in response to a request from Mr. Barofsky, Congress amended the Emergency Economic Stabilization Act of 2008 to expand the authority of the SIGTARP by adding a requirement that the Secretary of the Treasury respond to any deficiency identified by Mr. Barofsky by taking action or certifying to Congress why no action was necessary.⁸

Indeed, it is unclear in many instances whether participants in certain limited TARP programs (for instance, the Auto Supplier Support Program) will be subject either to SIGTARP review or to the limitations placed on other TARP recipients such as executive compensation limitations. Mr. Barofsky has made clear in public statements that he will investigate any and all uses of TARP funds.⁹ Practically speaking, it would be challenging, if not risky, for an institution to complain about the scope or nature of any SIGTARP requests.

3. Office of the Special Inspector General for the Troubled Assets Relief Program, *Quarterly Report to Congress*, Apr. 21, 2009, 19, 245, available at http://www.sig tarp.gov/reports/congress/2009/April2009_Quarterly_Report_to_Congress.pdf.

4. *Id.* at 25; and Office of the Special Inspector General for the Troubled Assets Relief Program, *Initial Report to the Congress*, Feb. 6, 2009, 15, available at http://www.sig tarp.gov/reports/congress/2009/SIGTARP_Initial_Report_to_the_Congress.pdf.

5. “SEC Charges Nashville-Based Financial Planner With Fraud Involving Purported Investments in TARP,” Jan. 28, 2009, available at <http://sec.gov/news/press/2009/2009-12.htm>.

6. *Quarterly Report to Congress*, at 16.

7. *Id.* at 18.

8. Special Inspector General for the Troubled Assets Relief Program Act of 2009, Pub. L. No. 111-15.

9. See *Quarterly Report to Congress* and Mr. Barofsky’s testimony before Congress, available at <http://www.sig tarp.gov/reports.shtml>.

RECOMMENDATIONS / CONCLUSION

In light of the continuing evidence of the SIGTARP's expanding authority and the potential for criminal inquiries in connection with TARP fund usage, TARP fund recipients should develop detailed protocols for the use of TARP funds and for responding to SIGTARP requests. Fund usage should comply with the letter, if not also the spirit, of the TARP program and should be memorialized accurately by the company. Responses to the SIGTARP should be accurate, thorough, and timely. And, TARP fund recipients should continue to monitor the activities and exercises of authority of the SIGTARP, just as the SIGTARP surely will continue to monitor them.

LAWYER CONTACTS

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