S. HRG. 112–81

TARP OVERSIGHT: EVALUATING RETURNS ON TAXPAYER INVESTMENTS

HEARING

BEFORE THE

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

ON

THE TREASURY DEPARTMENT, COP, SIGTARP AND GAO ON THE STATUS AND OVERALL EFFECTIVENESS OF TARP IN MEETING ITS STATUTORY MANDATE, AND THE ROLE OVERSIGHT PLAYED IN EFFORTS TO IMPROVE THE ADMINISTRATION OF THE PROGRAM

MARCH 17, 2011

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C O N T E N T S

THURSDAY, MARCH 17, 2011

WITNESSES

ADDITIONAL MATERIAL SUPPLIED FOR THE RECORD

TARP OVERSIGHT: EVALUATING RETURNS ON TAXPAYER INVESTMENTS

THURSDAY, MARCH 17, 2011

U.S. SENATE,
COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS,
Washington, DC.

The Committee met at 10 a.m. in room SD–538, Dirksen Senate Office Building, Hon. Tim Johnson, Chairman of the Committee, presiding.

OPENING STATEMENT OF CHAIRMAN TIM JOHNSON

Chairman JOHNSON. I would like to call to order this Senate Banking Committee hearing entitled "TARP Oversight: Evaluating Returns on Taxpayer Investments."

Whenever the topic of TARP comes up, it is hard not to think back to the intensity and dramatic moments of the financial panic nearly 2 ½ years ago. Treasury Secretary Paulson and the Federal Reserve were quickly running out of options, and legislators were faced with the difficult choice of whether to provide hundreds of billions of taxpayer dollars at Wall Street or possibly see the economy slide deeper into chaos.

However, as the Congressional Oversight Panel put it in their final report released yesterday:

> It is now clear that, although America has endured a wrenching recession, it has not experienced a second Great Depression. The TARP does not deserve full credit for this outcome, but it provided critical support to markets at a moment of profound uncertainty.

COP made another point in its report that bears repeating:

> TARP has become one of the most thoroughly scrutinized Government programs in U.S. history . . . [and] in the midst of a crisis, perfect solutions do not exist; every possible action carries regrettable consequences, and even the best decisions will be subject to critiques and second-guessing.

That said, the outcome of TARP was much more successful than many ever anticipated, averting a depression and with other emergency policies, saving 8.5 million [inaudible].

I strongly believe that tough oversight was vital to TARP's success. Early estimates showed the program costing taxpayers over $350 billion. Now, thanks to effective oversight, the price tag has plummeted to $25 billion as estimated by the non-partisan Congressional Budget Office. That's one-sixth the cost of the savings & loan crisis in the 1980s and 1990s. Taxpayers clearly win when oversight works.

Today, some still criticize HAMP for its inability to help more homeowners. While I welcome a discussion of how to improve the program, simply ending foreclosure assistance will not make the problem go away and would limit the sustainable options for struggling homeowners who could save their homes. Over 530,000 families have been helped through HAMP, which is not an insignificant number. Their neighbors have been helped as well, by preventing their home values from declining due to a nearby foreclosure. HAMP has also led the way on loan modifications that work, pushing the industry to follow suit and standardizing the process. The American people deserve better than the "repeal everything but the kitchen sink" approach to governance that they are offering.

I look forward to learning more from our witnesses about what worked in TARP, what did not work, and why. Going forward, I believe these lessons prove the importance of tough oversight in implementing the Dodd-Frank Act. I also believe it can be instructive as we continue to work through the foreclosure crisis and as we consider reforms to the mortgage finance system.

Before I recognize Ranking Member Shelby for his statement, I want to note that at his request there is written testimony from Professor John Taylor of Stanford University that we will make part of the record.

Chairman JOHNSON. I would also ask that the paper "How the Great Recession Was Brought to an End" by Professor Alan Blinder and Mark Zandi be made part of the record.

Chairman JOHNSON. I will remind my colleagues that we will keep the record open for 7 days for statements, questions, and any other material you would like to submit.

With that, I will turn to Ranking Member Shelby for his opening statement.

STATEMENT OF SENATOR RICHARD C. SHELBY

Senator SHELBY. Thank you, Mr. Chairman.

In late 2008, Treasury Secretary Paulson and Federal Reserve Chairman Bernanke came to Congress demanding $700 billion to buy so-called toxic assets from banks. They insisted at the time that we were on the verge of a worldwide financial meltdown. Their scare tactics worked. Congress passed legislation creating the Troubled Asset Relief Program, or what we call TARP. Although TARP was proposed by President Bush, his successor was a supporter of the program.

I voted against TARP. I believed then, as I do today, that TARP was a serious policy mistake. And while many will try to claim it was a success, a thorough examination of TARP's record tells us a very different story.

The design of TARP was so flawed that just weeks after the bill was passed, Treasury had to abandon its plan to purchase toxic assets. Purchasing assets proved to be a very difficult plan to implement. It was also a very risky way to stabilize the financial system.

If Treasury purchased assets at too low a price, it could have threatened the solvency of financial institutions by forcing them to mark down the value of their assets to reflect the prices paid. And if Treasury paid too much, it would have given banks a taxpayer-funded windfall.

But due to these inherent problems, right after TARP was passed, Treasury had to switch to a direct equity injection for banks. Accordingly, a vote for the original TARP was a vote for a flawed plan, I believe.

And what price did we pay? Our credit markets froze and our equity markets tanked as they saw our policy leaders panicking and recognized that TARP would not solve our problems. I would like to submit for the record—I want to bring it up again because it is important, what the Chairman just did—testimony by former Under Secretary of the Treasury and the distinguished economist John Taylor which lays out in detail how the process of enacting TARP worsened our economic downturn. Mr. Chairman, I appreciate you putting that in the record.

I fear myself that the long-term damage caused by TARP will be even more damaging to our financial system. TARP turned our already severe too-big-to-fail problem into official policy. Even TARP's Special Inspector General has said that perhaps, and I will quote:

> TARP's most significant legacy is the moral hazard and potentially disastrous consequences associated with the continued existence of financial institutions that are too-big-to-fail.

Perhaps as concerning was the fact that our regulators used TARP to keep even insolvent banks afloat. After TARP, creditors, investors, and big banks have every reason to expect that the U.S. Government will never allow these banks to fail. Even worse, the implicit Government guarantee will make big banks careless about the risks they take and will make the next financial crisis and even more severe.

TARP, I believe, has created moral hazard with respect to financial regulation. By using TARP to bail out banks, our financial regulators were able to hide their regulatory failures—and there were many—leading up to the crisis. Going forward, our regulators will have reduced incentives to be tough with the big banks if they know that their work has little bearing on whether or not the bank fails.

Moreover, TARP sets a new standard for Government intervention in our markets to achieve political ends. The sloppy drafting of TARP legislation gave the Treasury Secretary unfettered discretion on how he spent the $700 billion, and as a result, it was used to bail out politically powerful automakers and pour billions into a series of largely ineffective homeowner assistance programs.

Some say that TARP is a success because TARP may yield a so-called profit. I am not persuaded. First, claims of TARP's profitability are premature. The taxpayer will likely still take losses on TARP's housing programs, and many financial institutions have yet to fully repay their TARP funds. Moreover, TARP used taxpayers' dollars for very risky investments. A proper evaluation of the returns on any investment must appropriately adjust for risk. I believe such an evaluation would show that the taxpayers were not adequately compensated for incurring such large risk.

Second, what matters most is TARP's negative long-term impact on the overall economy which will dwarf any profit generated, if there is any.

On that basis, TARP's record has not been good for American families. Since TARP was enacted, the unemployment rate has reached and stayed at record levels, lending remains stagnant, and millions of Americans are facing foreclosure. In light of the vast authority granted to the Treasury Department under TARP, I believe that this Committee had a responsibility to conduct extensive oversight of the program. Unfortunately, the majority once again decided to outsource the work of the Committee to outside parties.

Today we will hear from three bodies charged by Congress with overseeing TARP. It is especially important for us to hear from Special Inspector General Barofsky before he leaves his post at the end of the month.

Today we hope to learn how Treasury has managed TARP and how effective such an oversight body was at supervising Treasury. Were they able to obtain the information they needed from Treasury and our financial regulators to do their [inaudible]? What problems did they identify? How receptive were Treasury and our financial regulators to their recommendations? Hopefully today's hearing will help us better understand what actually happened in this very controversial program.

Thank you, Mr. Chairman.

Chairman JOHNSON. Thank you.

Timothy Massad serves as the Acting Assistant Secretary for Financial Stability. In such capacity, he heads the Office of Financial Stability which administers TARP. He joined the Treasury in May 2009 as the Chief Counsel for OFS and later became the Chief Reporting Officer for the office. Prior to joining Treasury, Mr. Massad was a partner with the law firm of Cravath, Swaine & Moore in New York and served as a special legal adviser to the Congressional Oversight Panel for its first report on TARP investments.

Senator Ted Kaufman serves as the Chair of the Congressional Oversight Panel. He was appointed by Senate Majority Leader Reid last fall to replace Elizabeth Warren on the panel. Previously, Senator Kaufman was sworn in as the junior Senator from Delaware in January 2009, taking the seat of Vice President Joe Biden, whom he served 19 years as chief of staff. He served in the Senate until November 15, 2010.

Special Inspector General Neil M. Barofsky was confirmed by the Senate on December 8, 2008, and was sworn into office on December 15, 2008. Prior to serving as SIGTARP, Mr. Barofsky was a Federal prosecutor in the U.S. Attorney's Office for the Southern District of New York for more than 8 years and was a senior trial counsel who headed their mortgage fraud group.

Thomas McCool is the Director of the Center for Economics, which is part of GAO's Applied Research and Business Group. He has served at the GAO since 1987 and previously taught economics at Vassar College and Georgetown University from 1977 to 1987.

Before we start the testimony, I want to note that COP issued its final report yesterday and closes its doors in a few weeks. Mr. Barofsky also recently announced his resignation effective at the end of the month. So I want to say a special word of thanks to Mr. Barofsky and Senator Kaufman for their public service as well as excellent service provided by all the staff from COP, SIGTARP, GAO, and Treasury.

Mr. Massad, go ahead.

STATEMENT OF TIMOTHY G. MASSAD, ACTING ASSISTANT SECRETARY, OFFICE OF FINANCIAL STABILITY, DEPARTMENT OF THE TREASURY

Mr. MASSAD. Thank you, Mr. Chairman.

Chairman Johnson, Ranking Member Shelby, and other Members of the Committee, thank you for the opportunity to testify about the Troubled Asset Relief Program, or TARP, as it is commonly known. As the Acting Assistant Secretary for Financial Stability, I am responsible for overseeing the program on a day-to-day basis.

It is now 2 ½ years since TARP was created, and it is clear that the program has been remarkably effective.

First and foremost, TARP, in conjunction with other Government actions, helped prevent a catastrophic collapse of our financial system and economic. In the fall of 2008, we were starting into the abyss. We faced the very real risk of a second Great Depression.

Now we are on the road to recovery. We no longer fear that our financial system will fail. Businesses are able to raise capital, and the credit markets on which consumers, and particularly small businesses, depend have reopened.

TARP was not a solution to all of our economic problems, and much work remains to be done. Unemployment is still unacceptably high and the housing market is still weak. But the worst of the storm has passed.

Second, we accomplished all this using much less money than Congress originally provided, and we are unwinding TARP far faster than anyone thought possible. Congress authorized $700 billion, but we will spend no more than $475 billion. And we have already recouped two-thirds of what we have spent.

Third, the ultimate cost of TARP will be far less than any expected. The total cost was initially projected to be approximately $350 billion. According to the latest estimates, both from Treasury and the Congressional Budget Office, the overall cost of TARP will be between $25 and $50 billion, and most of that will represent the money we spent to help responsible American families keep their homes.

Based on current market prices, we expect that all the other TARP programs and investments taken as a whole will result in very little or no cost to the American taxpayers.

Moreover, the overall cost of the Government's response efforts to this crisis is likely to be less than 1 percent of GDP, far less than the cost to resolve the S&L crisis and far less than the average cost of resolving other financial crises, according to an IMF study.

Finally, our financial system is in much better shape today than before the crisis. Banks are better capitalized, and Congress has adopted the most sweeping overhaul of our regulatory structure in generations, which will give us tools we did not have in the fall of 2008 to mitigate and prevent financial crises and to address the too-big-to-fail problem, which you have noted. This work is not yet completed either, but great progress has been made since TARP's inception.

We have moved quickly to reduce the dependence of the financial system on emergency support. We have already recovered from banks an amount equal to 99 percent of the funds invested in the banking system. And where this Administration provided funds to particular companies, we did so with tough conditions. Those companies are stronger today, and we already have begun to recoup those investments.

For example, we provided assistance to the automotive industry on the condition that fundamental changes occur. Our actions helped prevent the loss of as many as 1 million jobs and have helped restore the industry to profitability. We completed a highly successful public offering of General Motors last November, and we are working to exit our investments in Chrysler and Allied Financial as well.

I want to also address our efforts to help responsible but struggling American homeowners. By reducing mortgage rates and providing sensible incentives to prevent avoidable foreclosures, our policies have helped hundreds of thousands of families stay in their homes, and they have helped to change the mortgage servicing industry generally. We have also done so in a manner that uses taxpayer resources prudently.

There is much more work to be done. The programs we have can continue to ease the pain of this terrible crisis, which is why we oppose the efforts to terminate them. In all of these efforts, TARP has been subjected to unprecedented oversight. When Congress created TARP, it also directed that four different oversight bodies carefully review our programs. Representatives of three of those entities are sitting with me today. To date, Treasury has responded to 75 reports from the GAO, the SIGTARP, and the Congressional Oversight Panel, and we have adopted more than 120 of their recommendations.

TARP has also been subject to vigorous congressional oversight by this Committee and several others. We welcome this oversight. Individually and collectively, it has helped us to develop, implement, and improve our TARP programs.

Mr. Chairman, in short, TARP succeeded in what it was designed to do: It helped stabilize the financial system and laid the foundation for economic recovery. And it did so at a fraction of the expected cost. Both political parties deserve credit for these achievements. Congress enacted the program at a time when the financial system was falling apart. In that moment, leaders from both parties stood up, stood together, and did what was best for this country.

Thank you for the opportunity to testify, and I welcome your questions.

Chairman JOHNSON. Thank you, Mr. Massad.

Ted Kaufman.

STATEMENT OF TED KAUFMAN, FORMER U.S. SENATOR FROM THE STATE OF DELAWARE AND CHAIRMAN, CONGRESSIONAL OVERSIGHT PANEL

Mr. KAUFMAN. Yes, thank you, Chairman Johnson, Ranking Member Shelby, and Members of the Committee. It is truly a pleasure to see my former colleagues, and it is a privilege to offer my perspective on the Troubled Asset Relief Program, TARP.

The Congressional Oversight Panel is, along with the GAO and SIGTARP, charged by law with overseeing the TARP. Since our former Chair testified before this Committee in September 2009, the Panel has issued nearly 20 reports examining issues such as TARP's support for the domestic automotive industry, the rescue of AIG, commercial real estate, small banks, Government contracting, executive compensation restrictions, as well as four reports on Treasury's foreclosure prevention efforts. In total, the Panel has authored 30 oversight reports, concluding with our March 2011 report issued to Congress just yesterday. By statute, the Panel will end on April 3, 2011.

As the Congressional Oversight Panel concludes our work, we should recall where America stood when the TARP was enacted in 2008. The stock market endured triple-digit swings. Major financial institutions had collapsed. The economy was hemorrhaging jobs. Foreclosures were escalating with no end in sight. In the words of Ben Bernanke, America was on a course for "a cataclysm that could have rivaled or surpassed the Great Depression."

The good news is that America did not suffer another Depression. The TARP does not deserve full credit, but it provided critical support at a time of great uncertainty.

The further good news is that the TARP's projected costs have fallen sharply. The Congressional Budget Office now projects taxpayers will lose $25 billion. Now, $25 billion is a lot of money, but down from the initial estimate of $356 billion, which is mind-boggling.

Unfortunately, while there is no question that the TARP rescued Wall Street, its programs for Main Street have been far less effective. Its main foreclosure prevention program, which was designed to help 3 to 4 million homeowners, is now on track to help fewer than 800,000. In fact, the TARP's failure to address foreclosures is one of the reasons why its costs are coming in so low. The TARP will cost less than expected in part because it will accomplish far less than envisioned for American homeowners.

The TARP also distorted markets. It created profound moral hazard and led to a deep stigma, a sense among the public that policymakers cared more about bailing out Wall Street than helping ordinary families.

Some degree of moral hazard and stigma was unavoidable. The Treasury clearly could have done more to rein in these problems.

For example, many senior managers of TARP recipient banks maintained their jobs and their high salaries, and shareholders maintained significant ownership stakes. To the public, it looks as though Wall Street banks and bankers can retain their profits in boom years but shift their losses to taxpayers during a bust—an arrangement that cannot help but undermine our free market system.

Finally, as the Panel has noted for over 2 years, the lack of transparency and clear goals has rendered the public unable to hold Treasury fully accountable. Most significantly, Treasury decided in the TARP's early stage to push tens of billions of dollars out the door to very large financial institutions without requiring banks to reveal how the money was being used. The TARP's transparency has improved dramatically, and it has improved dramatically since then. When it comes to these very early and very large type investments, the public will never know to what purpose this money was put.

I would like to say a few words about the importance of oversight. The TARP has been, as expressed by the Members, one of the most thoroughly scrutinized Government programs in history, and there can be no doubt that oversight has improved the program and increased taxpayers' returns.

For example, in July 2009, the Panel reported that Treasury's method for selling warrants purchased through TARP appeared to be recovering 66 percent of their estimated worth. Due in part to pressure generated by the Panel's work, Treasury changed its approach, and subsequent sales recovered 103 cents on the dollar, contributing to $8.6 billion in returns. Other substantial improvements in TARP—such as Treasury's heightened focus on second liens, the increased transparency of contracting, and the greater release of data—are all partly the result of pressure exerted by the Panel and the other oversight bodies.

Clearly, careful scrutiny is an indispensable step to preserving the public trust and ensuring the effective use of taxpayers' money.

Thank you again. I genuinely thank you for the opportunity to testify. I would be happy to answer any questions you may have. As Chair of the Panel, I will endeavor to convey the views of the Panel; however, ultimately my words are my own.

Thank you, Mr. Chairman.

Chairman JOHNSON. Thank you, Senator Kaufman.

Mr. Barofsky.

STATEMENT OF NEIL BAROFSKY, SPECIAL INSPECTOR GENERAL, TROUBLED ASSET RELIEF PROGRAM

Mr. BAROFSKY. Thank you, Mr. Chairman, Ranking Member Shelby, Members of the Committee. It is a privilege to appear before you once again and to testify today about the role of oversight in the Troubled Asset Relief Program. In that vein, it is also a pleasure for me today to be testifying alongside my oversight colleagues—Senator Kaufman of the Panel and Tom McCool of GAO.

As has been noted, TARP has been a historic program in many respects, but one has been the unprecedented oversight assigned to this program by Congress as embodied by the three representative organizations for oversight present here today. By working together closely and coordinating our activities, I believe that collectively we have well served the American people by making sure that we could cover the broadest coverage possible and ensuring unprecedented transparency and accountability in the 13 different programs that make up TARP.

At SIGTARP, as the lone oversight body with law enforcement authority, part of our focus has been on policing and investigating TARP-related criminal activity. And in our short timeframe, we have had a major impact. Fifty-two different individuals and 18 different entities have been the subject of civil and criminal actions, and perhaps more significantly, 18 defendants have already been convicted of TARP-related frauds, including just yesterday a senior official from Colonial Bank.

Colonial had applied for and received conditional approval for more than $550 million in TARP funds before SIGTARP investigators stopped a massive, ongoing, multi-billion-dollar accounting fraud dead in its track. All told, SIGTARP's investigations have led to the recovery of funds and the avoidance of loss from fraud of more than $700 million, making sure that SIGTARP as an agency over its lifetime will more than pay for itself.

Another example of the collective benefits of our oversight actions, as the Senator just mentioned, have been the tangible results from one of the pieces of good news from TARP: the lowering expectations of the financial costs of the program. As the Senator mentioned, my oversight colleagues deserve credit for those lowering numbers, as does Treasury for its efficient management of its portfolio of assets.

At SIGTARP, our approach to limiting losses has been focusing on limiting the amount of losses from fraud, and we have done that in two areas: deterring criminals from making applications to TARP in the first place, and working with Treasury to develop strong anti-fraud provisions within the program itself. For a program the size and scope of TARP, one would normally expect a loss from fraud in the area of 8 to 12 percent, in the neighborhood of $50 billion. I am very proud to say today that we will come nowhere close to that number, in no small part thanks to the willingness of Treasury and the Federal Reserve, particularly in the early days of this program, to work with SIGTARP to put in effective anti-fraud provisions that help limit the vulnerability of the programs to fraud.

As for deterrence, I recall a conversation I had in late 2009 with Secretary Geithner. After a somewhat heated discussion on another topic, he took me aside and told me that he believed that SIGTARP has scared away many banks and others from participating in the TARP program. And after a pause, he told me he thought that was a good thing because it meant that some bad actors did not apply for TARP funds. And he was right. Strong deterrence and better program design have been instrumental in tamping down potential TARP losses.

On a final note, as Members have noted, today is likely my last time testifying before the U.S. Senate as Special Inspector General. And I remember one of the initial times I appeared before this Committee. I think it was my confirmation hearing, and, Ranking Member Shelby, you gave me some advice and a warning, and you told me that this was a great opportunity and that if I did my job well, I would never be able to work again.

[Laughter.]

Mr. BAROFSKY. And you told me you thought it was a good thing, which my wife disagreed.

Senator SHELBY. I meant work with some people you do not need to work for.

Mr. BAROFSKY. I am very happy to say that in this very, very limited circumstance, Senator, circumstances have proven you wrong, and I have been able to get a job. And I will be working—I am very thrilled to be joining New York University's School of Law as an adjunct professor and senior fellow at its Center on the Administration of Criminal Law. And I thank you, Ranking Member Shelby, I thank you, Mr. Chairman, and I thank all of the Members of this Committee for your strong, unwavering, continuous, and bipartisan support of SIGTARP. We would not have been able to come close to achieving the successes that we have had on behalf of the American taxpayer without that support.

I thank you, and I thank you for the opportunity to testify today, and I look forward to answering any questions that you may have.

Chairman JOHNSON. Thank you, Mr. Barofsky. We will miss you. Mr. McCool.

STATEMENT OF THOMAS J. MCCOOL, DIRECTOR, CENTER FOR ECONOMICS, APPLIED RESEARCH AND METHODS, GOVERNMENT ACCOUNTABILITY OFFICE

Mr. MCCOOL. Thank you, Chairman Johnson, Ranking Member Shelby, Members of the Committee, for inviting us here to talk about TARP, and I am pleased to be here to do that.

Under TARP, a broad range of activities have been initiated, from injecting capital into key financial institutions to addressing securitization, market problems, providing assistance to the automobile industry and to AIG, and offering incentives to modify residential mortgages. As TARP passes its 30-month mark, U.S. financial markets appear to be less volatile than they were in 2008, but certain areas of the economy still face significant challenges, especially the mortgage markets and, to a lesser extent, small business lending.

While many programs have ended and begun winding down, some participating institutions have repaid part or all of their TARP funds, the prospect of repayment from other institutions, large and small, remain somewhat uncertain.

Some TARP programs have been terminated. Others, like the Capital Purchase Program, have closed and are winding down operations. And several programs that focus on preserving home ownership and providing assistance to auto companies and AIG remain active. The Capital Purchase Program, of course, we know a lot of that has been repaid. Thirty-point-eight billion still remains outstanding. And one of the issues that we have tried to focus Treasury's attention on, and they have responded, is that there are a number of institutions that are still in the Capital Purchase Program who have potential issues. Almost 200 of them have missed at least one dividend payment and there are issues, again, with some other institutions that may not be as sound as they were thought to be when they initially applied for the program. This just means that they require continued monitoring.

The Home Affordable Modification Program, or HAMP, remains Treasury's primary program to assist homeowners facing foreclosure. The program had a slow start and some of its newer programs are having even a slower start getting off the ground, and so far, as we have already stated, it has not spent much money, but that is not necessarily a sign of success.

There are issues with HAMP going forward. We issued a report just today that will look at the programs that go beyond the firstly modification program, and particularly the Second Lien Modification Program, the Foreclosure Alternative Program, and the Principal Reduction Program. And again, there have been some movements in the right direction, but we still have some areas where we think Treasury can improve those programs.

The Automotive Industry Financing Program has an outstanding balance of just a little over $44 billion. Approximately $29 billion has been repaid, and clearly, the auto industry, at least GM and Chrysler in particular, are doing much better than they were back in 2008 and early 2009. But whether they will be able to fully repay the Treasury investment is still up in the air. It is going to depend a lot on what the share price of GM does, and because of the IPO, which was a success by many standards, the fact that they sold below their break-even price means that their remaining shares are going to have to bring in an even higher price to actually make the program break even. So the Treasury has gone from a 60 percent owner to a 33 percent owner, and that is probably a good thing, but it needs to make a lot of money in future sales to be able to make the program actually break even.

AIG has continued to receive assistance over the last year from an equity capital line. It has repaid $6.9 billion just last week, and this reduced the Treasury's balance to about $58.7 billion. Treasury owns 92 percent of AIG, and again, the extent to which it is going to be able to be repaid is going to depend very much on its ability to sell shares in AIG over time at a reasonable price, and there is, I think, a lot of uncertainty to that.

And last, just let me point out that one of the recommendations we made in our most recent report, which we issued in January, is to try to focus Treasury's attention on staffing going forward. Currently, it is in very good shape in terms of staffing, has great, qualified people under term contracts. Our concern is as the programs wind down, it may be harder and harder to retain staff, especially if the job market gets any better, and so we just think that there is the need for them to update their workforce plan and take into account alternative scenarios for retaining staff as the program winds down.

I would like to thank you and appreciate the opportunity to testify and I am happy to answer any questions you might have.

Chairman JOHNSON. Thank you, Mr. McCool. Thank you for your testimony.

As we begin questioning the witnesses, I will have the Clerk put 5 minutes on the clock for each Member's questions.

Mr. Barofsky, you recently testified on HAMP, saying we have advocated tirelessly that Treasury should fix the program. So if we should not repeal the program, how do we fix it? Is one option to have Treasury focus on the earlier part of the process, encouraging servicers to reach out to homeowners sooner?

Mr. BAROFSKY. I think that HAMP is a fundamentally broken program and does need—if it is going to be permitted to continue, Treasury needs to finally stop defending the status quo of the program, as it continues to do, and lay out a plan on how to fix the program. And there are a number of, I think, good ideas out there.

I think you start with something that Secretary Geithner has acknowledged before the Senate a couple weeks ago, that the very incentive structure of the program is broken. This whole program is a voluntary program. It is designed by encouraging services to participate by making incentive payments. So it is largely a carrot program where discipline would presumably be provided by sticks and financial penalties, and initially, Treasury announced that it would impose financial penalties on servicers for not complying with the guidelines. They issued a press release in late 2009.

But now, with Secretary Geithner acknowledging that the incentives are insufficient, not powerful enough to overcome, I think the word he used, the muck, I will say the conflicts of interest that the servicers operate under. And Treasury's refusal to impose a single sanction on the servicers, is it really all that surprising that the program has been a failure?

So I think the place to start is let us address what Secretary Geithner acknowledged was a problem, the incentive structure, and what is universally regarded as a problem, the lack of penalty, lack of financial penalties on servicers whose performance that Secretary Geithner and Mr. Massad have both acknowledged has been abysmal under the program. I think that is a starting point.

I think they need to be far more transparent. I think for those who are seeking to defend the existence of the HAMP program, one of the most basic pieces of information that I think that you need to have is what is Treasury's projection of how many people it is going to help through permanent modifications over the life of this program. I have been calling for this for more than a year. The COP panel has been calling for it more than a year. GAO has been calling for this for more than a year. Members of Congress have been doing that. The Congressional Oversight Panel went so far as to have to give its own analysis and its own estimate of 700,000 to 800,000. Moody's has provided an estimate. CBO has provided an estimate. They will not. And I think at a certain point, for those who are criticizing the program, have every right to conclude that the reason why they will not provide a number is that their internal projections must be so abysmal and so terrifying that they will not provide this level of transparency.

So I think to have an informed debate, Treasury needs to finally be transparent about its expectation, not putting out a number of the total number of people potentially eligible, not the total number of offers that they intend to make. How many people when this program ends are going to be in sustained permanent modifications? And their failure to do so is inexplicable, and, frankly, indefensible.

Chairman JOHNSON. Mr. McCool, do you agree that servicers should reach out to homeowners sooner? And another suggestion, should Treasury explore creating a single point of contact so that borrowers know who to communicate with?

Mr. MCCOOL. Well, we have made recommendations and some of them have actually been at least either implemented or partially implemented on the front of having Treasury issue better guidance about how servicers deal with customers, how they deal with complaints, and I think that there has been some improvement in that arena, but I think there is still work to be done.

Sort of to echo Mr. Barofsky's point, I think what we have been pushing for from the very beginning is performance standards, and in particular, performance standards for the servicers, that we think the Treasury needs to come up with performance standards, hold the servicers accountable to those performance standards, and until they do that, again, we think some of the problems are going to continue to fester.

Chairman JOHNSON. Mr. Massad, what is your response to these suggestions?

Mr. MASSAD. Thank you, Mr. Chairman. I would be happy to respond. First, on the issue of performance standards, that is precisely what we have done. Let us remember, first of all, this is a crisis that was a decade in the making and for 2 years nothing was done. When we launched this program, no modifications were occurring. We launched the program on a voluntary basis. It had to be that way under the law.

In terms of performance standards, we have forced the servicers to do a lot of things they simply were not doing. Those include a whole range of borrower protections, like the issue on dual track, for example, the practice where servicers were discussing a modification or considering a modification at the same time as they were proceeding to a foreclosure sale. We stopped that. We put in other borrower protections, as well.

Now, we agree, as the Secretary has said, that there is a need for national servicing standards. This is a servicing model that was set up to collect payments on performing loans. It was not equipped to deal with this crisis. And far more is needed than the HAMP program to fix that. The regulators are now paying attention to it. The FHFA, the conservator of the GSEs is paying attention to it. And I think we will see that.

Second, in terms of estimates, it is very difficult to make estimates as to how many we will ultimately serve, but the facts are that, number one, the cost of this program is directly related to how many we serve. So it is not a matter that we will spend the same amount of money regardless.

Number two, we publish reams of information about this program, including how many people we are reaching every month in permanent modifications, in trial modifications, how many fall out of that, how many redefault. We publish information by servicer. Anybody can see how this program is doing. It is not a matter of not being able to evaluate it. It is a matter of the fact that this is a very difficult housing market to fix and this program is at least helping fix it. It is not enough, but it needs to be continued so that we can try to ease the pain for millions of American families.

Chairman JOHNSON. Senator Shelby?

Senator SHELBY. Thank you, Mr. Chairman.

Mr. Barofsky, first of all, I want to thank you for a great job you have done as Inspector General. I remember when you were up for confirmation and I told you, among other things, right here in this Committee, that I hoped that you would do something very good for the American people and that you would stand up for the American people, and you have and I am glad that you are employable. My reference then was probably that you did not need to be employed by some of the people that you were going after, and they would never hire you anyway, thank God. But you will leave that post with a lot of help, a lot of thanks from the American people for the job you have done and you will always do well, I know that.

I would like to ask you a couple of questions, if I could. In your written testimony, you state, “Unfortunately”—I am quoting you—

"TARP's most significant legacy may be the exacerbation of the problems posed by too-big-to-fail." You go on to quote Secretary Geithner from a December 2010 hearing before the Congressional Oversight Panel in which he states that "in the future, the Federal Government may have to do exceptional things," he says, "again if we face a large shock." In your view, do financial markets still believe that the Federal Government will not allow big banks to fail?

Mr. BAROFSKY. Senator, first of all, thank you for your comments. I really do appreciate them. They mean a lot to me and my family, so thank you.

Senator SHELBY. Thank you.

Mr. BAROFSKY. The answer to your question, absolutely and unambiguously, the financial markets believe more than ever that the United States Government will step in and save the too-big-to-fail institutions should there be another financial shock.

Senator SHELBY. Is that not what helped bring the GSEs to where they are today, sitting in the Government's lap? In other words, that was the implicit guarantee that we would never let them——

Mr. BAROFSKY. It is nearly the identical toxic cocktail of implicit guarantees and market distortions that the too-big-to-fail banks have today as Fannie and Freddie did leading into the financial crisis, yes.

Senator SHELBY. Let me, if I can, some of your words, I just want to read it into the record and share it with you, and this is on page six of your testimony, and I will quote you:

> Regardless of whether all the required regulations are properly calibrated and fully implemented, the ultimate success of the Dodd-Frank Act depends to a certain degree on market perception. Thus far, the Act has clearly not solved the perception problem. Reflecting on Secretary Geithner's candid assessment of the likely limits of Dodd-Frank in the event of another full-blown financial crisis, the largest institutions continue to enjoy access to cheaper credit based on the existence of this implicit Government guarantee against failure.

And I will quote you again:

> Standard and Poors and Moody's Investors Services, two of the world's most influential credit rating agencies, recently reinforced this significant advantage for those institutions. In January of this year, S&P announced its intention to make permanent the prospect of Government support as a factor in determining a bank's credit rating, a radical change from pre-TARP practice, stating its expectation, quote, 'this pattern of banking sector boom and bust and Government support to repeat itself in some fashion regardless of Government's recent emergency policy response.' Similarly, Moody's stated its belief that the proposed resolution regime, quote, 'will not work as planned, posing a contagion risk and most likely forcing the Government to provide support in order to avoid a systemic risk . . . '

and so forth.

And I want to quote former Secretary of the Treasury and National Economic Counsel Director Lawrence Summers, what he said a number of years back, and I will quote: "A healthy financial system cannot be built on the expectation of bailouts." Do you disagree with that?

Mr. BAROFSKY. No, I do not, Senator.

Senator SHELBY. Thank you for that.

Mr. Massad, I would like to direct a question to you with my time. In October 2010, in an editorial, Secretary Geithner stated, quote, “The TARP is over.” The TARP Inspector General’s, who we have here, most recent quarterly report clarifies that although no new TARP funds may be obligated, $59.7 billion remain obligated and available to be spent, and $149.4 billion in TARP funds remain outstanding. Do you have differences with those figures?

Mr. MASSAD. Thank you, Senator Shelby. I think what the Secretary was referring to in October of 2010 was that the purchase authority, the authority to make new commitments under TARP, expired. We do still have about $150 billion in investments outstanding, which we are working every day to get back, and we do still have commitments, particularly with respect to our housing program, that will allow us to disperse money for the housing program. Those are the programs we want to continue.

If I could, Senator, I would also like to respond to the too-big-to-fail issue, if you would let me. Would that be all right?

Senator SHELBY. Absolutely.

Mr. MASSAD. First of all, I share your concern about the issue. We obviously have to have a financial system where companies fail when they take excessive risks——

Senator SHELBY. The too-big-to-fail doctrine is a flawed doctrine from the beginning, is it not?

Mr. MASSAD. Well, it is an unfortunate doctrine, that is for sure, but——

Senator SHELBY. Well——

Mr. MASSAD.——let us remember, TARP did not create the problem. It existed before TARP.

Senator SHELBY. We know.

Mr. MASSAD. And we needed TARP because we did not have the tools to fix it, and I do think Dodd-Frank has given us some tools to address it and now the task is to implement those.

Senator SHELBY. Mr. Barofsky, in an editorial in the Wall Street Journal, two current members and one former member of the Congressional Oversight Panel explained why TARP was not a win for taxpayers. They criticize the Administration’s claim that TARP was successful because the money may be repaid. They state, and I quote:

> The focus on repayment of TARP is deceptive because it fails to consider the huge taxpayer cost from non-start programs that directly and indirectly enable many of the large banks to repay their TARP funds.

They list several programs that provided significant aid to banks, including the Federal Reserve’s purchase of $1 trillion of GSE-guaranteed MBSs, Treasury’s $150 billion bailout of the GSEs, and other Fed and FDIC programs which place another $2 trillion in taxpayers’ money at risk. Do you disagree with that conclusion?

Mr. BAROFSKY. No. I think it is very important to view TARP in the context of the broader scope of the Government’s response to the financial crisis, and each July, SIGTARP publishes a comprehensive overview of all those programs. And what we saw this past summer was an actual increase in the total amount of outstanding commitments year over year, from $3 trillion to $3.7 trillion. So our job here at SIGTARP is to focus on the TARP, but, of course, the TARP does not exist in isolation and any overall accounting would necessarily have to include those other things. That is outside the scope of our jurisdiction, but we always do try to put it in context. I think that is important.

Senator SHELBY. Thank you. Thank you, Mr. Chairman.

Chairman JOHNSON. Senator Reed.

Senator REED. Well, thank you very much, Mr. Chairman. I was listening closely to the recollections of both you and the Ranking Member about September 2008 because I was also there. What I recall in the room was not so much scare tactics but palpable fear that we were on the cusp of a significant financial collapse, that the tools available had been exhausted, and that we needed to provide assistance, and that in the context of the legislative debate, which was a bipartisan debate and ultimately with bipartisan support, we crafted something that, as the Ranking Member pointed out, it was not the initial proposal of Secretary Paulson to acquire assets and securities in the marketplace but it gave Secretary Paulson the flexibility to make essentially equity injections. I think so far this has proven to at least stabilize the situation, and in fact, I would argue, has probably avoided a significant financial deterioration which would still be plaguing us.

And Mr. Barofsky, I am just going to ask, because you have done remarkably good work—and let me join my colleagues in saluting you as you leave. You have been not only thoughtful, but your independence and your integrity and your commitment has been so clear, indeed, inspiring.

But let me ask you, putting aside too-big-to-fail and all those discussions, if we had not acted decisively in September of 2008, where would we be today, basically? Do you have a sense of the magnitude that we were facing?

Mr. BAROFSKY. Senator, thank you for your comments earlier. I think I could best report on the extensive work we have done of interviewing all of the major participants, and I think there was universal agreement that we were on the brink of a cataclysmic failure and that this was a very significant crisis that we had not seen since the Great Depression and that there was certainly a sense of widespread panic among regulators and that the reaction was a kitchen sink response, not just with TARP, but with the FDIC's programs, the Federal Reserve's programs, the trillions and trillions of dollars that were thrown at the situation. And I think that accurately reflects the deep level of panic that was felt by the regulators and the market participants, as well, to the severity of the problem.

Senator REED. But having done all this work, that reaction was not irrational, given what they were seeing in the marketplace, given the contagion, given the fear. In fact, frankly, I think, particularly for Chairman Bernanke, his studies of the Great Depression and the lead-up to it, the very tentative response in the 1920s and 1930s to an evolving international crisis prompted him and others to say this is the only way we can do it, and he has been very clear about this, let us go all out, let us hit it hard, let us hit it fast.

Mr. BAROFSKY. No, and I think there is no doubt that financial crises are, in part, psychological, and that fear was universal and it was widely held. What specific—and one of the things I think the Congressional Oversight Panel really hits the nail right on the head is that while we do believe that TARP was a very important component of calming the markets, it is, of course, impossible to say which one of the myriad programs was responsible for helping calm the markets eventually——

Senator REED. Right.

Mr. BAROFSKY.——and which ones did not. But we believe, and we have long been an advocate for the position that the broad statement by Secretary Paulson, and then later in the spring an almost identical statement by Secretary Geithner that they would not let these large financial institutions fail and they had the TARP funds to back it up, while it certainly then caused a lot of the problems, Senator Shelby, that you were discussing about moral hazard and too-big-to-fail, it was an instrumental tool in calming the markets and avoiding that cataclysmic potential second Great Depression.

Senator REED. Thank you. I also have to salute Senator Kaufman for his service, both here in the Senate, for putting up with a lot of my bad jokes as we traveled around the world, and many other things, so thank you, Senator.

In the process of taking the proposal that Secretary Paulson and Chairman Bernanke offered a one-page sketchy kind of outline—we did some things that I think not only gave them the flexibility to respond, but there is also one critical aspect which is often overlooked. This is the inclusion of the warrants provision, which I insisted on being included with the support of my colleagues because I knew that if any Wall Street investment bank was going to do this, they would not only take preferred stock, but they would also insist on warrants, which we did. Those warrants to date, and for those who may not be familiar with this, it is essentially a right to buy their stock at a fixed price, and as they improved and the stock price went up, we got a second payback, which is about $8.6 billion, which might be seen as another dividend from the improving banks to the taxpayers. Can you comment on that, Secretary Massad?

Mr. MASSAD. Thank you, Senator, for the question, and thank you for your push for that provision. It was very, very important, and you are absolutely right on your figures and your analysis of it. We have today recovered about $9 billion from the warrants, because we had a recent repurchase this week. That is from about 15 or 20 auctions as well as about 45 repurchases, and we still have more positions that we will sell over time. So it was an excellent provision and I thank you for it.

Senator REED. Thank you.

Just to, if I may, Mr. Chairman, a quick and very brief comment from Senator Kaufman and Mr. Barofsky is that this issue of moral hazard is not unique to this time and this place in financial history. It seems to be any time a Government provides support—we do it through Federal Deposit Insurance. I know in the 1930s there was a great debate on this. Franklin Roosevelt did not like deposit insurance because it was a moral hazard, *et cetera.* But, it has proven to be effective.

And I think one of the reasons it has been effective, even though there is an issue of moral hazard, is it has been very well regulated, and the sense of Dodd-Frank, I hope, is that if we accurately and aggressively and with the resources regulate, understanding that moral hazard is implicit, we will do a lot to avoid a potential crisis, and Senator Kaufman, please respond just very briefly, because my time has expired.

Senator KAUFMAN. No, and I think it is really quite extraordinary. This panel that I am on has five members, two appointed by Republican members and three by Democrats. But there was a consensus, and this is a very difficult issue, it is a very political issue, but there was a solid consensus that the TARP with the other pieces that went through it stopped what could have been a very bad situation, number one.

And number two is that moral hazard was one of the decisions. When you sat there and made the decision whether you were going to go ahead with the TARP, you were faced with the fact of moral hazard. And I think the moral hazard part, you see it now in terms of what is going on with the rating agencies. If you are running an organization and you know that if there is a sine curve of this is positive and this is negative and you know you cut that negative section off, and you know that if you increase your risk, there is no price to be paid, then you can increase the risk because we know return is directly related to risk. The higher the risk, the higher the return. You just go for the moon with the understanding that if you fail, the taxpayers are there to bail you out.

So this is not some theoretical economic business school analysis. I think the real concern, as stated, is the rating agencies are now saying essentially they believe that there are firms who are too-big-to-fail, and very big firms that are too-big-to-fail.

Senator REED. Mr. Barofsky, please take this for the record, because my time expired. The Chairman has been very gracious. Thank you.

Chairman JOHNSON. Senator Moran.

Senator MORAN. Mr. Chairman, thank you very much.

Perhaps this is directed to Mr. Barofsky, but I am not certain. I am troubled by the long-time assertion that the success of TARP is determined by the return of taxpayer dollars as if that is the criteria by which we can judge success or failure. And I am troubled by that because I think it fails to take into account other consequences. Even if all the money is repaid to the Treasury, there were consequences of TARP not accounted for in that accounting. And I think of things in your testimony that the Ranking Member indicated about large institutions continuing to enjoy access to cheaper credit. There is a consequence to that. My small community banks in Kansas feel a consequence of that occurrence, particularly when you couple that with Dodd-Frank and increasing regulations. So larger institutions have cheaper access to credit and a better ability to spread the costs of additional regulation among larger economies of scale. My smaller banks are disadvantaged in both instances. As Congress responds by providing money to large institutions and increasing regulations on all institutions, there is a consequence, an economic consequence certainly in places like Kansas for our community banks.

So if the criteria is the money got repaid, I think we have failed to take into account that and many other consequences of this legislation. It also fails to take into account was there a better way to do it than what we did. Could there have been a greater return? So the fact that—and Mr. Reed talked about the warrants. I wonder—and I have heard several in your testimony talk about the—as compared to the credit union—I am sorry. Forgive me, to the credit unions—for the savings and loan bailout. That was the criteria in which we are judging success today, and the indication was, well, this is better than—we are going to lose less money than we did then.

But I wonder about Continental Illinois, for example. Was that not a better example where we were able to reap return and prohibit investors from getting a return as well?

One of the things that I think was a consequence of TARP is that those who invested in these institutions, they were held a lot less accountable for their investment than, for example, in Continental. And so my question is, I suppose, a broad one, but my assertion is that I am not satisfied when I hear that just because the money has been repaid this was a good idea.

Mr. BAROFSKY. Nor should you be, and I think that a tunnel vision focus on financial costs and a declaration of mission accomplished because of the return to profitability and strength of Wall Street ignores the important non-financial costs of TARP, which are just as important and may in time prove to be more important. So it includes, as you identified, Senator, the moral hazard and the legacy of too-big-to-fail that TARP has left. It includes the very real harm to Government credibility through mismanagement of this program. It includes the failure of TARP to meet its very important Main Street goals as well as Wall Street goals, including, as we have discussed earlier, the very important goal and very prominent reason why many Members of Congress voted for TARP—the goal of preserving homeownership.

So I think that you have good reason to say that this is not a simple black-and-white answer, did it work, did it not work, and that financial costs are the only determinant of its success. It is a much deeper issue.

Mr. KAUFMAN. The one thing to keep in mind is that while we talked about a $356 billion cost estimate, the original number in the legislation was $700 billion, and I will guarantee you that 80 percent of the news articles that talk about TARP talk about the $700 billion. I totally agree with what you said. I totally agree with what the member said, and I totally agree with the rest of the panel. Clearly, there are a lot of concerns, moral hazard being one of the really gigantic causes. But the thing that is amazing is, according to a recent Bloomberg poll, 60 percent of Americans think we lost it all. Sixty percent think we lost all $700 billion.

So I think spending a little bit of time saying, OK, we had a problem here, clearly this was all part of a big thing, clearly all the questions you raised are legitimate concerns. But let us start out with the fact that we did not lose $700 billion; it looks like it was $25 to $50 billion. Now, $25 to $50 billion is a lot of money. But, part of running a Government is the perception of the Government. You have a perception out there that the Government lost $700 billion on TARP, again, not talking about the Fed and all the other things the Ranking Member has raised and the Chair has raised.

But it actually turns out to be $25 to $50 billion. That is an important point to make, I think.

Senator MORAN. Senator, thank you. Is there any analysis by those of you who are doing oversight in regard to was there a better way to do it? Was there a greater opportunity for return as compared to the way that TARP was structured?

Mr. KAUFMAN. Well, we have got 30 reports you can take a look at, but the best thing is we have a final report in terms of lessons learned, and you can look through that.

Now, again, remember, we are all oversight so we do not write the rules. We start with the basic premise that Congress has passed a law and we have oversight on that law. But I think you would find, if you go back and read our reports and others, there is a rich area to ask: on a calm day, without the panic, without the concern that everyone has raised, could we have done this a little differently? And are there things we could have done as we went along? There is a lot of meat in those 30 reports.

Senator MORAN. I appreciate that only a former Senator would attribute the responsibility back to Congress.

[Laughter.]

Chairman JOHNSON. Senator Hagan.

Senator HAGAN. Thank you, Mr. Chairman, very much, and I want to welcome all of you here today and thank you for your testimony.

Senator Kaufman, it is certainly a pleasure to see you again. You were certainly instrumental during the debate of the Dodd-Frank bill, and you certainly added so much to the work that has taken place in that situation. We certainly do thank you for your oversight in this new position, also, and I am thrilled to hear you are going to be back at Duke University Law School doing your good work there. So it is great to see you again.

One of the things that you talked about in your testimony is the reference to the higher cost of funds for our small and community banks relative to the larger banks, and sort of what Senator Moran was talking about, too, is that the smaller community banks in North Carolina consistently are very concerned about, one, their capital requirements, the regulation, sort of their inability to do so much of the lending that they have done in the past, and it is so adversely affecting so many of the smaller communities where these banks have been the mainstay in those areas.

One of my concerns is what can we be doing in Congress to reverse this trend, and here I guess I am talking primarily about the higher cost of funds that you mentioned to ensure that we maintain a vibrant network of community banks in our Main Street communities.

Mr. KAUFMAN. I think you have just got to stay on the regulator and Dodd-Frank and make sure we do not have too-big-to-fail. I mean, it is very, very difficult to compete in a market if some of the people in the market have lower credit ratings, and if they know when they go into it they can compete in businesses. So really the key thing is we have got to get away from this too-big-to-fail. It is bad in so many different ways in terms of the concept. And we have done a lot, and there are a lot of things in Dodd-Frank, and a lot of things in the hands of the regulators. But, look at our local banks, small banks right now. It was really interesting being on the Panel and finding out how many small banks are now in commercial real estate. We have a real problem, the commercial real estate overhang over there on our small banks. Why are our small banks in commercial real estate? They are in commercial real estate because the big banks now come in and can do all the other services that they used to do—the checking accounts, all the rest of this stuff. They can come in there and do it at a much lower price than they can because of the advantages that they have. The small banks never want to get up and say, you know, the big banks really are not treating me as well as I might like to be treated, and they are causing me competitive problems, and they are keeping me in businesses that I do not want to be in. They kind of all hang together. But I think it is time for the small banks in candor to come out and point out what some of the problems there are when you have these major, major, major banks that feel like they are too-big-to-fail, and, therefore, they can get rates at a low rate. And I think it is up to Congress and I think it is up the Treasury and I think it is up to the other regulators to make sure that the Dodd-Frank provisions in there—to make sure that we do not have too-big-to-fail, you know, that the capital requirements and the rest of it that we have to do so we do not have too-big-to-fail. Because how are small and medium banks going to survive when they have got these giants coming to town with lower interest rates. It is very, very difficult to have a positive picture unless you go into things like commercial real estate, and now we see what happens. They are so heavily into commercial real estate that it makes it tough for them to make money, and they are in danger and they are failing at an incredible rate of speed.

Mr. MASSAD. If I may, yes, thank you, Senator, if I may add to that. We agree very strongly that we have to have a thriving community bank, small bank industry in this country. That is why when the Obama administration took office, we did not provide any additional funds to the largest banks in the country. We provided funds to about 400 very small banks. Most of the funds under the Republican administration were provided to the large banks.

Now, I agree with the decisions they made. They were necessary to prevent the collapse of our system. But we have tried to work with the smaller banks.

I also would point out that while we have had some weakness in that sector, those banks are getting stronger, and actually those banks that took the TARP money overall are in a much better place than the industry average.

Finally, I would agree with Senator Kaufman that the task now is to implement the tools under Dodd-Frank. You know, you have to distinguish between what you have to do in a crisis to put the fire out and then what you do to look at what were the causes of the fire, how do we prevent this from happening again. And that is the phase now that we are in with Dodd-Frank.

Senator HAGAN. Well, it appears that some of the smaller banks are having trouble paying some of the TARP money back. Are we setting them up for problems by continuing to ask them to pay at a higher rate?

Mr. MASSAD. That is a very good question, Senator. First of all, they are not obligated to pay it, and they have to have the approval of their regulators in order to pay it. And as a result, many of the regulations have said you should not pay this, you need to conserve your capital, and that is fine with us.

I would point out again, though, that while we do have a number of banks who have not been paying the dividend, when we looked at the rate at which banks that are in the program are paying dividends on preferred stock versus those outside of the program, to the extent there is data—and there is not data for all the banks—what we found was that 11 percent of the banks in the program were not able to pay the dividends. The rate among those banks outside of the program who were not paying dividends on preferred stock was 43 percent.

Senator HAGAN. I wanted to turn to the HAMP program, and I know several of you all have talked about how it has not been operating the way you would have liked it to, and I would just like, Mr. Barofsky, could you speak a little bit on what you would see changes going forward in that program to certainly help the homeowner at this point in time?

Mr. BAROFSKY. Well, again, I think the important thing is there has to be initially an acknowledgment from Treasury that this program is failing and the cessation of continuing to defend the status quo.

Senator HAGAN. Well, aside from that, going forward what can we be doing?

Mr. BAROFSKY. Well, again, as an example, as I mentioned before to the Chairman, I would say you start with reassessing the incentive structure and the penalty structure. So if the current system is not working, as the Secretary has acknowledged, revisit that structure with both penalties as well as taking a look at the incentive structure.

We have made other recommendations as well as fixing the program, recommendations regarding principal reduction and the approach to principal reduction, which appears to not be working; increasing transparency. There are a number of things—we have a number of recommendations. GAO, the Congressional Oversight Panel, there is a whole host of recommendations that could help improve this program, but it starts with an acknowledgment that there is a problem. And as long as there is this continued defense of the status quo, it is not going to happen.

Senator HAGAN. Senator Kaufman, do you have some thoughts on that?

Mr. KAUFMAN. Obviously the program is over, you cannot do things, but I think you have got the reality of the situation. It started out with the idea that borrowers and lenders, like it used to be, sit across the table from each other and modify a loan. That is pretty simple. Now you have got the servicers in there, and one of the things that is very difficult to deal with and it is very difficult for Treasury to deal with—but we have to deal with it—and that is, there are two really big elephants in the room. One is some servicers get higher incentives by going to foreclosure. And, remember, these servicers are not—some people have this view that servicers are these third parties or whatever else. The servicers are the big banks. They are the servicers. So the first thing is you have a conflict of interest. How do you get a bank that really is going to make more money doing a foreclosure not to do foreclosures?

The second big one, which the Treasury addressed in, I think it was, April of 2009, is the second lien. So think about it. If you are a first servicer on a bank and you have a second lien on a mortgage, and the first mortgage is with someone else, do you want to modify that first mortgage? Because when you modify that first mortgage, your second lien goes to zero or very close to zero.

So those are two gigantic conflicts that have got to be overcome if you are going to deal with the program, and Treasury has a second lien modification program.

And the third piece, of course, is the whole thing was designed for the subprime problem. In fact, really it became quickly a prime unemployed problem. And Treasury also has a program for unemployed.

So I think, you know, it is trying to catch up with all the different things, and I think it is pretty well identified, and we have pretty well identified it. We have had four reports on HAMP and one report just on the irregularities. We have identified what the changes are. But it has to be a program that recognizes the realities of what is out there.

Mr. MASSAD. Thank you, Senator. First of all, I think we have implemented most of the specific suggestions that have been made by the oversight bodies with respect to the program. As far as the basic structure, which Mr. Barofsky has alluded to, that is determined by the law and the powers that we had. It had to be a voluntary program.

I do not think it is a matter of acknowledging that it is failing. I do not consider the fact that we have gotten 600,000 people into permanent modifications or the fact that we have helped another 1.4 million at least get some breathing room through a temporary modification, many of whom then went on to get other forms of modifications outside of our program—very few went to foreclosure—or the fact that this program has resulted in significant changes in the industry is a failure. And since he and I testified before the House Oversight Committee, we have gotten in about another 40,000 families. In the time that this hearing is running, we will have a couple hundred more.

Now, that is not enough. We need to do more. One of the things we have done in response to the Congressional Oversight Panel's suggestions was we did implement programs that addressed unemployment and falling house prices, negative equity. In particular, we set up the hardest-hit program where we are sending money to a number of States hardest hit, including North Carolina. And those programs take time to ramp up, but, again, I think the important thing is to keep at it. This is, again, a crisis that took a long time to develop, so it is not going to be fixed overnight.

Chairman JOHNSON. The Senator's time has expired.

Mr. Barofsky, can you elaborate about the HAMP program and what you advise us to do with the penalties?

Mr. BAROFSKY. Sure, and I think the numbers just presented by Mr. Massad are potentially misleading, to use no better word. There may have been 40,000 initial permanent modifications, but how many—is that really a net number? I mean, how many of those ongoing permanent modifications have dropped out in the period since we last testified? To suggest that 1.4 million people have been assisted by this program frankly demeans the real harm that many of those people who got failed trial modifications have suffered. We have documented it, and it has been documented time and time again.

Chairman JOHNSON. But can you come up with some examples of penalties?

Mr. BAROFSKY. Absolutely. I think that one place where we can start is by Treasury living up to its commitment that it made in late 2009 about imposing financial penalties by withholding payments to mortgage servicers under the terms of their agreement. This is what they said in late 2009:

> Recently Treasury has been saying, well, we do not have that ability legally under the contracts that we negotiated with the servicers. We did not give ourselves the ability to impose financial penalties for failures in conduct.

—conduct that they have described as being abysmal.

So we sent a letter, and we asked them to detail to us the changes in their legal position. So far they have ignored that. But I think going back to the agreements and trying to withhold payments and impose some financial penalty, that would be the easiest thing to do to work within the contracts. And, frankly, if it is, as they suggest, ambiguous, try it. Let us go to court. Let us have servicers sue Treasury under the idea that they are allowed to willfully violate the terms of their agreement with no consequences.

So I think that is a good starting point. I think that here in Congress, as far as financial penalties, encouraging—and if Mr. Massad believes that he does not have the necessary tools under these agreements, he should tell you what tools he needs in order to compel servicers to abide by the terms of their agreement. If the complaint is that Congress has not given them the tool, well, tell them what tools that they—tell you what tools they need so that they can have those tools and bring about servicer accountability.

Chairman JOHNSON. Mr. Massad?

Mr. MASSAD. I am happy to respond. Thank you, Senator.

Let me just say there is always more that can be done with respect to compliance. This is an industry that was not working. Particularly it was not equipped to deal with this crisis.

Number two, we have not changed our legal position. We have the ability to withhold payments. What we have always said and what is the law is we cannot impose fines and penalties in the manner a regulator would for violations of the law.

Number three, our compliance efforts have been extremely aggressive. We have over 200 people working on compliance. We are in the servicers' shops all the time. Frankly, the things we have made a lot of them do, they would have preferred to write a check. We have made, for example, servicers go back and solicit 150,000 people—one servicer in particular solicit 150,000 people that they had overlooked. We made them go back, not just do telephone calls and letters but door knocking. We made them go back and reevaluate people that they wrongly evaluate for HAMP mods.

Is there more we can do? Yes. I think you will see us withhold more payments. But what we were working on initially was getting the servicers' systems in a place where they could implement this program.

Chairman JOHNSON. Senator Menendez.

Senator MENENDEZ. Well, thank you, Mr. Chairman. Sorry, I had another hearing, but I have been reading the testimony in advance, so I thank you all for your testimony.

Let me start off with a question that I am happy to have any one of you answer, and I am thrilled to see my former colleague here sitting at the table. Now I get to ask you all those questions that you would not answer for me when you were on the other side here. No, I am just kidding.

If we did not do TARP, as some suggested we should not have, what would have been the consequences?

Mr. MASSAD. I am happy to answer. I think we would have faced the very real risk of a Great Depression, as has been noted by many economists and others. It was not just TARP. It was all the Federal Government interventions. It was a broad-based action, and the keys to it were it was coordinated, it was powerful, and it was swift.

I think all the oversight agencies have recognized that, and, you know, I was chatting the other day with Elizabeth Warren, who obviously had plenty of criticism for how we did things, but she put it rather simply. She said, "Well, it is obvious. If we had not done these things, we would have been back in the Stone Age."

Mr. KAUFMAN. The Congressional Oversight Panel never came up with an answer specifically, but what they did say and what is in an op-ed today—and I think Neil Barofsky had the perfect metaphor, and that is, when you were faced with a situation, they threw everything but the kitchen sink at it, and I think the kitchen sink, too. I think trying to find out, you know, whether TARP specifically stopped terrible things, go back to the Stone Age, I believe that, and I believe that this was the kind of financial crisis that would have taken up back to "Grapes of Wrath," at least, if not the Stone Age.

And so, you know, the Panel agreed, which is a bipartisan panel, that TARP in conjunction with a bunch of other things that were done—by the Fed, by FDIC, by everybody else—really did stop a panic and keep us from a complete, absolute financial meltdown.

Clearly, the Panel also points out a number of negative things we have talked at length today and we should talk about at length and even more length and even more length about the moral hazard with the Government getting involved in this and the fact that—I think it is not just a perception. The reality is that Wall Street came out a lot better than Main Street in terms of the program. But in terms of the Panel felt as a group of things that the Federal Government did at that time helped us avoid a major problem.

Senator MENENDEZ. I wonder if it is not moral hazard to allow a nation to go into a depression?

Mr. KAUFMAN. Absolutely. I was on a show today, and they asked me about what lessons were learned, and we have got a great report we just came out with that I recommend to everybody. It is over 200 pages, and we have lessons learned in each section. You know the one lesson I have learned from this, Senator? Prevention. Everybody can sit here and we can talk about if we had done this or we had done that, or it worked here, we shot this, or who did that or how did we do that, and the rest of that stuff, and I will sit right with them on the panel and discuss what we could have done. But when you get faced with the ultimate Hobson's Choice, which is the moral hazard of putting people back in the street, losing their homes on a scale like the Great Depression, and the moral hazard of creating institutions too-big-to-fail, there is no win in that one. What you have got to do is you have to make sure you just never have to face that again.

Senator MENENDEZ. I raise those questions because when I go back home to New Jersey, I often have average citizens stop me and say, "Senator, I do not get it. When I make a mistake, I have to pay for my mistakes. And when they make a mistake"—meaning these financial institutions—"I have to pay for their mistakes." And explaining systemic risks and the consequences to their savings, their livelihood, and their opportunities is a tough proposition. But that is the essence of what we face, because I do not—I am not thrilled with TARP as it was both devised and executed. But by the same token, having listened to Ben Bernanke in 2008 coming to Members of this Committee and members of the leadership and largely describe the series of events that were unfolding that would have had a series of financial institutions collapse, and if they collapsed, create systemic risk to the entire country's economy. And I will never forget the answer to the question.

> Well, surely you must have enough tools at the Federal Reserve to get us through this period of time so we can think more proactively about how we respond and how we do it.

And the answer: "If you do not act in the next 2 weeks, we will have a global financial meltdown." And basically the response to that, "That would mean a new depression." And in essence the answer to that was, "Yes, if we allow it to happen."

So I think, you know, back home in New Jersey and across the country, as we talk about an economy that is coming out of a deep recession, we were really on the verge of a new depression. And had market forces just been allowed to act on their own without any governmental intervention, I think we would be—not because of any of my expertise but Ben Bernanke, while, you know, I may not always agree with him, his expertise is in Depression Era economics, how this country got into the last depression, what worked for Roosevelt to get out of it. He is not a politician. He is an academician. And so I think it had some weight to it, and I think that sometimes we need a little bit of a sobering understanding of where we started, what we had to face, the timeframe in which we had to face it in order to understand where we have been and where we have come from.

Now, that does not mean there are not a series of things that I hope we have learned that we can prevent, as Senator Kaufman suggests, for the future but also understand that when we need to act, how we need to do it in a more effective and efficient way.

But I just wanted to take this opportunity to just put this in the right frame because I think it is very easy, people gloss over that moment in history, and it was a tipping point in terms of how we responded to what would have happened to this country.

Thank you, Mr. Chairman, for the opportunity.

Chairman JOHNSON. Senator Shelby?

Senator SHELBY. Mr. McCool, if you would, walk us back through what happened at AIG, what we got in—what we did to get into it, where we are today. You alluded to it earlier in your testimony, and——

Mr. MCCOOL. Yes. Yes, Senator.

Senator SHELBY.——because we hear all kind of reports that everything is over with, everything is great. I do not believe that is true, but go ahead.

Mr. MCCOOL. Well, I mean, what I alluded to in my testimony is that, at least in the recent past with the recapitalization program that has been announced, there is at least some chance of us exiting AIG, and we will see whether we——

Senator SHELBY. How much money have we put into AIG?

Mr. MCCOOL. Well, umm——

Senator SHELBY. Directly and indirectly, roughly.

Mr. MCCOOL. I think it was as high as $150 billion at one point. There was a——

Senator SHELBY. Have they paid that back yet?

Mr. MCCOOL. They paid a fair amount of it back.

Senator SHELBY. What is a fair amount?

Mr. MCCOOL. Well, as I said, I think we are down to about $96 billion——

Senator SHELBY. So they paid——

Mr. MCCOOL. Something like $50 or $60 billion, primarily by paying back——

Senator SHELBY. A little over a third, they have paid back.

Mr. MCCOOL. Yes, by paying back——

Senator SHELBY. So they owe about two-thirds, more or less?

Mr. MCCOOL. More or less. More or less.

Senator SHELBY. So they still owe a substantial amount of money, nearly $100 billion.

Mr. MCCOOL. If you include the assets in the Maiden Lanes——

Senator SHELBY. Sure.

Mr. MCCOOL.——as well as the money——

Senator SHELBY. OK. Tell us where we are today.

Mr. MCCOOL. Well, I am just saying that the key is going to be, since the Treasury owns 92 percent of the common stock, what kind of a price they are going to be able to get as they sell that stock over time——

Senator SHELBY. That is a lot of money, is it not?

Mr. MCCOOL. It is a lot of money, and there are a lot of questions about just how deep the market is going to be and things like that. I mean, we are actually doing some work to look at that, but that is an ongoing issue for the future——

Senator SHELBY. To recoup $90-something-billion in a sell, you are going to have to have a pretty good stock price there, are you not?

Mr. MCCOOL. Well, no, I mean, it is not $96 billion for equity. There is about $25 billion of that that is financing for the troubled assets——

Senator SHELBY. OK.

Mr. McCool.——that the Fed has put in the Maiden Lanes. But there is about $60 billion worth——

Senator Shelby. Sixty.

Mr. McCool.——of equity that they have to sell.

Senator Shelby. Still, you are going to have to have a pretty good stock price.

Mr. McCool. Exactly. Exactly.

Senator Shelby. And when do you think that might happen, if it will?

Mr. McCool. Well, I think they are going to be starting to sell, or at least they cannot start to sell until, is it May, I think, Tim? Tim can actually——

Mr. Massad. Happy to respond. Today, there is the following outstanding. Under TARP, there is about $60 billion, which is represented by common stock and preferred.

Senator Shelby. OK.

Mr. Massad. The preferred is about $10 billion and it is secured by assets that exceed that value, so we fully expect that we will——

Senator Shelby. Is that all part of that $60 billion?

Mr. Massad. That is part of that 60.

Senator Shelby. All right.

Mr. Massad. And then the common, about $50 billion or so today——

Senator Shelby. OK.

Mr. Massad.——and I am including all of the AIG shares.

Senator Shelby. Sure.

Mr. Massad. There is a little bit of technicality there, but today, the stock price is above the value of our investment.

In addition to that, there is about $32 billion that Mr. McCool referred to of the Maiden Lane vehicles. Those are technically not obligations of AIG today. Those are special purpose vehicles. They are secured by assets that exceed the value of the Federal Reserve's loans today. So they are in the money, if you will. AIG has also offered to take the Fed out of one of those vehicles.

So as of today, current market prices, we expect to recover the entire investment. Now, that represents—sorry.

Senator Shelby. When will this happen, generally? When do you expect that to happen?

Mr. Massad. It will take some time——

Senator Shelby. Two years, five?

Mr. Massad. We do not have a specific time table, but I would think a couple of years.

Senator Shelby. Mr. McCool, it is my understanding that on several occasions, the GAO has asked Treasury to release their internal projections for the number of mortgages they expect to be successfully modified under the TARP Mortgage Modification Programs. Have you received all the internal projections from Treasury that you requested?

Mr. McCool. Yes, we have. [Mr. McCool subsequently expanded on his response.]

> Although it is true that Treasury has provided GAO the internal projections used to establish funding caps for servicers participating in the Making Home Affordable Program, these internal projections are not used as goals

or benchmarks to hold servicers accountable for their performance. According to Treasury, these projections are not the best measures for holding servicers accountable. As we reported in July 2009, June 2010, and March 2011, Treasury must establish specific and relevant performance measures that will enable it to evaluate HAMP and its other TARP-funded housing programs success against stated goals in order to hold itself and servicers accountable. Treasury does measure performance of servicers participating in the first lien program. It measures conversion rates and redefault rates, for example. But it has not established goals to indicate what would be acceptable conversion and redefault rates. Further, as we reported last June, Treasury has neither established performance measures for the second-lien, foreclosure alternative, and principal reduction programs nor established benchmarks or goals, including benchmarks or goals for the number of homeowners these programs are expected to help. We continue to believe that it is important for Treasury to develop benchmarks for performance measures under the first-lien modification program, and develop measures and benchmarks for other HAMP-funded homeowner assistance programs, as we recommended in June 2010.

Senator SHELBY. You have. And Mr. Massad, I assume in his answer that you provided that information to them.

Mr. MASSAD. Yes.

Senator SHELBY. How can we measure the success of the Mortgage Modification Program now? How can we measure it, Mr. McCool?

Mr. MCCOOL. Well, again, I think that, as some of us have been saying, I think we have not seen benchmarks for some of the programs, and that is one of the things I think we would like to see. The fact that they have given us the analysis they have done does not mean that they have necessarily done all the analysis that we would like them to do. And so the question, I think, is, you know, to try to come up with benchmarks for the programs in terms of how many homeowners you think you are going to be able to help or not going forward, and again, releasing that to the public so the public can actually be able to hold them accountable.

Senator SHELBY. Well, you have to do the metrics. You have got to measure this, have you not?

Mr. MCCOOL. Mm-hmm.

Senator SHELBY. And you are in the process of doing that?

Mr. MCCOOL. We are not currently in the process of doing that, no.

Senator SHELBY. When will you do that?

Mr. MCCOOL. Well, I do not know that we had plans to do that, but maybe we will look forward to doing that in the future. But again——

Senator SHELBY. And what does the future mean? Do you mean——

Mr. MCCOOL. Well, we have ongoing work on this program——

Senator SHELBY. OK.

Mr. MCCOOL. Until the program goes away, we are not going away.

Senator SHELBY. OK. All of you have made recommendations to the Administration during the course of your oversight of TARP. Mr. Barofsky, how many recommendations have you made to the Administration regarding TARP, or let us say the top three. What would they be?

Mr. BAROFSKY. Those that have not yet been implemented, are you referring to, Senator?

Senator SHELBY. Yes.

Mr. BAROFSKY. Well——

Senator SHELBY. Are not implemented yet.

Mr. BAROFSKY. Not implemented. I would go back to some of the ones we were talking about today. What is ongoing today and what is the biggest failure so far right now as we are speaking is related to HAMP. So I would go back to our HAMP modifications, publishing realistic estimates, stop accepting the status quo, fix the incentive structure, impose financial claw-backs or penalties. If they have the power to do so, why on earth have they not done so yet given the abysmal performance——

Senator SHELBY. Have you heard from Treasury, why they have not done that yet?

Mr. BAROFSKY. They have several explanations, but they have not implemented these recommendations.

Senator SHELBY. Mr. Massad, do you want to respond to that? Why have you not worked on these recommendations?

Mr. MASSAD. Certainly. First of all, I think we have implemented their recommendations with respect to the structure of the program, by and large.

Number two, with respect to the compliance issue, we have withheld payments in some cases. All we can do is withhold the payments that the servicers are entitled to when they actually enter into the permanent modifications. Our problem—the problem for the first year and a half was the servicers were not getting the permanent modifications done, so we were in their shops forcing them to take corrective action because we felt that was a better result. I think you will see us impose more financial withholding where we feel it is appropriate in the future.

Senator SHELBY. OK. Thank you, Mr. Chairman.

Chairman JOHNSON. One more quick question. Senator Kaufman, before HAMP, when servicers were left to their own devices, what kind of modifications were servicers offering to struggling homeowners?

Senator KAUFMAN. That is out of our jurisdiction. What they were doing outside of HAMP is something that we have not looked into. I know that this is a systemic problem, a systemic problem regarding the servicers due to the fact that the servicers have these incredible conflicts of interest. It is true whether they are in the HAMP program or any other program.

If you are a servicer and you also hold a lot of mortgages, like the big servicers do, there are conflicts. The main two conflicts we talked about were: one, they may make more money out of foreclosure than any kind of incentive that we had offered them. And two is they are very concerned about modifying a primary mortgage where they hold a second lien.

Chairman JOHNSON. Mr. Massad?

Mr. MASSAD. Thank you, Senator. That is a very good question and a very important issue. Prior to the launch of the HAMP program, there were very, very few modifications that were occurring, and this was a crisis that had been acute for 2 years and very little had been done. The few modifications that were happening generally did not reduce people's payments.

One of the things HAMP accomplished was it set standards as to how to go about modifying mortgages. It set what we called an affordability standard as well as a calculation of where it makes sense to modify the mortgage. We do not try to prevent every foreclosure. We do not pay for every modification. We do it where, based on an economic analysis, it makes sense to do as the alternative to foreclosure.

What we have seen since is the servicers have now done a lot of what we call proprietary modifications outside of the HAMP program using many of our standards. So that volume of modifications has increased dramatically as a result of this program.

Senator KAUFMAN. Mr. Chairman, can I say one other thing?

Chairman JOHNSON. Yes.

Senator KAUFMAN. It has to do with potential Congressional action, which I did not realize when I was here. I voted for cram down. But I was talking to someone who was in merger and acquisitions and he said to me, I do not understand why there is a problem here. He said, if this was a commercial deal, the lender would reduce the price of the asset, in this place the house, because they know as soon as they go into bankruptcy, the bankruptcy judge is going to lower their price. The reason why the lenders do not reduce the price and come in for a loan modification is because they know that if they go into bankruptcy, the bankruptcy judge cannot put the real asset.

One of the real problems we have, systemic problems we have in getting lenders to actually go ahead with this is they know they do not have to make a deal. If it was a commercial loan, they would deal because they know the first thing the bankruptcy judge would do is say, hey, what is the real value of your asset, and that is what the value it is. So it is just something for you to think about in terms of legislation.

I know cram down is a very political issue and that there are a lot of other things. But the biggest difference between commercial and residential, and one of the biggest reasons why we have a problem reaching a modification with a lender is because they know when they go into bankruptcy, the house price cannot be reduced. Thank you.

Chairman JOHNSON. Well, there are many lessons we can take from TARP, but one of the key ones is that oversight, when done aggressively and responsibly, improves outcomes.

As Chairman, I intend to follow that example and push for tough oversight in all that we do, whether it is Dodd-Frank implementation, monitoring the foreclosure crisis, housing finance reform, and other key issues, so that we can better protect consumers, investors, and taxpayers while promoting economic growth.

Thanks again to my colleagues and our panelists for being here today.

This hearing is adjourned.

[Whereupon, at 11:39 a.m., the hearing was adjourned.]

[Prepared statements, responses to written questions, and additional material supplied for the record follow:]

PREPARED STATEMENT OF CHAIRMAN JOHNSON

I'd like to call to order this Senate Banking Committee hearing entitled: "TARP Oversight: Evaluating Returns on Taxpayer Investments."

Whenever the topic of TARP comes up, it's hard not to think back to the intensity and dramatic moments of the financial panic nearly 2½ years ago. Treasury Secretary Paulson and the Federal Reserve were quickly running out of options, and legislators were faced with the difficult choice of whether to provide hundreds of billions of taxpayer dollars at Wall Street or possibly see the economy slide deeper into chaos.

I did not support the legislation because I was concerned there were too few strings attached, and it sent a message that the Government would always step in and save large financial institutions from their own bad decisions. However, as the Congressional Oversight Panel put it in their final report released yesterday: "It is now clear that, although America has endured a wrenching recession, it has not experienced a second Great Depression. The TARP does not deserve full credit for this outcome, but it provided critical support to markets at a moment of profound uncertainty."

COP (pronounced "cop") made another point in its report that bears repeating: "TARP has become one of the most thoroughly scrutinized Government programs in U.S. history . . . [and] in the midst of a crisis, perfect solutions do not exist; every possible action carries regrettable consequences, and even the best decisions will be subject to critiques and second-guessing." That said, the outcome of TARP was much more successful than many ever anticipated, averting a depression and with other emergency policies, saving 8.5 million jobs.

I strongly believe that tough oversight was vital to TARP's success. Early estimates showed the program costing taxpayers over $350 billion. Now, thanks to effective oversight, the price tag has plummeted to $25 billion as estimated by the non-partisan Congressional Budget Office. That's one-sixth the cost of the Savings & Loan crisis in the 80s and 90s. Taxpayers clearly win when oversight works.

Today, some still criticize HAMP for its inability to help more homeowners. While I welcome a discussion of how to improve the program, simply ending foreclosure assistance won't make the problem go away and would limit the sustainable options for struggling homeowners who could save their homes. Over 530,000 families have been helped through HAMP, which is not an insignificant number. Their neighbors have been helped as well, by preventing their home values from declining due to a nearby foreclosure. HAMP also led the way on loan modifications that work, pushing the industry to follow suit and standardizing the process. The American people deserve better than the "repeal everything but the kitchen sink" approach to governance the Republicans are offering.

I look forward to learning more from our witnesses about what worked in TARP, what did not work, and why. Going forward, I believe these lessons prove the importance of tough oversight in implementing the Dodd-Frank Act. I also believe it can be instructive as we continue to work through the foreclosure crisis and as we consider reforms to the mortgage finance system.

PREPARED STATEMENT OF TED KAUFMAN

FORMER SENATOR FROM THE STATE OF DELAWARE AND
CHAIRMAN, CONGRESSIONAL OVERSIGHT COMMITTEE

MAY 5, 2011

Thank you, Chairman Johnson, Ranking Member Shelby, and Members of the Committee for inviting me to testify today. It is a pleasure to see so many former colleagues, and it is a privilege to offer my perspective on the Troubled Asset Relief Program (TARP).

I am the chairman of the Congressional Oversight Panel, which was established by the Emergency Economic Stabilization Act of 2008 (EESA). The Panel is one of three organizations, along with the Government Accountability Office and the Special Inspector General for TARP, charged by law with overseeing the TARP. In particular, Congress instructed the Panel to 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 acted in the best interests of the American people. The Panel has pursued these goals through 30 oversight reports, including our March 2011 report, which we issued to Congress just yesterday.

Our former chair last testified in front of this committee in September 2009. Since then, much has changed in the financial markets and in TARP itself. The Panel has issued nearly 20 reports in the ensuing months, including four reports on Treasury's foreclosure mitigation efforts. Additionally, the Panel has looked at issues such as TARP support for the domestic automotive industry, the rescue of AIG, commercial real estate, small banks and small business lending, Government contracting, and executive compensation restrictions under the TARP.

Treasury's authority under the TARP expired on October 3, 2010. By statute, the Panel terminates 6 months after the expiration of the TARP. Thus, the Panel's most recent report concludes our oversight work.

I believe that, in order to evaluate the TARP's impact, one must first recall the extreme fear and uncertainty that infected the financial system in late 2008. The stock market had endured triple-digit swings. Major financial institutions, including Bear Stearns, Fannie Mae, Freddie Mac, and Lehman Brothers, had collapsed, sowing panic throughout the financial markets. The economy was hemorrhaging jobs, and foreclosures were escalating with no end in sight. Federal Reserve Chairman Ben Bernanke has said that the Nation was on course for "a cataclysm that could have rivaled or surpassed the Great Depression."

It was in this climate that the Congressional Oversight Panel began its oversight work. The unprecedented financial crisis and the corresponding Government intervention left many questions. What steps would be taken to ensure accountability from TARP recipients? How would Treasury make certain that its actions were transparent and that the taxpayer would be fairly compensated for the risk they were taking? What steps would Treasury take to stem the tide of foreclosures that was having a debilitating effect on American families and neighborhoods? These questions have informed all of our work.

It is now clear that, although America has endured a wrenching recession, it has not experienced a second Great Depression. The TARP does not deserve full credit for this outcome, but it did provide critical support to markets at a moment of profound uncertainty. It achieved this effect in part by providing capital to banks but, more significantly, by demonstrating that the United States would take any action necessary to prevent the collapse of its financial system.

The Cost of the TARP. The Congressional Budget Office (CBO) today estimates that the TARP will cost taxpayers $25 billion—an enormous sum, but vastly less than the $356 billion that CBO initially estimated. Although this much-reduced cost estimate is encouraging, it does not necessarily validate Treasury's administration of the TARP. Treasury deserves credit for lowering costs through its diligent management of TARP assets and, in particular, its careful restructuring of AIG, Chrysler, and GM. However, a separate reason for the TARP's falling cost is that Treasury's foreclosure prevention programs, which could have cost $50 billion, have largely failed to get off the ground. Viewed from this perspective, the TARP will cost less than expected in part because it will accomplish far less than envisioned for American homeowners. In addition, non-TARP Government programs, including efforts by the FDIC and the Federal Reserve, have shifted some of the costs of the financial rescue away from the TARP's balance sheet. Further, accounting for the TARP from today's vantage point—at a time when the financial system has made great strides toward recovery—obscures the risk that existed in the depths of the financial crisis. At one point, the Federal Government guaranteed or insured $4.4 trillion in face value of financial assets. If the financial system had suffered another shock on the road to recovery, taxpayers would have faced staggering losses.

"Too Big To Fail." The Panel has always emphasized that the TARP's cost cannot be measured merely in dollars. Other costs include its distortion of the financial marketplace through its implicit guarantee of "too-big-to-fail" banks. At the height of the financial crisis, 18 very large financial institutions received $208.6 billion in TARP funding almost overnight, in many cases without having to apply for funding or to demonstrate an ability to repay taxpayers. In light of these events, it is not surprising that markets have assumed that "too-big-to-fail" banks are safer than their "small enough to fail" counterparts. Credit rating agencies continue to adjust the credit ratings of very large banks to reflect their implicit Government guarantee. Smaller banks receive no such adjustment, and as a result, they pay more to borrow relative to very large banks.

By protecting very large banks from insolvency and collapse, the TARP also created moral hazard: very large financial institutions may now rationally decide to take inflated risks because they expect that if their gamble fails, taxpayers will bear the loss. These inflated risks may create even greater systemic risk and increase the likelihood of future crises and bailouts.

In addition, Treasury's intervention in the automotive industry, rescuing companies that were not banks and were not particularly interconnected within the financial system, extended the "too-big-to-fail" guarantee and its associated moral hazard to non-financial firms. The implication was that any company in America can receive a Government backstop, so long as its collapse would cost enough jobs or deal enough economic damage.

Stigma. As the TARP evolved, Treasury found its options increasingly constrained by public anger about the program. The TARP is now widely perceived as having restored stability to the financial sector by bailing out Wall Street banks and domestic automotive manufacturers while doing little for the 13.9 million workers who are unemployed, the 2.4 million homeowners who are at immediate risk of foreclosure, or the countless families otherwise struggling to make ends meet. As a result of this perception, the TARP is now burdened by a public "stigma."

Because the TARP was designed for an inherently unpopular purpose—rescuing Wall Street banks from the consequences of their own actions—stigmatization was likely inevitable. Treasury's implementation of the program has, however, made this stigma worse. For example, many senior managers of TARP-recipient banks maintained their jobs and their high salaries, and although shareholders suffered dilution of their stock, they were not wiped out. To the public, this may appear to be evidence that Wall Street banks and bankers can retain their profits in boom years but shift their losses to taxpayers during a bust—an arrangement that undermines the market discipline necessary to a free economy.

Transparency, Data Collection, and Accountability. Beginning with its very first report, the Panel has expressed concerns about the lack of transparency in the TARP. In perhaps the most profound violation of the principle of transparency, Treasury decided in the TARP's earliest days to push tens of billions of dollars out the door to very large financial institutions without requiring banks to reveal how the money was used. As a result, the public will never know to what purpose its money was put.

In some cases, public understanding of the TARP has suffered not because Treasury refused to reveal useful information but because relevant data were never collected in the first place. Without adequate data collection, Treasury has flown blind; it has lacked the information needed to spot trends, determine which programs are succeeding and which are failing, and make necessary changes. A related concern is Treasury's failure to articulate clear goals for many of its TARP programs or to update its goals as programs have evolved. For example, when the Home Affordable Modification Program was announced in early 2009, the Administration said that it would prevent three to four million foreclosures. The program now appears on track to help only 700,000 to 800,000 homeowners, yet Treasury has never formally announced a new target. Absent meaningful goals, the public has no meaningful way to hold Treasury accountable, and Treasury has no clear target to strive toward in its own deliberations.

On the Role of Oversight. Between the efforts of the Congressional Oversight Panel, SIGTARP, the GAO, the U.S. Congress, and many journalists and private citizens, the TARP has become one of the most thoroughly scrutinized Government programs in U.S. history. Such close scrutiny inevitably begets criticism, and in the case of the TARP—a program born out of ugly necessity—the criticism was always likely to be harsh. After all, in the midst of a crisis, perfect solutions do not exist; every possible action carries regrettable consequences, and even the best decisions will be subject to critiques and second-guessing.

Yet there can be no question that oversight has improved the TARP and increased taxpayer returns. For example, in July 2009, the Panel reported that Treasury's method for selling stock options gained through the CPP appeared to be recovering only 66 percent of the warrants' estimated worth. Due in part to pressure generated by the Panel's work, Treasury changed its approach, and subsequent sales recovered 103 cents on the dollar, contributing to $8.6 billion in returns to taxpayers. Other substantial improvements in the TARP—such as Treasury's heightened focus on the threat to HAMP posed by second liens, the increased transparency of the TARP contracting process, and the greater disclosure of TARP-related data—are all partly the result of pressure exerted by the Panel and other oversight bodies.

Thus, an enduring lesson of the TARP is that extraordinary Government programs can benefit from, and indeed may require, extraordinary oversight. This lesson remains relevant in the context of the Government's extraordinary actions in the 2008 financial crisis: The public will continue to benefit from intensive, coordinated efforts by public and private organizations to oversee Treasury, the FDIC, the Federal Reserve, and other Government actors. Careful, skeptical review of the Government's actions and their consequences—even when this review is uncomfortable—is an indispensable step toward preserving the public trust and ensuring the effective use of taxpayer money.

Before I close, I would like to take a moment to acknowledge my fellow Panel members. We were three Democrats and two Republicans, often coming from very different directions in thinking about the issues surrounding TARP. Yet we worked hard to negotiate through our differences, without compromising on our principles, and as a result produced many unanimous reports. It was a pleasure working with such thoughtful, principled, and smart colleagues.

I also want to pay tribute to our excellent bipartisan staff. Their determination to help us reach bipartisan agreements was critical to the success of our work. They worked many, many late nights to help the Panel produce in-depth reports every 30 days, and they did so with tremendous professionalism in their dealings with each other and Treasury. I want to commend them for their deep and varied knowledge, for their attention to detail, and for the dedication they brought to our oversight mandate. Our work would not have been possible without them.

Thank you again for the opportunity to testify. I would be happy to answer any questions you may have. As the chair of the Panel, I will endeavor to convey the views of all the Panel members; however, ultimately, my words are my own.

Congressional Oversight Panel

March 16, 2011

MARCH OVERSIGHT REPORT*

The Final Report of the Congressional Oversight Panel

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

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Glossary of Terms

ABS	asset-backed securities
AGP	Asset Guarantee Program
AIA	American International Assurance Company, Limited
AIFP	Automobile Industry Financing Program
AIG	American International Group
AIGFP	AIG Financial Products
AIGIP/SSFI Program	American International Group Investment Program/Systemically Significant Failing Institutions Program
ALICO	American Life Insurance Company
AMLF	Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility
ARRA	American Recovery and Reinvestment Act
ASSP	Auto Supplier Support Program
BHC	bank holding company
C&I loans	commercial and industrial loans
CAP	Capital Assistance Program
CBO	Congressional Budget Office
CDCI	Community Development Capital Initiative
new Chrysler	Chrysler Group LLC; Chrysler post bankruptcy
Chrysler Holding LLC	Chrysler Holding Limited Liability Company
CMBS	commercial mortgage-backed securities
CPFF	Commercial Paper Funding Facility
CPP	Capital Purchase Program
CRE	commercial real estate
DGP	Debt Guarantee Program
Dodd-Frank Act	Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010
EESA	Emergency Economic Stabilization Act of 2008
FDIC	Federal Deposit Insurance Corporation
FHA	Federal Housing Administration
FHFA	Federal Housing Finance Agency
FOMC	Federal Open Market Committee
FRB	Federal Reserve Board
FRBNY	Federal Reserve Bank of New York
GAO	Government Accountability Office
GDP	gross domestic product
new GM	General Motors Company; GM post bankruptcy
GM	General Motors Corporation
GMAC	General Motors Acceptance Corporation; now Ally Financial
GMAC/Ally Financial	Ally Financial
GSE	government sponsored enterprise
GSE MBS Purchase Program	Government Sponsored Enterprises' Mortgage Backed Securities Purchase Program

HAMP	Home Affordable Modification Program
IFR-COI	Interim Final Rule on TARP Conflicts of Interest
IFR-Comp	Interim Final Rule on TARP Standards for Compensation and Corporate Governance
IPO	initial public offering
IRR	internal rate of return
LIBOR	London Interbank Offered Rate
LIBOR-OIS spread	measures the difference between the LIBOR and the OIS
LLC	limited liability company
MBS	Mortgage Backed Securities Purchase
MMF	Money Market Fund
OIS	Overnight Indexed Swaps rate
OMB	Office of Management and Budget
PDCF	Primary Dealer Credit Facility
PPIP	Public-Private Investment Program
RCF	revolving credit facility
RMBS	residential mortgage-backed security
SBA	Small Business Administration
SBA 504	a loan program of the Small Business Administration
SBA 7(a)	a loan program of the Small Business Administration
SBLF	Small Business Lending Fund program
SCAP	Supervisory Capital Assessment Program (the "stress tests")
SEC	U.S. Securities and Exchange Commission
SIGTARP	Special Inspector General for the Troubled Asset Relief Program
SPA	Securities Purchase Agreement
SPV	special purpose vehicle
SSFI program	Systemically Significant Failing Institutions program (solely for AIG)
TAF	Term Auction Facility
TAG	Transaction Account Guarantee
TALF	Term Asset-Backed Securities Loan Facility
TALF LLC	Term Asset-Backed Securities Loan Facility Limited Liability Company
TARP	Troubled Asset Relief Program
TGPMMF	Temporary Guarantee Program for Money Market Funds
TIP	Targeted Investment Program
TLGP	Temporary Liquidity Guarantee Program
Trust	AIG Credit Facility Trust
TSLF	Term Securities Lending Facility

Executive Summary*

On October 3, 2008, in response to rapidly deteriorating financial market conditions, Congress and the President created the Troubled Asset Relief Program (TARP) to "immediately provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States." The same law also established the Congressional Oversight Panel and charged it with providing public accountability for Treasury's use of its TARP authority. By statute, the Panel terminates six months after the expiration of TARP authority, which ended on October 3, 2010. Thus, the Panel's work concludes with this report.

For its final report, the Panel summarizes and updates its comprehensive body of oversight work. The report describes the financial crisis and the broad array of federal initiatives undertaken in response. The Panel also provides a summary of its key findings and recommendations, along with updates since the Panel's prior work.

In order to evaluate the TARP's impact, one must first recall the extreme fear and uncertainty that infected the financial system in late 2008. The stock market had endured triple-digit swings. Major financial institutions, including Bear Stearns, Fannie Mae, Freddie Mac, and Lehman Brothers, had collapsed, sowing panic throughout the financial markets. The economy was hemorrhaging jobs, and foreclosures were escalating with no end in sight. Federal Reserve Chairman Ben Bernanke has said that the nation was on course for "a cataclysm that could have rivaled or surpassed the Great Depression."

It is now clear that, although America has endured a wrenching recession, it has not experienced a second Great Depression. The TARP does not deserve full credit for this outcome, but it provided critical support to markets at a moment of profound uncertainty. It achieved this effect in part by providing capital to banks but, more significantly, by demonstrating that the United States would take any action necessary to prevent the collapse of its financial system.

The Cost of the TARP. The Congressional Budget Office (CBO) today estimates that the TARP will cost taxpayers $25 billion – an enormous sum, but vastly less than the $356 billion that CBO initially estimated. Although this much-reduced cost estimate is encouraging, it does not necessarily validate Treasury's administration of the TARP. Treasury deserves credit for lowering costs through its diligent management of TARP assets and, in particular, its careful restructuring of AIG, Chrysler, and GM. However, a separate reason for the TARP's falling cost is that Treasury's foreclosure prevention programs, which could have cost $50 billion, have

*The Panel adopted this report with a 5-0 vote on March 15, 2011.

largely failed to get off the ground. Viewed from this perspective, the TARP will cost less than expected in part because it will accomplish far less than envisioned for American homeowners. In addition, non-TARP government programs, including efforts by the FDIC and the Federal Reserve, have shifted some of the costs of the financial rescue away from the TARP's balance sheet. Further, accounting for the TARP from today's vantage point – at a time when the financial system has made great strides toward recovery – obscures the risk that existed in the depths of the financial crisis. At one point, the federal government guaranteed or insured $4.4 trillion in face value of financial assets. If the financial system had suffered another shock on the road to recovery, taxpayers would have faced staggering losses.

"Too Big to Fail." The Panel has always emphasized that the TARP's cost cannot be measured merely in dollars. Other costs include its distortion of the financial marketplace through its implicit guarantee of "too big to fail" banks. At the height of the financial crisis, 18 very large financial institutions received $208.6 billion in TARP funding almost overnight, in many cases without having to apply for funding or to demonstrate an ability to repay taxpayers. In light of these events, it is not surprising that markets have assumed that "too big to fail" banks are safer than their "small enough to fail" counterparts. Credit rating agencies continue to adjust the credit ratings of very large banks to reflect their implicit government guarantee. Smaller banks receive no such adjustment, and as a result, they pay more to borrow relative to very large banks.

By protecting very large banks from insolvency and collapse, the TARP also created moral hazard: very large financial institutions may now rationally decide to take inflated risks because they expect that, if their gamble fails, taxpayers will bear the loss. Ironically, these inflated risks may create even greater systemic risk and increase the likelihood of future crises and bailouts.

In addition, Treasury's intervention in the automotive industry, rescuing companies that were not banks and were not particularly interconnected within the financial system, extended the "too big to fail" guarantee and its associated moral hazard to non-financial firms. The implication may seem to be that any company in America can receive a government backstop, so long as its collapse would cost enough jobs or deal enough economic damage.

Stigma. As the TARP evolved, Treasury found its options increasingly constrained by public anger about the program. The TARP is now widely perceived as having restored stability to the financial sector by bailing out Wall Street banks and domestic automotive manufacturers while doing little for the 13.9 million workers who are unemployed, the 2.4 million homeowners who are at immediate risk of foreclosure, or the countless families otherwise struggling to make ends meet. As a result of this perception, the TARP is now burdened by a public "stigma."

Because the TARP was designed for an inherently unpopular purpose – rescuing Wall Street banks from the consequences of their own actions – stigmatization was likely inevitable.

Treasury's implementation of the program has, however, made this stigma worse. For example, many senior managers of TARP-recipient banks maintained their jobs and their high salaries, and although shareholders suffered dilution of their stock, they were not wiped out. To the public, this may appear to be evidence that Wall Street banks and bankers can retain their profits in boom years but shift their losses to taxpayers during a bust – an arrangement that undermines the market discipline necessary to a free economy.

Transparency, Data Collection, and Accountability. Beginning with its very first report, the Panel has expressed concerns about the lack of transparency in the TARP. In perhaps the most profound violation of the principle of transparency, Treasury decided in the TARP's earliest days to push tens of billions of dollars out the door to very large financial institutions without requiring banks to reveal how the money was used. As a result, the public will never know to what purpose its money was put.

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Yet there can be no question that oversight has improved the TARP and increased taxpayer returns. For example, in July 2009, the Panel reported that Treasury's method for selling stock options gained through the CPP appeared to be recovering only 66 percent of the warrants' estimated worth. Due in part to pressure generated by the Panel's work, Treasury changed its approach, and subsequent sales recovered 103 cents on the dollar, contributing to \$8.6 billion in returns to taxpayers. Other substantial improvements in the TARP – such as Treasury's heightened focus on the threat to HAMP posed by second liens, the increased transparency of the TARP contracting process, and the greater disclosure of TARP-related data – are all partly the result of pressure exerted by the Panel and other oversight bodies.

Thus, an enduring lesson of the TARP is that extraordinary government programs can benefit from, and indeed may require, extraordinary oversight. This lesson remains relevant in the context of the government's extraordinary actions in the 2008 financial crisis: The public will continue to benefit from intensive, coordinated efforts by public and private organizations to oversee Treasury, the FDIC, the Federal Reserve, and other government actors. Careful, skeptical review of the government's actions and their consequences – even when this review is uncomfortable – is an indispensable step toward preserving the public trust and ensuring the effective use of taxpayer money.

Section One

I. Introduction

In response to rapidly deteriorating financial market conditions, Congress passed and the President signed into law the Emergency Economic Stabilization Act of 2008 (EESA) on October 3, 2008, creating the Troubled Asset Relief Program (TARP). The Act was intended to "immediately provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States" and "to ensure that such authority and such facilities are used in a manner that protects home values, college funds, retirement accounts, and life savings; preserves homeownership and promotes jobs and economic growth; maximizes overall returns to the taxpayers of the United States; and provides public accountability for the exercise of such authority."

In order to provide the intended public accountability, EESA designated multiple oversight bodies. In particular, Section 125 established the Congressional Oversight Panel (the Panel) and charged it with reviewing the current state of the financial markets and regulatory system. In addition to one special report on regulatory reform, the Act required monthly reports, including oversight of "the use by the Secretary of authority under this Act, including with respect to the use of contracting authority and administration of the program; the impact of purchases made under the Act on the financial markets and financial institutions; the extent to which the information made available on transactions under the program has contributed to market transparency; and the effectiveness of foreclosure mitigation efforts, and the effectiveness of the program from the standpoint of minimizing long-term costs to the taxpayers and maximizing the benefits for taxpayers." In meeting this mandate the Panel has issued 27 monthly oversight reports, as well as the special report on regulatory reform and a subsequently required special report on farm credit.

Under EESA, the Panel terminates six months after the expiration of TARP authority, which ended on October 3, 2010. Thus, the Panel's work will conclude with this report. For its final report the Panel summarizes and revisits its comprehensive body of monthly oversight work. To provide a context for understanding and evaluating the TARP, the report first describes the major events of the financial crisis in the fall of 2008 and the economic conditions prevailing during the crisis and response, as well as the broad array of federal initiatives undertaken to promote financial stability and liquidity as a result of the crisis. For each area in which it has done oversight work, the Panel then provides a summary of its key findings and recommendations, along with an update since the Panel's prior work and the current status of the Panel's recommendations.

The Panel's body of work reveals a number of clear and consistent themes. In closing, the report summarizes these key "lessons learned" in order to guide policymakers as they continue to unwind the TARP, but more important, to inform policymakers should they find it necessary to respond to financial crises in the future.

A. Key Events of the Financial Crisis

1. Events Leading up to Enactment of EESA[1]

The first tremors of the impending financial crisis and the severe recession that followed were seen in the American housing market. During the years from 2000 until 2007 home prices more than doubled and the amount of mortgage debt outstanding increased nearly 80 percent.[2] The rapid appreciation in home prices, which increased every month from January 2000 to their peak in April 2006, helped fuel housing speculation and a boom in mortgage refinancing and home equity loans.[3]

The Housing Bubble Bursts

In late 2006, home prices began to decline and delinquencies on home mortgages, particularly those taken out by subprime borrowers, began to rise significantly.[4] Figure 1

[1] For a more expansive listing of the events prior to and during the financial crisis, *see* Federal Reserve Bank of St. Louis, *The Financial Crisis: A Timeline of Events and Policy Actions* (online at timeline.stlouisfed.org/) (accessed Mar. 3, 2011).

[2] The S&P Case/Shiller home price index, a measure of home values in the United States, reached its peak level of 206.5 in April 2006, representing a 105 percent increase from January 2000. Standard & Poor's, *S&P/Case-Shiller Home Price Index* (Instrument Used: Home Price Index Levels, Seasonally adjusted, Composite 20-city Index) (online at www.standardandpoors.com/indices/sp-case-shiller-home-price-indices/en/us/?indexId=spusa-cashpidff--p-us----) (accessed Mar. 11, 2011) (hereinafter "S&P/Case-Shiller Home Price Index"). An alternative measure of home prices, the Federal Housing Finance Agency's quarterly Purchase Only Index increased for 49 consecutive quarters beginning in the first quarter of 1995 until the second quarter of 2007. Federal Housing Finance Agency, *Purchase Only Indexes: U.S. Summary Through Q4 2010* (Instrument Used: HPI % Change Over Previous Quarter) (online at www.fhfa.gov/Default.aspx?Page=87) (accessed Mar. 11, 2011).

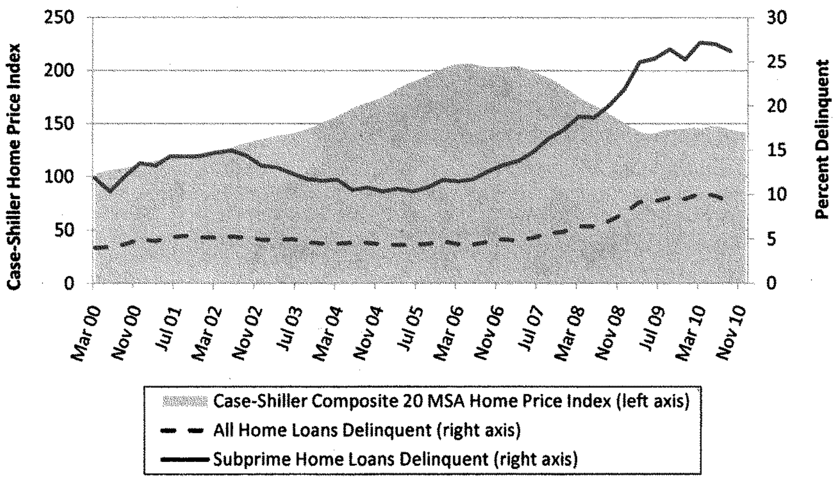
Total mortgage debt outstanding for one to four family homes increased from $4.8 trillion at the end of 1999 to $10.4 trillion in the beginning of 2007. Board of Governors of the Federal Reserve System, *Statistical Supplement to the Federal Reserve Bulletin: Mortgage Debt Outstanding* (Jan. 2004) (online at www.federalreserve.gov/pubs/supplement/2004/01/table1_54.htm); Board of Governors of the Federal Reserve System, *Mortgage Debt Outstanding* (Dec. 2010) (online at www.federalreserve.gov/econresdata/releases/mortoutstand/current.htm).

[3] From 2001 to 2005, Americans extracted an average of $646.3 billion of equity from their homes each year. In the ten years prior, the average amount of equity extracted per year was $272.0 billion. Board of Governors of the Federal Reserve System, *Sources and Uses of Equity Extracted from Homes*, at 21 (Mar. 2007) (online at www.econ.jku.at/members/Riese/files/SS08/239315/topic2_wealth_effect/greenspan_kennedy.pdf).

[4] S&P Case Shiller index reached its peak of 206.5 in April 2006. Also, delinquencies as a percentage of loans rose from 4.39 percent at the end of Q2 2006 to 5.12 percent at the end of Q2 2007. Mortgage Bankers Association, *National Delinquency Survey – 2010 4th Quarter*, at 4 (Feb. 17, 2011) (hereinafter "National Delinquency Survey – 2010 4th Quarter").

illustrates the dramatic increase in subprime mortgage delinquencies, which reached 13.3 percent by the end of 2006, and the corresponding beginning of a relative decline in home values that continues to this day.[5]

Figure 1: Percentage of Delinquent Home Loans by Type as Compared to Home Prices[6]



The subprime mortgage crisis grew in 2007, and during the period from April to the end of August the credit rating agencies downgraded hundreds of bonds backed by such mortgages. Later that summer, Bear Stearns closed two mortgage-backed securities (MBS) focused hedge funds, and two of the largest subprime mortgage originators and securitizers – New Century Financial and American Home Mortgage – filed for bankruptcy.[7] On August 9, 2007, BNP

[5] Case-Shiller values are indexed to 100 in January 2000. As of December 2010, national home prices, as measured by the S&P Case-Shiller Home Price Index, have declined 30.2 percent since January 2007 and declined 9.1 percent since the enactment of EESA in October 2008. S&P/Case-Shiller Home Price Index, *supra* note 2. Subprime delinquencies reached their highest level during the first quarter of 2010 when delinquencies reached 27.2 percent. National Delinquency Survey – 2010 4th Quarter, *supra* note 4, at 4.

[6] National Delinquency Survey – 2010 4th Quarter, *supra* note 4, at 4; S&P/Case-Shiller Home Price Index, *supra* note 2.

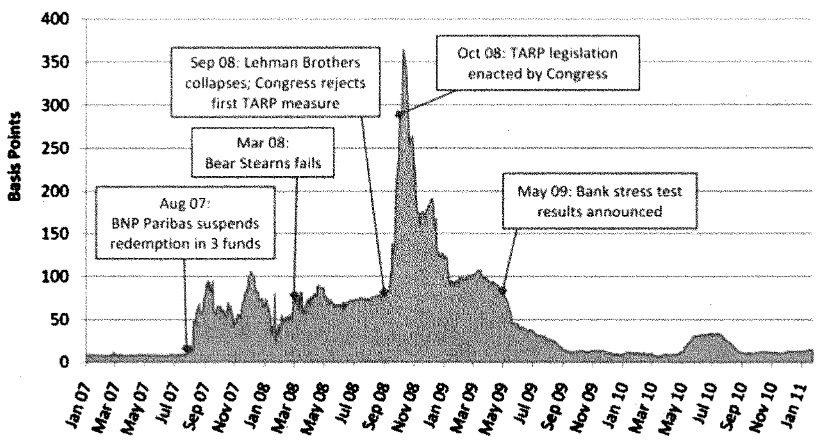
[7] U.S. Securities and Exchange Commission, *American Home Mortgage Investment Corp. Files for Chapter 11 Bankruptcy* (Aug. 6, 2007) (online at www.sec.gov/Archives/edgar/data/1256536/000091412107001892/am9746838-99_1.txt); U.S. Securities and Exchange Commission, *New Century Financial Corporation Files for Chapter 11; Announces Agreement to Sell Servicing Operations* (Apr. 2, 2007) (online at www.sec.gov/Archives/edgar/data/1287286/000129993307002129/exhibit1.htm).

Paribas, the largest bank in France, suspended redemptions in three investment funds due to their exposure to the U.S. subprime mortgage market.[8] These events contributed to the significant stress in the housing and mortgage finance market which then began to spread into the broader financial sector.

Beginning of the Financial Crisis

The uncertainty and fear that gripped the financial markets during this period can be seen in critical credit market indicators such as the closely watched LIBOR-OIS spread. This spread measures the difference between the London Interbank Offered Rate (LIBOR), which shows quarterly borrowing costs for banks, and the Overnight Indexed Swaps rate (OIS), which measures the cost of extremely short-term borrowing by financial institutions. An increase in the LIBOR-OIS spread indicates that market participants have growing fears about whether major financial institutions will be able to deliver on their obligations.[9] Figure 2 illustrates the spikes in the LIBOR-OIS spread as key events in the ensuing financial crisis unfolded.

Figure 2: LIBOR-OIS Spread and Selected Events[10]



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[8] Viral V. Acharya and Ouarda Merrouche, *Precautionary Hoarding of Liquidity and Inter-Bank Markets: Evidence from the Sub-prime Crisis*, at 2 (July 3, 2009) (online at pages.stern.nyu.edu/~sternfin/vacharya/public_html/acharya_merrouche.pdf).

[9] Federal Reserve Bank of St. Louis, *What the Libor-OIS Spread Says* (2009) (online at research.stlouisfed.org/publications/es/09/ES0924.pdf).

[10] SNL Financial (accessed Mar. 1, 2011).

For the first seven months of 2007, the LIBOR-OIS spread averaged 8.7 basis points, reflecting relative calm in the financial markets. Following the announcement by BNP Paribas on August 9, 2007, however, this measure increased nearly 200 percent, settling at 39.9 basis points.[11] On the same date, the rate for overnight commercial paper, a mechanism of short-term credit for enterprises, increased to levels not seen since early 2001.[12] The summer of 2007 ended with the Federal Open Market Committee (FOMC) of the Federal Reserve System concluding that financial market conditions had worsened, credit availability had decreased, and "downside risks to growth [had] increased appreciably."[13]

Initial Government and Industry Responses

Among the first direct actions taken by governments to stem the effects of the growing financial crisis was the creation by the British Government of a liquidity facility to support Northern Rock, the fifth largest bank in the United Kingdom.[14] In the United States, the Board of Governors of the Federal Reserve System, or Federal Reserve Board (FRB or Federal Reserve) lowered its target interest rate twice in the fall of 2007, signaling the Federal Reserve's growing concern regarding the tightening credit markets and worsening housing conditions.[15] On October 10, 2007, the HOPE NOW Alliance – a private sector initiative promoted by Treasury and the Department of Housing and Urban Development and aimed at bringing

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[11] SNL Financial (accessed Mar. 1, 2011).

[12] The interest rate for overnight AA Asset-backed Commercial Paper increased from 5.39 percent on August 8, 2007 to 5.75 percent on August 9, 2007. This was the highest level this measure reached since its January 31, 2001 level of 5.78 percent. The interest rate for overnight financial AA Financial Commercial Paper increased from 5.31 percent on August 8, 2007 to 5.39 percent on August 9, 2007. This was the highest level this measure reached since its March 33, 2001 level of 5.44 percent. Board of Governors of the Federal Reserve System, *Data Download Program: Commercial Paper* (Instruments Used: Rates; Overnight AA Asset-backed Commercial Paper, Overnight AA Financial Commercial Paper) (online at www.federalreserve.gov/datadownload/Choose.aspx?rel=CP) (accessed Mar. 1, 2011).

[13] Board of Governors of the Federal Reserve System, *FOMC Statement* (Aug. 17, 2007) (online at www.federalreserve.gov/newsevents/press/monetary/20070817b.htm).

[14] HM Treasury, *Liquidity Support Facility for Northern Rock plc* (Sept. 14, 2007) (online at webarchive.nationalarchives.gov.uk/+/www.hm-treasury.gov.uk/press_94_07.htm).

[15] On September 18, 2007, the FOMC reduced its target for the federal funds rate from 5.25 percent to 4.75 percent. In conjunction with that decision, the Federal Reserve stated that, "the tightening of credit conditions has the potential to intensify the housing correction and to restrain economic growth more generally. Today's action is intended to help forestall some of the adverse effects on the broader economy that might otherwise arise from the disruptions in financial markets and to promote moderate growth over time." Board of Governors of the Federal Reserve System, *FOMC Statement and Board Approval of Discount Rate Requests of the Federal Reserve Banks of Boston, New York, Cleveland, St. Louis, Minneapolis, Kansas City, and San Francisco* (Sept. 18, 2007) (online at www.federalreserve.gov/newsevents/press/monetary/20070918a.htm) (hereinafter "FOMC Statement and Board Approval of Discount Rate Requests"). On October 31, 2007, the FOMC reduced its target for the federal funds rate from 4.75 percent to 4.25 percent. Board of Governors of the Federal Reserve System, *FOMC Statement and Board Approval of Discount Rate Requests of the Federal Reserve Banks of Boston, New York, Cleveland, St. Louis, Minneapolis, Kansas City, and San Francisco* (Oct. 31, 2007) (online at www.federalreserve.gov/newsevents/press/monetary/20071031a.htm).

together mortgage market participants to encourage counseling and other foreclosure mitigation options – was announced.[16] Finally, on October 15, 2007, a consortium of banks agreed, after discussions facilitated by Treasury, to create a pooling mechanism to facilitate liquidity in the asset-backed commercial paper market.[17] Within a couple of months, however, the leading banks involved in this effort – Bank of America, JPMorgan Chase, and Citigroup – announced that the initiative had collapsed.[18]

The Financial Crisis Widens

As housing fundamentals continued to weaken and financial fear spread, some of the nation's largest financial firms began to teeter on the edge of failure. On January 11, 2008, Bank of America announced its purchase of a major mortgage originator, Countrywide Financial.[19] Then on March 14, the Federal Reserve intervened to rescue Bear Stearns by helping to arrange for and assisting with its purchase by JPMorgan.[20] During this period the impacts of the crisis in the housing and financial sectors began to be felt in the broader economy. The nation's gross domestic product (GDP), a measure of this country's economic activity, suffered its first quarterly decline since 2001 in the first quarter of 2008. Following a slight increase of 0.6 percent in the next quarter, GDP contracted for four consecutive quarters through June 2009.[21]

[16] HOPE NOW Alliance, *HOPE NOW Alliance Created to Help Distressed Homeowners* (Oct. 10, 2007) (online at www.fsround.org/hope_now/pdfs/AllianceRelease.pdf).

[17] Bank of America Corporation, *Global Banks Announce Plans for Major Liquidity Facility to Bolster Asset-Backed Commercial Paper Markets* (Oct. 15, 2007) (online at mediaroom.bankofamerica.com/phoenix.zhtml?c=234503&p=irol-newsArticle&ID=1389929&highlight=).

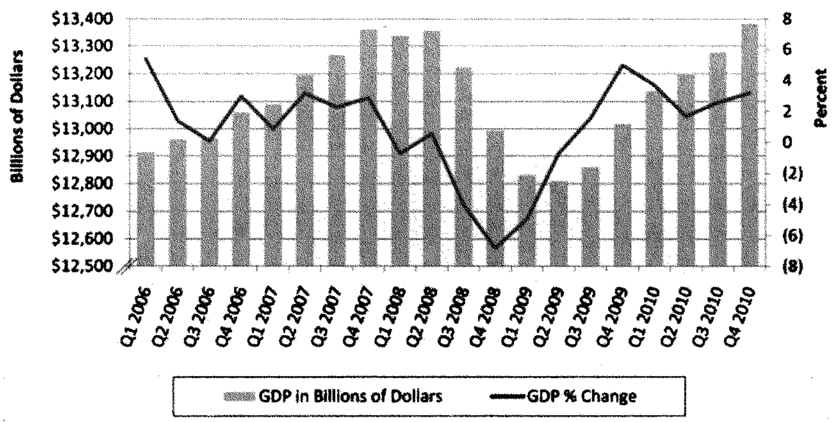
[18] Bank of America Corporation, *Consortium Provides Update on Master Liquidity Enhancement Conduit* (Dec. 21, 2007) (online at mediaroom.bankofamerica.com/phoenix.zhtml?c=234503&p=irol-newsArticle&ID=1389982&highlight=).

[19] *See* Bank of America Corporation, *Bank of America Agrees to Purchase Countrywide Financial Corp.* (Jan. 11, 2008) (online at mediaroom.bankofamerica.com/phoenix.zhtml?c=234503&p=irol-newsArticle&ID=1389986&highlight=). This purchase followed a $2 billion investment by Bank of America in Countrywide in return for 16 percent of the company on August 22, 2007. *See* Bank of America Corporation, *Bank of America Makes Investment in Countrywide Financial* (Aug. 22, 2007) (online at mediaroom.bankofamerica.com/phoenix.zhtml?c=234503&p=irol-newsArticle&ID=1389904&highlight=).

[20] For further details on the purchase of Bear Stearns by JPMorgan, as well as the government assistance provided to facilitate the agreement, see Section I.B.1, *infra*.

[21] The National Bureau of Economic Research, the body responsible for determining when shifts in the U.S. business cycle occur, stated on September 20, 2010 that the most recent recession – commonly referred to as the "Great Recession" – began in December 2007 and ended in June 2009, a period corresponding to the decline in GDP mentioned here. National Bureau of Economic Research, *US Business Cycle Expansions and Contractions* (online at www.nber.org/cycles/cyclesmain.html) (accessed Mar. 3, 2011) (hereinafter "NBER: US Business Cycle"). Bureau of Economic Analysis, *Gross Domestic Product* (Instruments used: Current-dollar and "real" GDP, Percent change from preceding period) (online at www.bea.gov/national/index.htm) (accessed Mar. 3, 2011) (hereinafter "Gross Domestic Product").

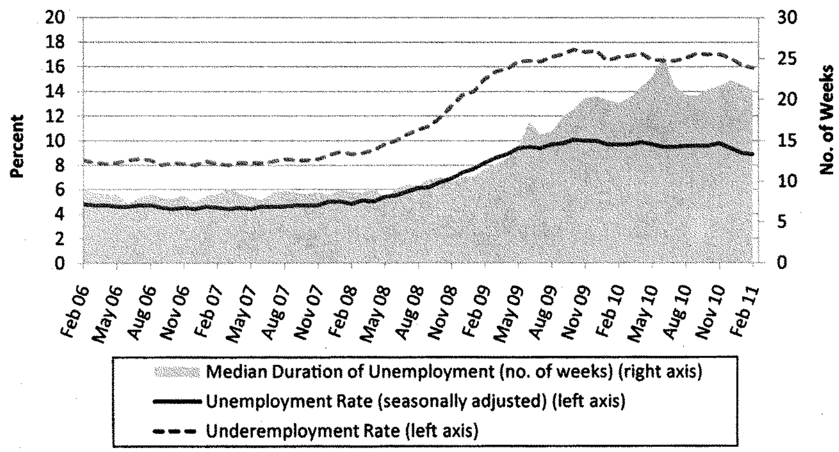
Figure 3: GDP Since 2006[22]



Similarly, unemployment rose sharply in 2008 and early 2009. The unemployment rate rose from a low of 4.6 percent in January 2007 to 6.2 percent by September 2008 and 10.1 percent by October 2009. Figure 4 shows not only the rise in the unemployment rate, but also the concurrent increase in the median duration of unemployment, and the sharp increase in underemployment, a measure that includes people who are unemployed as well as those who are working fewer hours than they want to work and those who have become discouraged and stopped looking for a job.

[22] Amounts are in constant 2005 dollars. Gross Domestic Product, *supra* note 21.

Figure 4: Unemployment, Underemployment, and Duration of Unemployment[23]



Second Half of 2008 Brings Extraordinary Government Intervention

As the effects of the crisis spread to the wider market, the summer of 2008 brought further concerns about financial institutions which specialized in mortgage finance. IndyMac Bank, one of the nation's largest savings and loans and the second largest mortgage lender in the country, came under pressure as fear spread about its potential insolvency. Over an eleven day period, depositors withdrew over $1.3 billion of the $19 billion it held in deposits and the institution was subsequently taken over by the Federal Deposit Insurance Corporation (FDIC).[24] Also in July 2008, the Federal Reserve and Treasury took coordinated action to provide increased credit support to Fannie Mae and Freddie Mac, two critical players in the secondary mortgage market which had begun experiencing difficulty in financing their operations.[25] Then

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[23] Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey: Unemployment Rate* (online at data.bls.gov/pdq/SurveyOutputServlet?data_tool=latest_numbers&series_id=LNS14000000) (accessed Mar. 4, 2011) (hereinafter "BLS: Unemployment Rate"); Bureau of Labor Statistics, *Alternative Measures of Labor Underutilization* (Instrument Used: U-6) (online at www.bls.gov/news.release/empsit.t15.htm) (accessed Mar. 4, 2011); Federal Reserve Bank of St. Louis, *Median Duration of Unemployment* (online at research.stlouisfed.org/fred2/series/UEMPMED) (accessed Mar. 4, 2011).

[24] Office of Thrift Supervision, *OTS Closes IndyMac Bank and Transfers Operations to FDIC* (July 11, 2008) (online at www.ots.treas.gov/index.cfm?p=PressReleases&ContentRecord_id=37f10b00-1e0b-8562-ebdd-d5d38f67934c&ContentType_id=4c12f337-b5b6-4c87-b45c-838958422bf3&MonthDisplay=7&YearDisplay=2008).

[25] U.S. Department of the Treasury, *Paulson Announces GSE Initiatives* (July 13, 2008) (online at www.treasury.gov/press-center/press-releases/Pages/hp1079.aspx). Also, the Federal Reserve announced that it

on July 30, the Housing and Economic Recovery Act of 2008 (HERA) was signed into law. Among its provisions, HERA reorganized the government sponsored enterprise's (GSE) regulatory framework, placing them under the supervision of the newly created Federal Housing Finance Agency (FHFA) and providing Treasury with the ability to invest taxpayer funds in Fannie Mae and Freddie Mac.[26]

In September, the housing bubble, the liquidity crunch, and the financial crisis culminated in a string of unprecedented events and government interventions that took place over a 19-day stretch. During this period, Fannie Mae and Freddie Mac were placed into conservatorship, Lehman Brothers filed for bankruptcy, the Federal Reserve initiated an $85 billion government rescue of American International Group (AIG), Treasury announced a temporary guarantee of the $3.7 trillion money market funds (MMFs), and the FDIC steered Washington Mutual through the largest bank failure in U.S. history.[27] By the beginning of October 2008, the value of the stock market had declined by nearly 20 percent from its level in January of that year, losing 10 percent in September alone.[28] Figure 2 illustrates the effect these events had on the credit markets. The LIBOR-OIS spread reached a record high of 364 basis points, or 3.64 percentage points, in October 2008.[29]

As a result of these events and the continuing rapid deterioration in the condition of the credit markets, Chairman of the Board of Governors of the Federal Reserve System Ben S. Bernanke and Secretary of the Treasury Henry M. Paulson, Jr. concluded on September 18th that their only realistic option to contain the rapidly spreading financial crisis was to convince

would supplement the Treasury credit line by providing its own credit line if necessary. Board of Governors of the Federal Reserve System, *Board Grants Federal Reserve Bank of New York the Authority to Lend to Fannie Mae and Freddie Mac Should Such Lending Prove Necessary* (July 13, 2008) (online at www.federalreserve.gov/newsevents/press/other/20080713a.htm).

[26] *Housing and Economic Recovery Act of 2008*, Pub. L. No. 110-289, §§ 1101, 1117 (2008) (codified at 12 U.S.C. §§ 4511, 1716 *et seq*., 1451 *et seq*.).

[27] Treasury took Fannie Mae and Freddie Mac into conservatorship on September 7, 2008. Lehman Brothers failed on September 14. The next day, Bank of America announced it was buying Merrill Lynch. The day after that, the government announced its bailout of AIG. Also, on September 16, the assets of a money-market mutual fund fell below $1 per share, exposing investors to losses, an occurrence known as "breaking the buck" that had not happened in the industry for 14 years. On September 20, the Federal Reserve announced that it was allowing Goldman Sachs and Morgan Stanley, the nation's only two remaining large investment banks, to become bank holding companies, giving them access to a key source of low-cost borrowing from the Federal Reserve. On September 25, the FDIC took Washington Mutual, the nation's largest savings and loan, into receivership and sold many of its assets to JPMorgan Chase. Congressional Oversight Panel, *December Oversight Report: Taking Stock: What Has the Troubled Asset Relief Program Achieved?*, at 11 (Dec. 9, 2009) (online at cop.senate.gov/documents/cop-120909-report.pdf) (hereinafter "2009 December Oversight Report"). The size of the money market funds (MMFs) was $3.66 trillion in June 2009. Institutional Money Market Funds Association, *Frequently Asked Questions* (online at www.immfa.org/about/faq/default.asp) (accessed Mar. 3, 2011) (hereinafter "IMMFA: Frequently Asked Questions").

[28] The value of the S&P 500 Index is used here as a proxy for the broader market. SNL Financial (accessed Mar. 3, 2011)

[29] SNL Financial (accessed Mar. 3, 2011).

Congress to authorize an overwhelming fiscal response by the federal government. On September 20th, Treasury sent Congress a three-page legislative proposal giving Treasury the authority to spend up to $700 billion to purchase "troubled assets," particularly "residential and commercial mortgage-related assets."[30]

Over the following two weeks, the proposal was defeated once in the House of Representatives and subsequently modified and expanded prior to being signed into law on October 3, 2008. The law – EESA – authorized the Treasury Secretary to purchase not only mortgage-related securities under the TARP, but also "any other financial instrument" the purchase of which the Secretary determined to be "necessary to promote financial market stability."[31] Although the federal government has intervened to rescue financial institutions and prevent bank runs on several previous occasions in U.S. history, the scale and breadth of the financial rescue authorized in EESA was unprecedented.[32]

Secretary Paulson and Chairman Bernanke had initially proposed using TARP funds to buy troubled assets on the books of the largest U.S. financial institutions; however, they soon decided that this was impractical given the need for quick action and the difficulty of structuring an auction process for purchasing such assets.[33] On October 14, 2008, Secretary Paulson met with the heads of the nine largest U.S. banks to Washington and told them that Treasury would instead make direct capital injections into each of their institutions.[34]

[30] 2009 December Oversight Report, *supra* note 27, at 16.

[31] 2009 December Oversight Report, *supra* note 27, at 16.

[32] For example, the savings and loan crisis of the late 1980s and early 1990s was the last significant previous disruption in financial markets that involved government intervention. At the time, the total cost of government assistance provided over the course of this crisis was estimated at $160 billion ($230 billion in 2005 dollars). Federal Deposit Insurance Corporation, *The Cost of the Savings and Loan Crisis: Truth and Consequences*, at 29 (Dec. 2000) (online at www.fdic.gov/bank/analytical/banking/2000dec/brv13n2_2.pdf). Dollars adjusted for inflation using the Gross Domestic Product Implicit Price Deflator. Federal Reserve Bank of St. Louis, *Gross Domestic Product: Implicit Price Deflator* (online at research.stlouisfed.org/fred2/data/GDPDEF.txt) (accessed Mar. 1, 2011).

[33] Less than two weeks after EESA was signed into law, Secretary Paulson announced that Treasury would "purchase equity stakes in a wide array of banks and thrifts." U.S. Department of the Treasury, *Statement by Secretary Henry M. Paulson, Jr. on Actions to Protect the U.S. Economy* (Oct. 14, 2008) (online at www.treasury.gov/press-center/press-releases/Pages/hp1205.aspx) (hereinafter "Statement by Secretary Paulson on Actions to Protect the U.S. Economy").

In response to questions posed by this Panel regarding the shift from asset purchases to injecting capital, Treasury stated: "Given such market conditions, Secretary Paulson and Chairman Bernanke recognized that Treasury needed to use the authority and flexibility granted under the EESA as aggressively as possible to help stabilize the financial system. They determined the fastest, most direct way was to increase capital in the system by buying equity in healthy banks of all sizes. Illiquid asset purchases, in contrast, require much longer to execute." U.S. Department of the Treasury, *Responses to Questions of the First Report of the Congressional Oversight Panel for Economic Stabilization*, at 56 (Dec. 30, 2008) (online at cop.senate.gov/documents/cop-010909-report.pdf).

[34] 2009 December Oversight Report, *supra* note 27, at 17-18.

2. Initial TARP Investments in the Largest Institutions

The nine institutions that were the recipients of the initial round of TARP investments included the four largest U.S. commercial banks (JPMorgan, Bank of America, Citigroup, and Wells Fargo), the three largest investment banks (Goldman Sachs, Morgan Stanley, and Merrill Lynch), and the two largest custodian banks (State Street and BNY Mellon). At that time, these banks held $10.3 trillion in assets, representing more than 75 percent of all the assets in the American banking system.[35] On October 28, 2008, Treasury purchased $125 billion of preferred stock in these nine institutions and by the end of 2008, Treasury had invested approximately $177.6 billion in banks through the Capital Purchase Program (CPP).[36]

In addition to the initial capital investments made in the nation's largest banks, Treasury undertook additional steps to ensure the stability of Citigroup and Bank of America in November and December 2008 by purchasing an additional $20 billion of preferred shares from both institutions under the Targeted Investment Program (TIP), a program that was utilized only for those two banks.[37] Furthermore, in November, Treasury, in conjunction with the Federal Reserve and the FDIC, put together a hastily crafted $301 billion guarantee of Citigroup assets.[38]

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[35] Amount of assets held by each of these institutions was as of the third quarter 2008. Total amount of assets in the banking system were accessed through the FDIC's Quarterly Banking profile as of the third quarter 2008. SNL Financial (accessed Mar.3, 2011); Federal Deposit Insurance Corporation, *Quarterly Banking Profile: Balance Sheet – Excel* (online at www2.fdic.gov/qbp/timeseries/BalanceSheet.xls) (accessed Mar. 3, 2011).

[36] On October 14, 2008, then Secretary Paulson stated that the nine initial Troubled Asset Relief Program (TARP) recipients "are healthy institutions, and they have taken this step for the good of the U.S. economy. As these healthy institutions increase their capital base, they will be able to increase their funding to U.S. consumers and businesses." Statement by Secretary Paulson on Actions to Protect the U.S. Economy, *supra* note 33; U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for Period Ending March 8, 2011* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf) (hereinafter "Treasury Transactions Report").

[37] U.S. Department of the Treasury, *Joint Statement by Treasury, Federal Reserve and the FDIC on Citigroup* (Nov. 23, 2008) (online at www.treasury.gov/press-center/press-releases/Pages/hp1287.aspx) (hereinafter "Statement by Treasury, Federal Reserve and the FDIC on Citigroup"); Treasury Transactions Report, *supra* note 36; Board of Governors of the Federal Reserve System, *Regulatory Reform: Citigroup* (online at www.federalreserve.gov/newsevents/reform_citi.htm) (accessed Mar. 11, 2011); Board of Governors of the Federal Reserve System, *Regulatory Reform: Bank of America* (online at www.federalreserve.gov/newsevents/reform_boa.htm) (accessed Mar. 11, 2011) (hereinafter "Regulatory Reform: Bank of America").

[38] On November 23, 2008, the Treasury, Federal Reserve, and FDIC announced in a joint statement that they would provide further assistance to Citigroup in the form of an asset guarantee and an additional $20 billion preferred investment. The funds were disbursed to Citigroup on December 31, 2010 under a program first introduced on that day named the Targeted Investment Program (TIP). Similarly, the asset guarantee announced in November was not a part of a specific TARP initiative until the agreement was finalized on January 16, 2010 under the newly designated Asset Guarantee Program (AGP). Statement by Treasury, Federal Reserve and the FDIC on Citigroup, *supra* note 37; Treasury Transactions Report, *supra* note 36.

A similar guarantee of $118 billion of Bank of America assets was announced as well, although it was never legally finalized.[39]

Also in November, the federal government supplemented the original $85 billion loan to AIG and initiated a second round of assistance to AIG in which the TARP purchased $40 billion of preferred equity and the Federal Reserve provided $44 billion to create two special purpose vehicles (SPVs) to take ownership of certain AIG financial assets.[40] Treasury also made its first investments in the automotive industry in late 2008 with loans and preferred stock purchases for General Motors, GMAC, Chrysler, and Chrysler Financial. By the end of January 2009, TARP assistance outstanding amounted to $301 billion with over 75 percent having been provided to only a few firms: the nation's biggest banks, the automotive industry, and AIG.[41]

It was in this climate that the Panel began its oversight work. The unprecedented financial crisis and the corresponding government intervention left many questions. What steps would be taken to ensure accountability from TARP recipients? How would Treasury make certain that its actions were transparent and that the taxpayer be fairly compensated for the risk they were taking? What steps would Treasury take to stem the tide of foreclosures that was having a debilitating effect on American families and neighborhoods? The Panel laid out these central concerns in its first two reports and, throughout its existence, has consistently used its oversight authorities to focus attention on these questions.

[39] Regulatory Reform: Bank of America, *supra* note 37; 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.treasury.gov/initiatives/financial-stability/investment-programs/agp/Documents/BofA%20-%20Termination%20Agreement%20-%20executed.pdf) (hereinafter "BofA Termination Agreement").

[40] Two Special Purpose Vehicles (SPVs), Maiden Lane II and Maiden Lane III, were created on December 12, 2008 as part of the federal government's restructuring of its original assistance to AIG. These facilities were funded with loans from the Federal Reserve of $19.5 and $24.3 billion respectively. Board of Governors of the Federal Reserve System, *Regulatory Reform: American International Group (AIG), Maiden Lane II and III* (online at www.federalreserve.gov/newsevents/reform_aig.htm) (accessed Mar.11, 2011) (hereinafter "Fed Regulatory Reform: AIG, Maiden Lane II and III"). These TARP funds were later supplemented with a commitment of an additional $30 billion TARP commitment to AIG in April 2009. Treasury Transactions Report, *supra* note 36, at 21.

[41] In total, $301 billion was outstanding under the TARP with $195.3 billion outstanding under the Capital Purchase Program (CPP), $40 billion outstanding under the TIP, $20.8 billion outstanding under the automotive portion of the program, $40 billion outstanding to AIG, and $5 billion in funds committed to the Citigroup asset guarantee. All but $70.3 billion of the $301 billion outstanding was provided to thirteen institutions: Citigroup, Bank of America, JPMorgan, Wells Fargo, Goldman Sachs, Merrill Lynch, Morgan Stanley, Bank of New York, State Street, General Motors, GMAC, Chrysler, and Chrysler Financial. U.S. Department of the Treasury, *Troubled Asset Relief Program Transaction Report for Period Ending January 30, 3009* (Feb. 2, 2009) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/transaction_report_02-02-09.pdf) (hereinafter "Treasury Transactions Report – January 2009").

B. Overview of Government Efforts

In response to the financial crisis, Congress, the Federal Reserve, Treasury, and the FDIC worked both independently and in concert with other agencies to implement a variety of policies and initiatives aimed at ensuring financial stability. In addition to the direct expenditures Treasury made through the TARP, the federal government also engaged in a broad array of programs directed at stabilizing the economy. Many of these programs explicitly augmented Treasury's TARP initiatives, like asset guarantees for Citigroup and Bank of America, or relied on cooperation, such as the Federal Reserve and Treasury working in tandem to create programs such as the Term Asset-Backed Securities Loan Facility (TALF). Other programs, like the Federal Reserve's extension of credit through its section 13(3) facilities and SPVs or the FDIC's Temporary Liquidity Guarantee Program (TLGP), stood independent of the TARP and sought to accomplish different, but related, goals. Given that all of these programs provided support to the largest banks, they had an interactive effect and clearly affected the performance of each separate program. Figure 6 illustrates the interconnectedness of certain financial stability programs.

1. Federal Reserve

The policy response to the financial crisis ran the gamut from the use of traditional monetary policy to the creation of unprecedented credit and liquidity measures. From September 2007 to December 2008, the Federal Reserve steadily lowered the federal funds rate from 5.25 percent to its December 2008 target of 0 to 0.25 percent.[42] Furthermore, in August 2007 the Federal Reserve lowered the interest rate it charged banks for loans through its discount window above the federal funds target rate to 50 basis points.[43] It also expanded the list of securities banks could post to draw down these loans through the discount window. While the discount window is an important monetary tool in normal economic conditions, there were two problems that limited its effectiveness in late 2007: (1) There was a fear in the market that companies

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[42] FOMC Statement and Board Approval of Discount Rate Requests, *supra* note 15; Board of Governors of the Federal Reserve System, *FOMC Statement and Board Approval of Discount Rate Requests of Federal Reserve Banks of New York, Cleveland, Richmond, Atlanta, Minneapolis, and San Francisco* (Dec. 16, 2008) (online at www.federalreserve.gov/newsevents/press/monetary/20081216b.htm).

[43] Its level prior to the reduction was 100 basis points above the federal funds target rate. Board of Governors of the Federal Reserve System, *Federal Reserve Board Discount Rate Action* (Aug. 17, 2007) (online at www.federalreserve.gov/newsevents/press/monetary/20070817a.htm). The Federal Reserve subsequently lowered this interest rate to 25 basis points above the federal funds target rate in March 2008. *See, e.g.*, Board of Governors of the Federal Reserve System, *FOMC Statement and Board Approval of Discount Rate Requests of the Federal Reserve Banks of Boston, New York, and San Francisco* (Mar. 18, 2008) (online at www.federalreserve.gov/newsevents/press/monetary/20080318a.htm). The discount window "functions as a safety valve in relieving pressures in reserve markets; extensions of credit can help relieve liquidity strains in a depository institution and in the banking system as a whole. The Window also helps ensure the basic stability of the payment system more generally by supplying liquidity during times of systemic stress." Board of Governors of the Federal Reserve System, *The Federal Reserve Discount Window* (Feb. 19, 2010) (online at www.frbdiscountwindow.org/discountwindowbook.cfm?hdrID=14&dtlID=43).

accessing the discount window would have a stigma attached to them,[44] and (2) only banks could access the discount window.

The Federal Reserve took actions to solve both of these issues. First, the Term Auction Facility (TAF) was created in order to allow banks to access funding anonymously through a bidding process. Second, the Federal Reserve created a number of new programs under section 13(3) of the Federal Reserve Act aimed at expanding access to liquidity beyond banks.[45] These programs included:

- The Commercial Paper Funding Facility (CPFF) – a facility for corporations to roll over their maturing commercial paper debt. At its maximum, nearly $350 billion was outstanding under the facility.[46]
- Support for Primary Dealers through the Primary Dealer Credit Facility (PDCF), an overnight loan facility for Primary Dealers, and the Term Securities Lending Facility (TSLF), a program that loaned Primary Dealers relatively liquid securities such as U.S. Treasury bonds in exchange for less liquid securities such as residential mortgage-backed security (RMBS).[47]
- Support for the money market mutual funds through the Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility (AMLF).[48] During the crisis, withdrawals from money market mutual funds caused the funds to sell the asset-backed commercial paper they held at discounted levels to meet liquidity needs.

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[44] Chairman Bernanke stated that, "In August 2007 ... banks were reluctant to rely on discount window credit to address their funding needs. The banks' concern was that their recourse to the discount window, if it became known, might lead market participants to infer weakness – the so-called stigma problem." Federal Reserve Bank of New York, *Stigma in Financial Markets: Evidence from Liquidity Auctions and Discount Window Borrowing During the Crisis*, at 1 (Jan. 2011) (online at www.newyorkfed.org/research/staff_reports/sr483.pdf).

[45] Board of Governors of the Federal Reserve System, *Regulatory Reform: Usage of Federal Reserve Credit and Liquidity Facilities* (online at www.federalreserve.gov/newsevents/reform_transaction.htm) (accessed Mar. 11, 2011).

[46] Board of Governors of the Federal Reserve System, *Regulatory Reform: Commercial Paper Funding Facility* (online at www.federalreserve.gov/newsevents/reform_cpff.htm) (accessed Mar. 11, 2011) (hereinafter "Fed Regulatory Reform: Commercial Paper Funding Facility"); Board of Governors of the Federal Reserve System, *Loans to CPFF LLC* (Instrument Used: CPFF commercial paper holdings, net) (online at www.federalreserve.gov/newsevents/files/cpff.xls) (accessed Mar. 11, 2011).

[47] Primary Dealers are banks and securities firms that serve as counterparties for FRBNY in the management of its open market operations. Fed Regulatory Reform: Commercial Paper Funding Facility, *supra* note 46; Board of Governors of the Federal Reserve System, *Regulatory Reform: Glossary of Terms* (online at www.federalreserve.gov/newsevents/reform_glossary.htm#primarydealers) (accessed Mar. 11, 2011).

[48] The Federal Reserve also introduced the Money Market Investor Funding Facility on October 21, 2008. However, this facility was never used and closed on October 30, 2009. *See* Board of Governors of the Federal Reserve System, *Regulatory Reform: Money Market Investor Funding Facility* (online at www.federalreserve.gov/newsevents/reform_mmiff.htm) (accessed Mar. 11, 2011).

Under the AMLF, the Federal Reserve provided loans to allow eligible institutions to purchase asset-backed commercial paper, thereby fostering liquidity in the market.

- Support for the securitization market through the TALF. Under the TALF, the Federal Reserve provided holders of eligible asset-backed securities (ABS) with loans, using the ABS as collateral. The intent of the program was to use TALF borrowers as conduits for enhanced liquidity by providing loans to those entities that served as issuers and sponsors of ABS.

At its height, $1.7 trillion was outstanding under the Federal Reserve's liquidity facilities.[49]

As noted earlier, in March 2008, the financial condition of Bear Stearns, an investment bank with assets of $400 billion, began to worsen rapidly and the Federal Reserve intervened to facilitate the purchase of Bear Stearns by JPMorgan Chase.[50] The Federal Reserve did so by creating a limited liability company (LLC) named Maiden Lane that acquired a portion of Bear Stearns' assets.[51] The Federal Reserve Bank of New York (FRBNY) extended approximately $30 billion of credit to the Maiden Lane vehicle to purchase the securities.[52]

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[49] To offset some of the impact of the Federal Reserve's liquidity programs, Treasury announced on September 17, 2008, the Supplementary Financing Program – a program expected to be temporary in nature but that would allow Treasury to auction bills to various financial institutions with relationships with the Federal Reserve. The program consisted of a series of Treasury bill auctions, separate and distinct from Treasury's standard borrowing operations. The proceeds from these auctions were maintained in a Treasury account held at the Federal Reserve Bank of New York. As a result, funds would flow from a particular bank's account with the Fed to Treasury's account with the Fed. The program was created in order to help the Federal Reserve manage the significant increase in the size of its balance sheet due to its newly created liquidity programs. U.S. Department of the Treasury, *Treasury Announces Supplementary Financing Program* (Sept. 17, 2008) (online at www.treasury.gov/press-center/press-releases/Pages/hp1144.aspx); Federal Reserve Bank of Cleveland, *The Supplemental Financing Program* (Sept 28, 2009) (online at www.clevelandfed.org/research/trends/2009/1009/03monpol.cfm).

[50] Bear Stearns was unable to fulfill its liquidity needs, and in response, the Federal Reserve authorized a $12.9 billion loan to the company. Although the loan was repaid in full with interest, continued pressure on the firm made it clear that without either a large infusion of capital or a sale, the firm would likely fail. Board of Governors of the Federal Reserve System, *Regulatory Reform: Bear Stearns, JPMorgan Chase, and Maiden Lane LLC* (online at www.federalreserve.gov/newsevents/reform_bearstearns.htm) (accessed Mar. 11, 2011) (hereinafter "Fed Regulatory Reform: Bear Stearns, JPMorgan Chase, and Maiden Lane LLC").

[51] The Maiden Lane facilities were named for the street behind the FRBNY building in Manhattan, New York. As of March 3, 2011, the net portfolio holdings of the Maiden Lane vehicle are $26.1 billion while the amount due to FRBNY, including accrued interest, is $24.7 billion. Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1)* (Mar. 3, 2011) (online at www.federalreserve.gov/releases/h41/20110303/); Fed Regulatory Reform: Bear Stearns, JPMorgan Chase, and Maiden Lane LLC, *supra* note 50.

[52] The Federal Reserve Act of 1913 provides for the central bank to take broad action in the face of financial or economic crisis. Section 13, paragraph 3 of the Act states that "[i]n unusual and exigent circumstances, the Board of Governors of the Federal Reserve System" may lend to any individuals, partnerships or corporations, given that certain conditions are met. On March 16, 2008, the Federal Reserve Board announced that it would use its authority under section 13(3) of the Federal Reserve Act to help facilitate the acquisition of Bear Stearns by

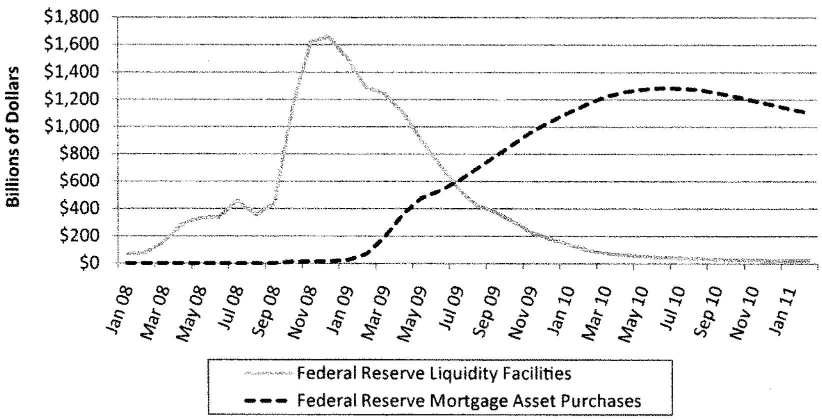
The Federal Reserve also undertook considerable asset purchases in response to the crisis. Between November 2008 and March 2010, the Federal Reserve purchased $1.25 trillion of MBS with government agency guarantees in an attempt to drive down mortgage rates and by doing so provided additional liquidity to financial institutions, including TARP participants.[53] The Federal Reserve also purchased nearly $175 billion of GSE debt.[54] As Figure 5 below illustrates, the purchase of agency MBS and GSE debt steadily increased as the liquidity facilities established at the height of the crisis were wound down, thus signaling a shift from crisis response to economic stimulus.

JPMorgan Chase. The Federal Reserve provided this assistance by creating a Limited Liability Company (LLC) named Maiden Lane that then received a $28.8 billion loan from FRBNY to purchase troubled assets from Bear Stearns. Subsequently, in September 2008, the Federal Reserve used its authority under section 13(3) of the Act to assist AIG. This assistance came in the form of a $85 billion credit facility for AIG and the creation as well as funding of two more Maiden Lane SPVs dedicated to purchasing troubled assets from the company. Federal Reserve Bank of Minneapolis, *The History of a Powerful Paragraph* (June 2008) (online at www.minneapolisfed.org/publications_papers/pub_display.cfm?id=3485); Federal Reserve Bank of New York, *Maiden Lane Transactions: Introduction* (online at www.newyorkfed.org/markets/maidenlane.html) (accessed Mar. 8, 2011).

[53] *See* Congressional Oversight Panel, *September Oversight Report: Assessing the TARP on the Eve of Its Expiration*, at 99-100 (Sept. 16, 2010) (online at cop.senate.gov/documents/cop-091610-report.pdf) (hereinafter "2010 September Oversight Report"); Board of Governors of the Federal Reserve System, *Data Download Program* (Instrument Used: Mortgage-Backed Securities Held by the Federal Reserve) (online at www.federalreserve.gov/datadownload/) (accessed Mar. 3, 2011).

[54] At its height, on March 31, 2010, the Federal Reserve owned $169 billion of GSE debt. Board of Governors of the Federal Reserve System, *Data Download Program* (Instrument Used: Federal agency debt securities: week average) (online at www.federalreserve.gov/datadownload/) (accessed Mar. 3, 2011).

Figure 5: Federal Reserve Liquidity Facilities as Compared to Asset Purchases[55]



2. FDIC

In keeping with its mission to "maintain stability and public confidence in the nation's financial system," the FDIC undertook a number of measures in response to the financial crisis.[56] The FDIC experienced significant losses to its Deposit Insurance Fund during the crisis due to the high number of bank failures. From the third quarter of 2008 through 2010, 318 banks failed in the United States with total assets of $631.7 billion.[57] During that same period, the FDIC set aside provisions for deposit insurance fund losses totaling $185.7 billion.[58] In addition, the

[55] Federal Reserve Liquidity Facilities are comprised of Term auction credit, Secondary credit, Seasonal credit, Term Asset-Backed Securities Loan Facility, Other credit extensions, Net portfolio holdings of Commercial Paper Funding Facility LLC, Central bank liquidity swaps, Primary dealer and other broker-dealer credit, Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility, Term facility. The Federal Reserve Mortgage Asset Purchases are comprised of federal agency debt securities and mortgage-backed securities held by the Federal Reserve. Board of Governors of the Federal Reserve System, *Data Download Program* (online at www.federalreserve.gov/datadownload/) (accessed Mar. 3, 2011).

[56] Federal Deposit Insurance Corporation, *FDIC Mission, Vision, and Values* (online at www.fdic.gov/about/mission/index.html) (accessed Mar. 3, 2011).

[57] This figure includes the $307 billion of assets Washington Mutual held when it was seized by regulators on September 25, 2008. The institution's banking assets were purchased by JPMorgan Chase the following day in a deal facilitated by the FDIC. Federal Deposit Insurance Corporation, *Failures and Assistance Transactions* (online at www2.fdic.gov/hsob/SelectRpt.asp?EntryTyp=30) (accessed Mar. 4, 2011); Federal Deposit Insurance Corporation, *JPMorgan Chase Acquires Banking Operations of Washington Mutual* (Sept. 25, 2008) (online at www.fdic.gov/news/news/press/2008/pr08085.html).

[58] This figure only reflects information provided through the third quarter of 2010. Federal Deposit Insurance Corporation, *DIF Income Statement* (Instrument Used: Provision for insurance losses, Q3 2008 through

enactment of EESA in October 2008 raised the basic limit on federal deposit insurance coverage from $100,000 per borrower to $250,000.[59]

The FDIC created its TLGP less than two weeks after the enactment of EESA, under the authority of the Federal Deposit Insurance Act. The TLGP had two parts. First, the Debt Guarantee Program (DGP) portion of the TLGP guarantees debt issued by banks. Second, the Transaction Account Guarantee Program (TAG) guaranteed certain noninterest-bearing transaction accounts at insured depository institutions.[60] Though it covered all depository accounts, the TAG program was intended to benefit business payment processing accounts, such as payroll accounts. The FDIC currently guarantees approximately $264.6 billion in outstanding financial institution obligations, and at its maximum $345.8 billion was guaranteed under the program.[61] Through both the TLGP and the expansion of deposit insurance, the FDIC provided significant additional support for the banking system at the peak of the crisis.

3. Treasury Department

In addition to the TARP, Treasury undertook several other highly important initiatives in response to the financial crisis. On September 7, 2008, Treasury announced that it would purchase government sponsored enterprises' mortgage backed securities (GSE MBS) in an attempt to promote both market stability and lower interest rates.[62] At its maximum, Treasury owned $220.8 billion in MBS under this program.[63] Furthermore, on September 29, 2008, Treasury announced a temporary guarantee for MMFs. While the total size of the money market

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Q3 2010) (online at www.fdic.gov/about/strategic/corporate/index.html) (hereinafter "FDIC: DIF Income Statement").

[59] Federal Deposit Insurance Corporation, *Emergency Economic Stabilization Act of 2008 Temporarily Increases Basic FDIC Insurance Coverage from $100,000 to $250,000 Per Depositor* (Oct. 7, 2008) (online at www.fdic.gov/news/news/press/2008/pr08093.html).

[60] Congressional Oversight Panel, *November Oversight Report: Guarantees and Contingent Payments in TARP and Related Programs*, at 38 (Nov. 6, 2009) (online at cop.senate.gov/documents/cop-110609-report.pdf) (hereinafter "2009 November Oversight Report").

[61] The maximum amount outstanding under this program was in May 2009. The current amount outstanding is as of January 31, 2011. Federal Deposit Insurance Corporation, *Monthly Reports Related to the Temporary Liquidity Guarantee Program* (Instrument Used: Debt Issuance Under Guarantee Program) (accessed Mar. 3, 2011) (online at www.fdic.gov/regulations/resources/tlgp/reports.html) (hereinafter "FDIC: Monthly Reports Related to the TLGP").

[62] U.S. Department of the Treasury, *Fact Sheet: GSE Mortgage Backed Securities Purchase Program* (Sept. 7, 2008) (online at www.treasury.gov/press-center/press-releases/Documents/mbs_factsheet_090708.pdf).

[63] U.S. Department of the Treasury, *Agency MBS Purchase Program* (Instrument Used: Trades by Month) (www.treasury.gov/resource-center/data-chart-center/Documents/Final%20Trades%20by%20month.pdf). As of February 2011, Treasury has received $84.0 billion in principal repayments and $16.7 billion in interest payments from the securities it holds as part of this program. U.S. Department of the Treasury, *MBS Purchase Program Principal and Interest Received* (online at www.treasury.gov/resource-center/data-chart-center/Documents/February%202011%20MBS%20Principal%20and%20Interest%20Monthly%20Breakout.pdf) (accessed Mar. 11, 2011).

at that point in time was $3.7 trillion, no losses were incurred and the program was closed on September 18, 2009, with Treasury having earned $1.2 billion in participation fees.[64]

In early September 2008, the FHFA, using authority it had been provided in law only six weeks earlier, placed the two large GSEs, Fannie Mae and Freddie Mac, in conservatorship, and Treasury agreed to provide capital infusions to these mortgage giants.[65] At that time, these two GSEs owned or guaranteed approximately $5.3 trillion in mortgage assets.[66] The FHFA placed Fannie Mae and Freddie Mac into conservatorship on September 7, 2008, in order to preserve each company's assets and to restore them to sound and solvent condition. Secretary Paulson announced Treasury's intention to make capital injections (through the purchase of preferred interests) in the GSEs in order to preserve their positive net worth.[67] Due to these coordinated actions, Treasury had guaranteed the GSE's debts, and FHFA had all the powers of the management, board, and shareholders of the enterprises.[68] In sum, these actions had the effect of changing the previously implicit government guarantee of these institutions into an explicit government guarantee.

Initially, Treasury acquired $1 billion in preferred stock from both Fannie Mae and Freddie Mac. Subsequently both entities drew upon this assistance by providing preferred stock with a dividend rate of 10 percent (double the initial dividend rate for participation in the CPP) in exchange for cash investments from Treasury. Furthermore, Treasury received warrants to purchase common stock in the GSEs, representing 79.9 percent of the common ownership when exercised.[69] The preliminary ceiling for the amount of preferred stock Treasury would purchase

[64] The size of the MMFs was $3.66 trillion in June 2009. IMMFA: Frequently Asked Questions, *supra* note 27; U.S. Department of the Treasury, *Treasury Announces Expiration of Guarantee Program for Money Market Funds* (Sept. 18, 2009) (online at www.treasury.gov/press-center/press-releases/Pages/tg293.aspx) (hereinafter "Treasury's Guarantee Program for Money Market Funds Expires").

[65] Conservatorship is the legal process by which an entity establishes control and oversight of a company to put it in a sound and solvent condition. Congressional Budget Office, *CBO's Budgetary Treatment of Fannie Mae and Freddie Mac* (Jan. 2010) (online at www.cbo.gov/ftpdocs/108xx/doc10878/01-13-FannieFreddie.pdf) (hereinafter "CBO: Fannie Mae and Freddie Mac").

[66] At the end of the third quarter 2008, Fannie Mae's mortgage credit exposure was $3.1 trillion, and Freddie Mac's exposure was $2.2 trillion. Federal National Mortgage Association, *Form 10-Q for the Quarterly Period Ended September 30, 2008*, at 110-111 (Instrument Used: Mortgage credit book of business) (Nov. 10, 2008) (online at www.sec.gov/Archives/edgar/data/310522/000095013308003686/w71392e10vq.htm#131); Federal Home Loan Mortgage Corporation, *Form 10-Q for the Quarterly Period Ended September 30, 2008*, at 99 (Instrument Used: Total mortgage portfolio) (Nov. 14, 2008) (online at www.sec.gov/Archives/edgar/data/1026214/000102621408000043/f65508e10vq.htm).

[67] U.S. Department of the Treasury, *Fact Sheet: Treasury Senior Preferred Stock Purchase Agreement* (Sept. 7, 2008) (online at www.treasury.gov/press-center/press-releases/Documents/pspa_factsheet_090708%20.pdf) (hereinafter "Treasury Fact Sheet on Senior Preferred Stock").

[68] 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).

[69] Treasury Fact Sheet on Senior Preferred Stock, *supra* note 67.

was $100 billion for each of the GSEs.[70] In February 2009, the ceiling for preferred stock purchases was raised to $200 billion for each GSE, and in December 2009, Treasury removed the cap on possible purchases entirely.[71] As of February 2011, the GSEs had drawn $153.9 billion under the Treasury preferred facility and paid $20.2 billion in dividends.[72] Earlier, in January 2010, the Congressional Budget Office (CBO) had estimated the total cost to the government for assistance to Fannie Mae and Freddie Mac to be $389 billion, a figure which included "the recognition of substantial losses on the entire outstanding stock of mortgages held or guaranteed by Fannie Mae and Freddie Mac" at the time the estimate was made in August 2009.[73]

From a larger perspective, TARP-assisted institutions were also among the many beneficiaries of the federal government's rescue of the GSEs themselves. Given the large holdings of GSE securities at the largest TARP-assisted institutions, the federal government's rescue of Fannie Mae and Freddie Mac effectively served to prevent additional major losses at these institutions. As noted above, one result of the federal government's intervention to place Fannie Mae and Freddie Mac in conservatorship in September 2008 was that their MBS and debt issues now enjoyed the effective guarantee of the federal government.[74] By first making explicit the federal support for these GSE securities and subsequently buying up to $1.25 trillion of the same securities, Treasury and the Federal Reserve effectively provided substantial economic benefit to the TARP-assisted banks that went well beyond the amounts reflected in the accounting for the TARP itself.

4. Coordinated Action

As mentioned above, there were a number of initiatives that called for cooperative action between government actors. Figure 6 below illustrates this interaction. For example, the TALF

[70] Treasury Fact Sheet on Senior Preferred Stock, *supra* note 67.

[71] U.S. Department of the Treasury, *Statement by Secretary Tim Geithner on Treasury's Commitment to Fannie Mae and Freddie Mac* (Feb. 2, 2009) (online at www.treasury.gov/press-center/press-releases/Pages/tg32.aspx); U.S. Department of the Treasury, *Treasury Issues Update on Status of Support for Housing Programs* (Dec. 24, 2009) (online at www.treasury.gov/press-center/press-releases/Pages/200912241534592 4543.aspx) (hereinafter "Treasury Update on Housing Programs").

[72] This figure excludes the $2 billion in preferred stock given to Treasury by the GSEs upon the creation of these facilities. Fannie Mae had drawn $90.2 billion and Freddie Mac had drawn $63.7 billion under their respective facilities. Thus far, Fannie Mae has paid $10.2 billion and Freddie Mac has paid $10.0 billion in dividends for their draws from the preferred facilities. Federal Housing Finance Agency, *Treasury and Federal Reserve Purchase Programs for GSE and Mortgage-Related Securities*, at 2-3 (Feb. 25, 2011) (online at www.fhfa.gov/webfiles/19854/TreasFED02252011%20pdf%20-%20Adobe%20Acrobat%20Pro.pdf) (hereinafter "Treasury & Federal Reserve Purchase Programs for GSE and Mortgage-Related Securities").

[73] CBO: Fannie Mae and Freddie Mac, *supra* note 65, at 8-9.

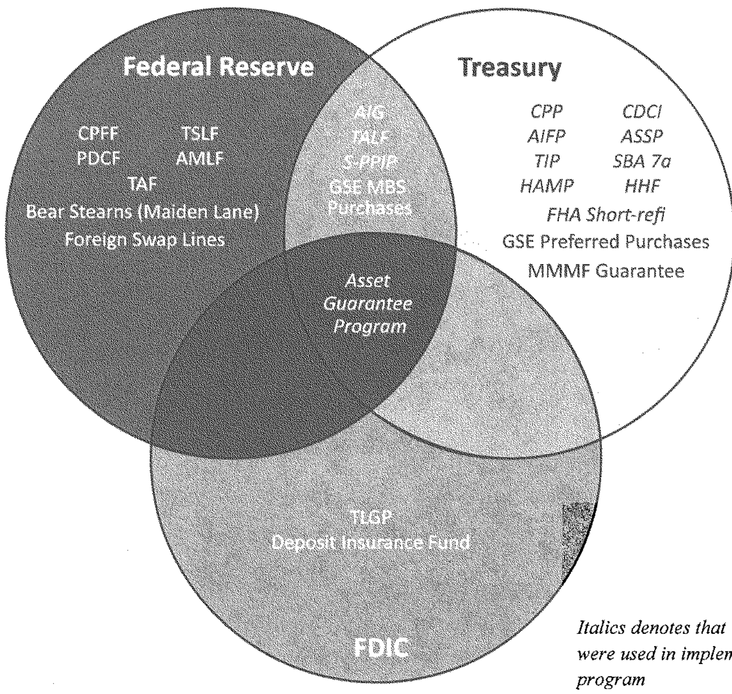
[74] Absent government intervention, the GSEs would have been unable to honor their MBS guarantees, and therefore the value of these MBS securities would have plummeted. Treasury Update on Housing Programs, *supra* note 71.

was a cooperative program between Treasury and the Federal Reserve in which the TARP took a first-loss position on any losses associated with TALF loans, originally up to $20 billion, with the Federal Reserve responsible for losses above that level.[75] Similarly, Citigroup and Bank of America benefitted from an asset guarantee in which Treasury, the FDIC, and the Federal Reserve all accepted risk liability for losses above a certain level.[76] Additionally, as discussed in Section VI of this report, AIG was the beneficiary of a coordinated effort between the TARP and the Federal Reserve, with $182 billion of funds being committed at the height of assistance.

[75] The TARP is currently only responsible for losses up to $4.3 billion. Treasury Transactions Report – January 2009, *supra* note 41.

[76] Although Treasury, the Federal Reserve, and the FDIC negotiated with Bank of America regarding a Guarantee similar to the one provided to Citigroup, 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. BofA Termination Agreement, *supra* note 39, at 1-2.

Figure 6: Government Response to Financial Crisis by Organization[77]



Italics denotes that TARP funds were used in implementing the program

Finally, the Federal Reserve, the FDIC, and the Comptroller of the Currency released the Supervisory Capital Assessment Program (SCAP), more commonly known as the "stress tests," on May 7, 2009. This forward-looking analysis was intended to determine whether or not the nation's 19 largest bank holding companies (BHCs) could withstand adverse economic conditions.[78] Under the SCAP, only one institution, GMAC/Ally Financial, was found to be in

[77] This figure does not reflect that Fannie Mae and Freddie Mac were placed into conservatorship by their regulator, the Federal Housing Finance Agency, on September 7, 2008. Federal Housing Finance Agency, *Statement of FHFA Director James B. Lockhart* (Sept. 7, 2008) (online at www.fhfa.gov/webfiles/23/FHFAStatement9708final.pdf); Congressional Research Service, *Government Interventions in Response to Financial Turmoil* (Dec. 16, 2010).

[78] Board of Governors of the Federal Reserve System, *Federal Reserve, OCC, and FDIC Release Results of the Supervisory Capital Assessment Program* (May 7, 2009) (online at www.federalreserve.gov/newsevents/press/bcreg/20090507a.htm).

need of additional government-provided capital, which was provided under the automotive portion of the TARP. The review, however, did note that roughly half of the firms needed to take steps, including raising capital, to be more adequately prepared for possible losses.[79]

[79] Board of Governors of the Federal Reserve System, *Federal Reserve Board Makes Announcement Regarding the Supervisory Capital Assessment Program (SCAP)* (Nov. 9, 2009) (online at www.federalreserve.gov/newsevents/press/bcreg/20091109a.htm) (hereinafter "Federal Reserve Announcement on the Supervisory Capital Assessment Program").

Figure 7: Total Federal Government Exposure to SCAP Bank Holding Companies *(billions of dollars)*

	TARP[i]				FDIC		Federal Reserve					Total Federal Exposure
							Liquidity Programs[iv]					
	CPP	AGP	TIP	AIFP	TLGP Debt Issuance[ii]	AGP[iii]	PDCF	CPFF	TAF	TSLF[vi]	AGP[v]	
Bank of America	$25.0	$5.0	$20.0	–	$68.6	$5.0	$9.3	$14.9	$88.0	$13.1	$87.2	**$336.1**
Citigroup	25.0	5.0	20.0	–	66.4	$10.0	21.3	24.9	25.0	34.0	244.5	**476.2**
JPMorgan Chase	25.0	–	–	–	40.6	–	[vii]3.0	–	48.0	13.0		**129.6**
Wells Fargo	25.0	–	–	–	9.7	–	–	–	72.5	–		**107.2**
American Express	3.4	–	–	–	5.9	–	–	4.5	–	–		**13.8**
Bank of New York Mellon	3.0	–	–	–	0.6	–	–	–	–	–		**3.6**
BB&T Financial	3.1	–	–	–	–	–	–	–	8.5	–		**11.6**
Capital One Financial	3.6	–	–	–	–	–	–	–	–	–		**3.6**
Regions Financial	3.5	–	–	–	3.8	–	–	–	13.0	–		**20.3**
KeyCorp	2.5	–	–	–	1.9	–	–	–	9.5	–		**13.9**
State Street	2.0	–	–	–	4.1	–	–	8.5	10.0	–		**24.6**
SunTrust	4.9	–	–	–	3.6	–	–	–	3.5	–		**11.9**
PNC Financial Services	7.6	–	–	–	3.9	–	–	0.4	2.0	–		**13.9**
Goldman Sachs	10.0	–	–	–	28.6	–	16.5	*	–	34.5		**89.6**
Morgan Stanley	10.0	–	–	–	24.5	–	60.2	4.3	–	36.0		**135.0**
US Bancorp	6.6	–	–	–	3.9	–	–	–	–	–		**10.5**
Fifth Third Bancorp	3.4	–	–	–	–	–	–	0.3	7.3	–		**11.0**
Ally Financial/GMAC	–	–	–	17.2	7.4	–	–	7.9	5.0	–		**37.5**
MetLife[viii]	–	–	–	–	0.4	–	–	1.6	2.8	–		**4.8**
Total	**$163.5**	**$10.0**	**$40.0**	**$17.2**	**$273.8**	**$15.0**	**$110.2**	**$67.4**	**$295.1**	**$130.6**	**$331.7**	**$1,454.6**

*Amount less than $50 million.

See endnote references in Annex III: Endnotes

In conjunction with its oversight mandate, the Panel has done its own accounting of the total resources that the federal government has devoted to stabilizing the economy through the programs and initiatives outlined above. A complete accounting of the government's current maximum exposure from these financial stability efforts can be found in Annex I.

Figure 8: Government Exposure to Financial Stability Efforts[80]

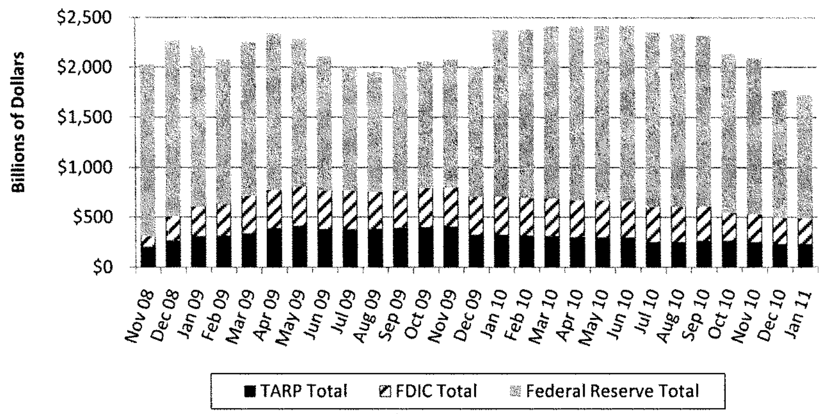


Figure 8[81] above shows the actual monthly amounts outstanding for all three agencies' (TARP, FDIC, and the Federal Reserve) stabilization efforts since November 2008. At its height, $2.4 trillion was outstanding under the financial rescue programs conducted by these agencies. While significant, TARP funds outstanding never represented more than 19 percent of the total government stability efforts.

[80] At its peak, the Federal Reserve had purchased $1.1 trillion of Fannie Mae and Freddie Mac MBS. These MBS are guaranteed by Fannie Mae and Freddie Mac and those two institutions in turn have been placed into conservatorship and had the entirety of their debts guaranteed by Treasury. Hence, while this graph represents the federal government's financial exposure to the MBS held by the Federal Reserve as part of the Federal Reserve's balance sheet, there is an open question as to what agency of the federal government is ultimately bearing the risk entailed in holding these securities. In a May 2010 Report, as part of a larger review of the Federal Reserve's actions during the financial crisis, CBO concluded that "Direct Purchases of Securities" (including MBS) of the Federal Reserve that had been made up to that time did not expose the federal government to any subsidy cost. This analysis was done on a risk-adjusted basis and implies that there was no risk of loss to the Federal Reserve from these MBS purchases. Treasury & Federal Reserve Purchase Programs for GSE and Mortgage-Related Securities, *supra* note 72, at 2-3; Congressional Budget Office, *The Budgetary Impact and Subsidy Costs of the Federal Reserve's Actions During the Financial Crisis* (May 2010) (www.cbo.gov/doc.cfm?index=11524&zzz=40793).

[81] The Federal Reserve total is comprised of the following: Term auction credit, Secondary credit, Seasonal credit, Term Asset-Backed Securities Loan Facility, Other credit extensions, Net portfolio holdings of Commercial Paper Funding Facility LLC, Central bank liquidity swaps, Primary dealer and other broker-dealer credit, Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility, Term facility, federal agency debt

II. Banks

A. Capital Infusions and Bank Balance Sheets

1. Summary of COP Reports and Findings

Since banks are the principal actors in most financial systems and were at the center of many of Treasury's TARP interventions, a substantial majority of the Panel's reports addressed the banking sector in some fashion.[82] The six reports discussed in this section (II.A), however, predominantly addressed issues arising out of one of Treasury's central strategies for the banking sector during the crisis: Treasury's (and, as applicable, the Federal Reserve's) focus on the health of bank balance sheets and Treasury's attempts to foster bank stability through capital infusions in the form of equity investments.[83] The questions that the Panel raised in its first two reports, including the means for ensuring accountability and transparency from TARP recipients (such as the tracking of TARP funds) and the methods for the taxpayer to be fairly compensated for the risk they were taking, run solidly through the Panel's reports on banks.

a. Treasury as Investor and Recovery for the Taxpayer

The Panel's reports on the banking sector have consistently focused on returns to the taxpayer from Treasury's investments and the valuation of the assets received by Treasury for the equity investments it made. Prior to the first CPP repayments, the Panel addressed the problem of valuation broadly and published a report assessing Treasury's investment to

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securities, mortgage-backed securities held by the Federal Reserve, Credit extended to American International Group, Inc., Net portfolio holdings of Maiden Lane II LLC, Net portfolio holdings of Maiden Lane III LLC, and Preferred interests in AIA Aurora LLC and ALICO Holdings LLC. Board of Governors of the Federal Reserve System, Data Download Program: *Factors Affecting Reserve Balances (H.4.1)* (Instrument Used: Weekly Average) (Mar. 3, 2011) (online at www.federalreserve.gov/releases/h41/20110203/). The TARP total uses the amounts outstanding at the end of each month as reported on Treasury's Monthly 105(a) Reports to Congress. The total amount committed under the HAMP and the SSFI/AIGIP is used rather than the outstanding amount in order to reflect more accurately the TARP's assistance. U.S. Department of the Treasury, *Monthly 105(a) Reports to Congress* (Dec. 5, 2008-Feb. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/105/Pages/default.aspx). The FDIC total is comprised of the amounts outstanding under the Temporary Liquidity Guarantee Program (TLGP), the quarterly amounts outstanding on the Deposit Insurance Fund's balance sheet for "liabilities due to resolutions" and "contingent liabilities: future failures," and the FDIC's exposure to the Bank of America and Citigroup asset guarantees. This figure represents the FDIC's actual balance sheet holdings for "liabilities due to resolutions" and "contingent liabilities: future failures" in the third and fourth quarters of 2008; the first, second, third, and fourth quarters of 2009; and the first, second, and third quarters of 2010. FDIC: DIF Income Statement, *supra* note 58; FDIC: Monthly Reports Related to the TLGP, *supra* note 61.

[82] For example, reports on small business lending and foreclosures and housing have important implications for banks' health and the stability of the financial system in general.

[83] In Sections II.B and II.C, *infra*, this report discusses additional types of Treasury actions intended to foster bank stability.

determine whether the taxpayers had received a fair deal.[84] The February 2009 report provided a financial valuation and legal analysis of the terms of Treasury's investment in the participating financial institutions and concluded that, partially because all investments were made on the same terms, Treasury paid substantially more for the assets it purchased under the TARP than their then-current market value.[85] While a legal analysis of the program concluded that one-size-fits-all terms aided speed and participation rates for the program,[86] the program design meant that Treasury could not address differences in credit quality or risk among institutions, or differences in their need for capital, by varying the terms of each investment. Insofar as the standard terms were set for strong institutions, they may have been too lenient for weaker institutions.[87] In its April 2009 report, the Panel continued to emphasize the need for a clear and well-explained strategy and transparent execution for Treasury's TARP investments to improve public confidence in the program,[88] and broadly discussed valuations for the distressed assets in the financial sector and their relationship to government options.[89]

[84] Congressional Oversight Panel, *February Oversight Report: Valuing Treasury's Acquisitions,* at 2-11 (Feb. 6, 2009) (online at cop.senate.gov/documents/cop-020609-report.pdf) (hereinafter "2009 February Oversight Report").

[85] The Duff & Phelps analysis was done for the ten largest TARP transactions and compared the amount of the government's investment with the value of the preferred stock and the warrants it received in return in each transaction. Since these were not publicly traded securities, the valuation had to make a variety of assumptions and make comparisons with a specific set of private deals. The study concluded that every time Treasury spent $100, it took back assets that were worth, on average, $66. This difference would equal a $78 billion shortfall for the $254 billion spent on these deals. See Section II.A.2 below for further analysis.

[86] The legal analysis study, performed by Timothy Massad and Catherina Celosse, found that the standardized documentation used by Treasury likely contributed to Treasury's ability to obtain speed of execution and wide participation, both important program goals. 2009 February Oversight Report, *supra* note 84, at 40-50. At the time of this report, Mr. Massad was a corporate lawyer at a New York-based law firm. He took a leave of absence from the law firm in order to serve as special advisor to the Panel on a pro bono basis. Ms. Celosse acted as counsel for the Panel.

[87] The Panel's ongoing concerns with respect to Treasury's "one size fits all" approach are discussed further in Section II.A.2 below.

[88] Congressional Oversight Panel, *April Oversight Report: Assessing Treasury's Strategy: Six Months of TARP*, at 7 (Apr. 7, 2009) (online at cop.senate.gov/documents/cop-040709-report.pdf) (hereinafter "2009 April Oversight Report").

[89] *Id.* at 75-76.

Figure 9: Estimated Value and Subsidy Rates of Certain TARP Investments as of COP's February 2009 Report[90]

Purchase Program Participant	Valuation Date	Face Value	Total Estimated Value		
			Value	Subsidy %	Subsidy $
Capital Purchase Program					
Bank of America Corporation	10/14/08	$15.0	$12.5	17%	$2.6
Citigroup, Inc.	10/14/08	25.0	15.5	38%	9.5
JPMorgan Chase & Co.	10/14/08	25.0	20.6	18%	4.4
Morgan Stanley	10/14/08	10.0	5.8	42%	4.2
Goldman Sachs Group	10/14/08	10.0	7.5	25%	2.5
PNC Financial Services	10/24/08	7.6	5.5	27%	2.1
U.S. Bancorp	11/3/08	6.6	6.3	5%	0.3
Wells Fargo & Company	10/14/08	25.0	23.2	7%	1.8
Subtotal		**124.2**	**96.9**	**22%**	**27.3**
311 Other Transactions		**70.0**	**54.6**	**22%**	**15.4**
SSFI & TIP					
American International Group, Inc.	11/10/08	40.0	14.8	63%	25.2
Citigroup, Inc.	11/24/08	20.0	10.0	50%	10.0
Subtotal		**60.0**	**24.8**	**59%**	**35.2**
Total		**$254.2**	**$176.2**	**31%**	**$78.0**

In June 2009, Treasury permitted (with the Federal Reserve's approval), ten of the nation's largest BHCs – representing more than one-third of the nation's banking assets – to repay the financial assistance they received in October 2008.[91] The Panel's July 2009 report on TARP repayments (including the repurchase of stock warrants) accordingly focused on whether the taxpayer was receiving maximum benefit from its investment in the TARP.[92]

As part of its analysis, the Panel determined that because the warrants that accompanied the CPP funds represented the only opportunity for the taxpayer to participate directly in the increase in the share prices of banks made possible by public money, the price at which the warrants were sold was critical. As of July 2, 2009, 11 small banks had repurchased their warrants from Treasury for a total amount that the Panel estimated to be only 66 percent of its best estimate of their market value.[93] However, at the time of this valuation, Treasury was just

[90] 2009 February Oversight Report, *supra* note 84, at 7. Note that Merrill Lynch was not included in the Duff & Phelps analysis because it did not exist as a standalone entity by February 2009.

[91] CPP recipients may only repay their funds if their regulator determines that the repayment will not jeopardize the entity's capital position, and thus repayments must be approved.

[92] Congressional Oversight Panel, *July Oversight Report: TARP Repayments, Including the Repurchase of Stock Warrants*, at 3-4 (July 10, 2009) (online at cop.senate.gov/documents/cop-071009-report.pdf) (hereinafter "2009 July Oversight Report"). The Panel noted, however, that its own valuations did not include the liquidity discounts and other adjustments contemplated by Treasury.

[93] *Id.* at 7.

beginning its warrant repurchase program, and the Panel acknowledged that the prices paid might not be representative of future repurchases. Building on its February 2009 report, the Panel's July 2009 report analyzed the contractual constraints governing Treasury's TARP investments in the banks.[94] As in prior reports, the Panel emphasized that it was critical that Treasury make the repayment process – the reason for its decisions, the way it arrived at its figures, and the exit strategy from or future use of the TARP – absolutely transparent.

b. Stability of the Banking System

The health – or possible lack thereof – of a variety of banks, small and large, lay at the center of the financial crisis and significantly informed Treasury's approach under the TARP. Thus, in a number of reports, the Panel focused on actions Treasury took to assess the health of financial institutions participating in the TARP, the impact of those actions on financial stability in general, and whether they contributed to market transparency. The Panel particularly focused on these issues in its June 2009 and August 2009 reports on the Federal Reserve's and Treasury's "stress tests" and on the impact of troubled assets on bank balance sheets, respectively.

As described above in Section I, in the first quarter of 2009 Treasury and the Federal Reserve announced that they would conduct stress tests of the 19 largest BHCs in the country, the vast majority of which were TARP recipients and which received the lion's share of the CPP funds. Upon completion of the stress tests in May 2009, BHCs found to be in need of an additional capital buffer were given six months to raise the necessary capital. Accordingly, the Panel's June 2009 report examined the first stress tests conducted by banking regulators on these BHCs.[95] The report focused on how effectively Treasury and the Federal Reserve conducted the stress tests, specifically reviewing the government's economic assumptions, their methods of calculating bank capitalization, their release of information to the public, and whether the stress tests should be repeated in the future.[96]

The Panel asked independent experts to review and evaluate the stress tests. These experts found the economic modeling used to conduct them to be generally soundly conceived and conservative based on the limited information available to them.[97] However, the experts

[94] *Id.* at 23.

[95] Congressional Oversight Panel, *June Oversight Report: Stress Testing and Shoring Up Bank Capital*, at 3-5 (June 9, 2009) (online at cop.senate.gov/documents/cop-060909-report.pdf) (hereinafter "2009 June Oversight Report"). Treasury and the Federal Reserve Board had announced in early February 2009 that they would conduct comprehensive and simultaneous reviews of the nation's largest BHCs – those with more than $100 billion in assets – to determine their ability to remain well capitalized if the recession were to lead to deeper than expected losses. The effort, called the Supervisory Capital Assessment Program (SCAP), has been referred to more informally as the "stress tests."

[96] To help make these assessments of the stress tests and review the stress test methodology, the Panel engaged two internationally renowned experts in risk analysis, University of California at Berkeley Professors Eric Talley and Johan Walden.

[97] 2009 June Oversight Report, *supra* note 95, at 50.

cautioned that the stress tests did not model BHC performance under "worst case" scenarios, and as a result did not project the capital necessary to prevent banks from being stressed to near the breaking point. Most important, the expert study stated that the primary issue with the stress test process was the program's lack of "transparency to outsiders and replicability of its results."[98] In the report, the Panel concluded that while the stress tests had a positive short-term effect on the markets, they did not address the question as to whether the values shown on bank balance sheets for certain classes of assets were too high; by restricting themselves to a two-year timeframe, their conclusions did not take into account the possibility that the asset values assumed (particularly for so-called troubled assets), may overvalue bank assets to the extent that those liabilities result in losses after 2010.[99] Thus, although the release of these stress test results had a positive effect on the market, it was not clear that the banks were fully healthy.

In its August 2009 report, the Panel revisited bank balance sheets in analyzing the potential risks troubled assets may present in the future and assessed Treasury's strategy for removing these assets from bank balance sheets.[100] In this context, the Panel has noted that a continuing uncertainty in the financial markets was whether the troubled assets that remain on banks' balance sheets could again become the trigger for instability.[101] The Panel found that ten months after the TARP was signed into law, substantial troubled assets remained on banks' balance sheets but that it was difficult to assess the full scope of the problem because of insufficient disclosure by the banks. In light of this finding, the Panel analyzed Treasury's program to remove these assets from banks' balance sheets, which was the Public-Private Investment Program (PPIP), and concluded that there was much uncertainty as to whether the PPIP would jump-start the market for troubled securities.[102] The Panel concluded that the future performance of the economy and the performance of the underlying loans, as well as the method of valuation of the assets, were critical to the continued operation of the banks.

[98] 2009 June Oversight Report, *supra* note 95, at 43.

[99] 2009 June Oversight Report, *supra* note 95, at 50.

[100] Congressional Oversight Panel, *August Oversight Report: The Continued Risk of Troubled Assets*, at 6 (Aug. 11, 2009) (online at cop.senate.gov/documents/cop-081109-report.pdf) (hereinafter "2009 August Oversight Report").

[101] *Id.* at 62.

[102] For details regarding the Public-Private Investment Program (PPIP), *see* U.S. Department of the Treasury, *Legacy Securities Public-Private Investment Program: Program Update – Quarter Ended December 31, 2010*, at 3 (Jan. 24, 2011) (online at www.treasury.gov/initiatives/financial-stability/investment-programs/ppip/s-ppip/Documents/ppip-%2012-10%20vFinal.pdf) (hereinafter "Treasury's Legacy Securities Public-Private Investment Program: Program Update"). The PPIP, announced on March 23, 2009, was designed to allow banks and other financial institutions to shore up their capital by removing troubled assets from their balance sheets by creating public-private investment funds financed by private investors, whose capital contributions were to be matched dollar-for-dollar by Treasury using TARP funds. Treasury initially pledged up to $30 billion for the PPIP, but the fund managers did not raise sufficient private sector capital for Treasury's combination of matching funds and debt financing to reach that amount. Therefore, Treasury's total obligation is limited to $22.4 billion (which includes $22.1 billion for active public-private investment funds and $356.3 million disbursed to TCW, which has been repaid). For an update on the PPIP as of December 31, 2010, *see id.* at 5.

The August 2009 report also addressed differences between smaller and larger banks, discussed more fully below: in particular, the Panel was concerned about the impact of troubled assets on small banks, whose troubled assets are generally whole loans that could not be sold under the PPIP's terms.[103] In addition, the report noted that small banks were and remain far more exposed to commercial real estate (CRE) loans and, unlike the larger financial institutions, are not stress tested by Treasury and the Federal Reserve.

c. Ongoing Risks for Smaller Banks

One of the recurring themes in the Panel's reports has been the different effects of Treasury's TARP programs on banks of different sizes. Smaller and larger banks have different types of exposures and focus on different assets in the banking sector. Accordingly, one-size-fits-all programs do not always have comparable effects on smaller and larger banks.

As an example, smaller banks lend to CRE ventures at much greater rates than larger banks. Smaller banks are therefore significantly exposed to one of the sectors in the economy that has been very hard-hit during and since the crisis. In this context, the Panel examined the effects of CRE loans on smaller banks in detail in its February 2010 report. The Panel expressed concern that a wave of CRE loan losses over the next four years could jeopardize the stability of many banks, particularly community banks.[104] CRE loans made over the last decade – for retail properties, office space, industrial facilities, hotels and apartments – totaling $1.4 trillion will require refinancing in the period 2011 through 2014. The report noted that nearly half of those CRE loans are "underwater," meaning the borrower owes more on the loan than the underlying property is worth. While these problems have no single cause, the loans made at the peak of the real estate market are most likely to fail.

In its evaluation of the effect of CRE exposures, the Panel stated that "a significant wave of commercial mortgage defaults would trigger economic damage that could touch the lives of nearly every American." The failure of commercial properties creates a downward spiral of economic contraction: job losses; deteriorating store fronts, office buildings and apartments; as well as the failure of the banks serving those communities. Acknowledging that not every bank can or should be saved, the Panel noted that because community banks play a critical role in financing the small businesses that could help the American economy create new jobs, their widespread failure could disrupt local communities, undermine the economic recovery, and extend an already painful recession.

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[103] As noted in the discussion of the Panel's small business lending report, Section III.A.3.d, *infra*, the PPIP can therefore be assumed to have had very little effect on small business lending since it had little effect on the balance sheets of the banks that are disproportionately engaged in such lending.

[104] Congressional Oversight Panel, *February Oversight Report: Commercial Real Estate Losses and the Risk to Financial Stability*, at 2 (Feb. 10, 2010) (online at cop.senate.gov/documents/cop-021110-report.pdf) (hereinafter "2010 February Oversight Report").

In July 2010, continuing its examination of stresses on smaller banks, and emphasizing problems with one-size-fits-all programs, the Panel published a comprehensive report on small banks in the CPP and addressed issues beyond the continued risk posed by CRE assets. The Panel's main conclusion was that because of the CPP's "one-size-fits-all" repayment terms, large banks had been much better served by the program than smaller institutions. In fact, the Panel concluded that small banks might find it difficult or impossible to exit the program, particularly if the banking sector remained weak.[105] As discussed earlier, Treasury provided capital to banks participating in the CPP under a single set of repayment terms designed at the outset of the program. Of the 19 American banks with more than $100 billion in assets, 17 participated in the CPP, receiving 81 percent of the total CPP funds. Money was made available to many of these large banks in only a matter of weeks, in some cases even before the banks applied for the funds. As of July 2010, 76 percent of these large banks had already repaid taxpayers, and the healthier banks were reporting record profits. However, the July 2010 report noted that by contrast, of the 7,891 banks with assets of less than $100 billion, only 690 received funds from CPP, and less than 10 percent of those banks had repaid their loans. Those banks experienced a longer and more stringent evaluation to receive the funds, and many are still struggling to meet their obligations to the taxpayer.[106] The Panel also stated that the CPP could have the potential to contribute to an already ongoing trend towards concentration in the financial sector and analyzed the potential negative consequences of such a trend.[107]

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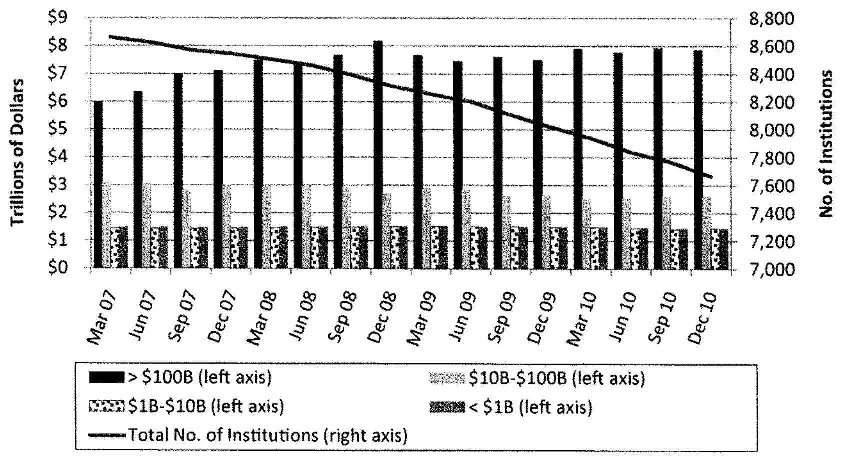
[105] Congressional Oversight Panel, *July Oversight Report: Small Banks in the Capital Purchase Program*, at 3 (July 14, 2010) (online at cop.senate.gov/documents/cop-071410-report.pdf) (hereinafter "2010 July Oversight Report").

[106] *Id.* at 3.

[107] *Id.* at 56 ("This increase in concentration could potentially have the ancillary, and likely unpopular, effect of reducing competition and giving the remaining banks a freer hand in setting terms for their depositors, possibly resulting in higher fees and more restrictions on account holders. Individuals and families with smaller accounts may receive diminished customer service, and smaller businesses are likely to suffer as well. Moreover, the limited systemic effect of small banks belies the critical role they can play in local economies.").

Figure 10: Concentration of Bank Assets, by Size (2007-2010)[108]



In its conclusions, the Panel questioned whether the participation of small banks in the CPP had advanced Treasury's broader aims for the program. These CPP-participant small banks comprised too small a share of the banking sector to be systemically significant, and therefore their participation was and remains unlikely to contribute to financial stability. In addition, the Panel stated that there was very little evidence to suggest that the CPP led small banks to increase lending, which was the other initial goal of the program.[109] According to the Panel's May 2010 report on small businesses, the inability of smaller banks to provide credit was also problematic because between 2008 and 2009 Wall Street banks' small business loan portfolios fell by 9.0 percent, more than double the 4.1 percent decline in their entire lending portfolios.[110]

[108] Data compiled using the FDIC's Statistics on Depository Institutions. Four asset categories were created in order to facilitate a snapshot of the industry at the end of each financial quarter. Federal Deposit Insurance Corporation, *Statistics on Depository Institutions* (Instrument: Total Assets) (online at www3.fdic.gov/sdi/) (accessed Mar. 3, 2011).

[109] See Section III for additional discussions on the consequences of these ongoing problems for small businesses and the economy.

[110] Congressional Oversight Panel, *May Oversight Report: The Small Business Credit Crunch and the Impact of the TARP*, at 3 (May 13, 2010) (online at cop.senate.gov/documents/cop-051310-report.pdf) (hereinafter "2010 May Oversight Report"). In addition, the Panel noted in its July report that "neither Treasury nor federal financial regulators have pushed big banks to deploy their TARP funds in lending to consumers, small businesses, and smaller banks to 'unfreeze' the financial markets the way they have pushed small banks. This may be in part because the larger institutions have largely exited, and therefore are not subject to the public pressure arising from the lingering credit crunch." 2010 July Oversight Report, *supra* note 105, at 48.

2. Panel Recommendations and Updates

Over the course of the last two years, in evaluating Treasury's capital infusion programs and approaches to bank balance sheets, the Panel has provided Treasury with a series of specific recommendations targeted towards particular programs. These recommendations are detailed below, and as individual and detailed as they may be, the recommendations share common themes. The Panel's recommendations have constantly included calls for greater transparency and accountability as well as suggested program changes that would improve the government's financial stabilization effort and protect the taxpayer's investments in the banking sector.[111]

a. Risk Assessments/Stress Tests

Accurately assessing the economic viability of the banks was critical to instilling public trust in our financial markets. Accordingly, the Panel recommended several steps that were geared towards reducing the risk of the banks' returning to instability and improving market confidence. In both the June 2009 and August 2009 reports, the Panel advocated that Treasury and the Federal Reserve repeat the stress tests if the adverse scenario assumptions (unemployment, GDP, and housing prices) of the original stress tests had been exceeded.[112] Specifically, the Panel noted the possibility that the actual unemployment rate average for 2009 would exceed the one used in the more adverse scenario.[113] The Panel also suggested that stress testing should be a regular feature of the 19 largest BHCs' examination cycle as long as an appreciable amount of troubled assets remain on their books, economic conditions do not substantially improve, or both.[114] In addition, the Panel stated that between supervisory stress tests, the 19 stress-tested BHCs should be required to run internal stress tests, according to supervisory guidance, and to submit those results as part of their ongoing supervisory

[111] In connection with its evaluation of Treasury's investments in banks, the Panel has also expressed continuing concerns with moral hazard associated with the TARP investments, which are detailed in Section IX, below.

[112] 2009 June Oversight Report, *supra* note 95, at 48-49; 2009 August Oversight Report, *supra* note 100, at 61-62.

[113] The adverse economic assumptions for the unemployment rate were 8.9 percent for 2009 and 10.3 percent for 2010. The actual unemployment rates for those years were 9.3 percent for 2009 and 9.6 percent for 2010. 2009 June Oversight Report, *supra* note 95, at 5, 17; BLS: Unemployment Rate, *supra* note 23. After the June 2009 report, the Panel questioned Secretary Geithner at a hearing and engaged in correspondence with him regarding the assumptions (including the unemployment assumptions) and the relative weight of the assumptions used in the stress tests without, however, receiving substantial additional clarity. *See* Congressional Oversight Panel, Testimony of Timothy F. Geithner, secretary, U.S. Department of the Treasury, *Transcript: COP Hearing with Treasury Secretary Timothy Geithner*, at 33 (Sept. 10, 2009) (online at cop.senate.gov/documents/transcript-091009-geithner.pdf); Letter from Elizabeth Warren, chair, Congressional Oversight Panel to Timothy F. Geithner, secretary, U.S. Department of the Treasury (Sept. 15, 2009) (online at cop.senate.gov/documents/cop-100909-report-correspondence.pdf); Letter from Timothy F. Geithner, secretary, U.S. Department of the Treasury to Elizabeth Warren, chair, Congressional Oversight Panel (Dec. 10, 2009) (online at cop.senate.gov/documents/cop-011410-report-correspondence.pdf).

[114] 2009 June Oversight Report, *supra* note 95, at 48-49.

examinations.[115] Finally, the Panel encouraged regulators to use stress tests on an ad hoc basis for all banks or BHCs as circumstances, including the banks' business mix, dictated.[116]

Although the stress tests are being repeated,[117] not all of the Panel's concerns regarding bank stability have been assuaged. For instance, neither Treasury nor the banking regulators have made stress testing a regular part of the bank examination process yet, although under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) the Federal Reserve must conduct and publish a summary of the results of annual stress tests for systemically important financial institutions.[118] Furthermore, Secretary of the Treasury Timothy F. Geithner has stated that he expects public disclosure of stress testing will become a regular part of bank supervision.[119] The Dodd-Frank Act has also made broader changes to the regulatory landscape, including requiring that regulators establish minimum capital leverage levels for the banks and other relevant financial institutions.[120]

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[115] 2009 June Oversight Report, *supra* note 95, at 48-49.

[116] 2009 June Oversight Report, *supra* note 95, at 48-49.

[117] Board of Governors of the Federal Reserve System, *Revised Temporary Addendum to SR Letter 09-4: Dividend Increases and Other Capital Distributions for the 19 Supervisory Capital Assessment Program Bank Holding Companies* (Nov. 17, 2010) (online at www.federalreserve.gov/newsevents/press/bcreg/bcreg20101117b1.pdf) (hereinafter "Fed Addendum to SR Letter 09-4").

[118] 12 U.S.C. §5365(i). The Federal Reserve has yet to implement this regulation or to release information on the extent to which it will disclose the results of the latest round of stress tests or those tests which will be performed in accordance with the Dodd-Frank Act Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act). The Federal Reserve lists the stress requirements under the Dodd-Frank Act as initiative that it plans to implement between April and June of 2011. *See* Board of Governors of the Federal Reserve System, *Implementing the Dodd-Frank Act: The Federal Reserve Board's Role: Initiatives Planned: April to June 2011* (online at www.federalreserve.gov/newsevents/reform_milestones201104.htm) (accessed Mar. 11, 2011).

[119] Congressional Oversight Panel, Testimony of Timothy F. Geithner, secretary, U.S. Department of the Treasury, *Transcript: COP Hearing with Treasury Secretary Timothy Geithner* (Dec. 16, 2010) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-121610-geithner.cfm) (hereinafter "Geithner Testimony to the Panel") ("I am very confident that a regular part of risk management and supervision in the future for our system will be regular public disclosure of stress tests by major institutions.").

[120] 12 U.S.C. §5371. The question of the level of capital leverage requirements remains a much debated issue among policymakers and academics. At the Panel's March 4, 2011 hearing, there was a consensus among economists across the political spectrum that the capital requirements should be more stringent than those required under Basel III and those that could be required under the Dodd-Frank Act. However, the economists still disagreed on the exact level that a bank should hold, with one economist suggesting that it should start at 10 percent and increase towards 20 percent based on the size of the bank and another economist indicating that a 40 or 50 percent capital requirement would not be unreasonable. Congressional Oversight Panel, Testimony of Allan H. Meltzer, Allan H. Meltzer University Professor of Political Economy, Carnegie Mellon University, *COP Hearing on the TARP's Impact on Financial Stability* (Mar. 4, 2011) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-030411-final.cfm) ("I would raise the requirement to say that for every – that after a minimum size to protect community banks, you start to phase in capital requirements which start at 10 percent and increase as the size of the bank increases so that it's 11, 12, 13, going up toward 20, so that the largest banks will be paying what they were paying in the 1920's."); Congressional Oversight Panel, Testimony of Simon Johnson, Ronald A. Kurtz (1954) Professor of Entrepreneurship, MIT Sloan School of Management, and senior fellow, Peterson Institute for International Economics, *COP Hearing on the TARP's Impact on Financial Stability*

b. Program Changes

For several of its program-centered recommendations, the Panel focused on stresses particular to smaller banks. In the August 2009 report, the Panel noted that Treasury must be prepared to turn its attention to small banks in crafting solutions to the growing problem of troubled whole loans. As discussed above, those banks also face special risks with respect to problems in the CRE loan sector. The Panel believed that Treasury should implement programs to ensure the viability of smaller banks. One such example was for Treasury and the banking regulators to extend the methodology and capital buffering involved in the stress tests to the nation's smaller banks on a forward-looking basis.[121]

Similarly, in the July 2010 report, the Panel's recommendations focused on the potentially long timeframe and the increased uncertainty of CPP investments in smaller banks.[122] Banks with more than $100 billion in assets have returned to profitability while smaller banks, which (among other things) have more significant CRE exposure, continue to struggle financially and are now struggling to meet their obligations to taxpayers.[123] To deal with CPP investments in smaller banks, the Panel's July 2010 report recommended that Treasury articulate

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(Mar. 4, 2011) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-030411-final.cfm) (hereinafter "Simon Johnson Testimony to the Panel") ("Gene Fama suggests, and I actually agree with him, we should be looking at capital requirements closer to 40 or 50 percent. This is – this is just the percent of the assets financed with equity. ...").

[121] 2009 August Oversight Report, *supra* note 100, at 62.

[122] During a discussion of Treasury's ability to exit CPP at the Panel's March 4, 2011 hearing, Acting Assistant Secretary for Financial Stability Timothy Massad indicated that Treasury was concerned with small banks and there was still work to be done to help their recovery. Congressional Oversight Panel, Testimony of Timothy G. Massad, acting assistant secretary for the Office of Financial Stability, U.S. Department of the Treasury, *Transcript: COP Hearing on the TARP's Impact on Financial Stability* (Mar. 4, 2011) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-030411-final.cfm) (hereinafter "Massad Testimony to the Panel") ("We've made a lot of progress, but we still have more work to do. And in particular with respect to our small banks, their path to recovery has been a little harder. And we need to continue to work with them on that."). In discussing stresses on smaller banks in the context of the CPP, however, the Panel noted that economic stability and a strengthened banking sector would help alleviate some of the difficulties facing various TARP recipients and Treasury. For example, if the banking sector strengthens and becomes a more attractive investment, all banks, but particularly smaller banks, may have an easier time repaying their CPP funds. If the economy recovers more generally, then commercial real estate (CRE) may weigh less on bank balance sheets and smaller banks may experience healthier balance sheets as a result. Similarly, if Treasury holds CPP-related warrants in a company, and the common stock value of that institution is greater than the strike price of its warrants, those warrants have a greater value since they can be exercised and immediately reap a profit. The strike price, or the fixed price that a holder must pay to exercise their option (warrant) to purchase a company's stock, for the warrants Treasury received as part of its TARP investment, were established by averaging the common stock price during the twenty days prior to TARP assistance being provided. U.S. Department of the Treasury, *Warrant Disposition Report*, at 3 (June 30, 2010) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/other/DocumentsOther/TARP_WRRTDISP_80310.pdf) (hereinafter "June 2010 Warrant Disposition Report").

[123] 2010 July Oversight Report, *supra* note 105, at 5, 33. Of the smaller banks in the CPP, approximately 16 percent have repaid their CPP funds. Many have no clear path for repaying their CPP investment and exiting the program in the near future, if at all.

and determine options for the illiquid portions of its portfolio, such as warrants that are too small to be listed on an exchange, including bundling or pooling investments if that makes them more attractive to investors.[124] The Panel went on to suggest that Treasury both articulate clear measures for risk-testing its own portfolio and aggressively exercise its shareholder rights, such as appointing directors in those banks that have missed the requisite number of dividends or payments, in order to protect the taxpayers' investment and maintain market discipline.[125] In addition, the Panel recommended that for the banks that Treasury's asset manager believed were in need of additional capital, Treasury should retain or create a workout team that will swiftly negotiate a deal.[126] Treasury has announced that it has exercised some of its shareholder rights and has observers attending board meetings at 31 banks; however, if Treasury has adopted any of these other recommendations, it has not announced them publicly.[127]

c. Particular Stresses on Smaller Banks

In connection with its concerns about the risks that distressed CRE loans pose to smaller banks, the Panel has continued to monitor the sector.[128] In its most comprehensive discussion of the problem, the February 2010 report, the Panel noted that there were no easy solutions to the risks CRE may pose to the financial system. Although it endorsed no specific proposals, the Panel identified a number of possible interventions to contain the problem until the CRE market could return to health. The Panel indicated that government cannot and should not keep every bank afloat, but neither should it turn a blind eye to the dangers of unnecessary bank failures and their impact on communities.[129]

Since the release of the February 2010 report, CRE continues to threaten the economic viability of banks, particularly smaller banks. There is approximately $3.2 trillion of outstanding debt associated with CRE loans, with a significant concentration of that debt centered in smaller banks.[130] Over the next two years over $1 trillion of that debt will come to maturity.[131] In

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[124] 2010 July Oversight Report, *supra* note 105, at 61.

[125] 2010 July Oversight Report, *supra* note 105, at 61.

[126] 2010 July Oversight Report, *supra* note 105, at 61.

[127] See Section II.A.2.d for a more detailed description of the board observers.

[128] Specifically, the Panel has held three hearings and released one report specifically dedicated to CRE issues. *See* 2010 February Oversight Report, *supra* note 104; Congressional Oversight Panel, *COP Hearing on Commercial Real Estate's Impact on Bank Stability* (Feb. 4, 2011) (online at cop.senate.gov/hearings/library/hearing-020411-cre.cfm); Congressional Oversight Panel, *COP Atlanta Field Hearing on Commercial Real Estate* (Jan. 27, 2010) (online at cop.senate.gov/hearings/library/hearing-012710-atlanta.cfm); Congressional Oversight Panel, *COP Field Hearing in New York City on Corporate and Commercial Real Estate Lending* (May 28, 2009) (online at cop.senate.gov/hearings/library/hearing-052809-newyork.cfm).

[129] 2010 February Oversight Report, *supra* note 104, at 138.

[130] Congressional Oversight Panel, Written Testimony of Patrick M. Parkinson, director, Division of Banking Supervision and Regulation, Board of Governors of the Federal Reserve System, *COP Hearing on Commercial Real Estate's Impact on Bank Stability*, at 3-5 (Feb. 4, 2011) (online at cop.senate.gov/documents/testimony-020411-parkinson.pdf) (hereinafter "2011 COP Hearing on CRE Impact on

February 2010, the Panel reported that losses on these loans for commercial banks alone could total $200 billion to $300 billion for 2011 and beyond.[132] However, Chairman Bernanke recently indicated that many of the worst fears about the CRE market do not seem to be coming to fruition.[133] In pursuit of information as to the degree of risk that the CRE market poses to economic recovery, the Panel held a hearing on February 4, 2011. The hearing focused in particular on CRE's impact on bank stability. Though there were indicators of price stabilization in some key markets, issues related to commercial real estate continue to cause problems for the banking sector and are the main reason for recent bank failures.[134] Sandra Thompson, director of the Division of Supervision and Consumer Protection at the FDIC, indicated that it could take time to sort out the CRE market through restructuring and for loans that cannot be modified, "prompt loss recognition and restructuring, painful as it may be, is needed to lay the foundation for recovery in CRE market."[135] The Panel stated that until Treasury and the bank supervisors

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Bank Stability") ("Notably, CRE concentrations are not a significant issue at the largest banks. Among banks with total assets of $10 billion or more, 10 percent had CRE concentrations. In contrast, one-third of all banks with assets between $1 billion and $10 billion had CRE concentrations. For banks with less than $1 billion in assets, approximately 17 percent had CRE concentrations."). *See also* Congressional Oversight Panel, Written Testimony of Matthew Anderson, managing director, Foresight Analytics, *COP Hearing on Commercial Real Estate's Impact on Bank Stability*, at 1, 3 (Feb. 4, 2011) (online at cop.senate.gov/documents/testimony-020411-anderson.pdf) ("Approximately two-thirds of CRE debt is held by banks with less than $100 billion in total assets.").

[131] 2011 COP Hearing on CRE Impact on Bank Stability, *supra* note 130, at 5 ("Approximately one-third of all CRE loans (both bank and non-bank), totaling more than $1 trillion, are scheduled to mature over the next two year"). *See also* Morgan Stanley, *CMBS Market Insights CRE Debt Markets: Challenges and Opportunities*, at 1 (Dec. 6, 2010) (online at cop.senate.gov/documents/testimony-020411-parkus.pdf) ("nearly $1.4 trillion of commercial real estate loans maturing over the next three years").

[132] 2010 February Oversight Report, *supra* note 104, at 2, 38, 102.

[133] Senate Committee on Banking, Housing, and Urban Affairs, Testimony of Ben S. Bernanke, chairman, Board of Governors of the Federal Reserve System, *Transcript: The Semiannual Monetary Policy Report to the Congress* (Mar. 1, 2011) (publication forthcoming) (online at banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=9ff8158e-fc56-495b-aa5b-e957b981da96) ("I would say overall that some of the worst fears about commercial real estate seem not to be coming true, that there is some stabilization of vacancy rates and prices and so on in this – in this market. That being said, there's still a lot of, as you say, a lot of properties that are going to have to be refinanced and probably some losses the banks are still going to have to take. So it's still certainly a risk to the financial system, but it does seem to be looking at least marginally better than we were fearing six months ago.").

[134] Congressional Oversight Panel, Testimony of Patrick M. Parkinson, director, Division of Banking Supervision and Regulation, Board of Governors of the Federal Reserve, *Transcript: COP Hearing on Commercial Real Estate's Impact on Bank Stability* (Feb. 4, 2011) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-020411-cre.cfm) ("CRE-related issues also present ongoing problems for the banking industry, particularly for community and regional banking organizations. Losses associated with CRE, particularly residential construction and land development lending, have been the dominant reason for the high number of bank failures since the beginning of 2008.").

[135] Congressional Oversight Panel, Testimony of Sandra Thompson, director, Division of Supervision and Consumer Protection, Federal Deposit Insurance Corporation, *Transcript: COP Hearing on Commercial Real Estate's Impact on Bank Stability* (Feb. 4, 2011) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-020411-cre.cfm) ("Distressed CRE loan exposures take time to work out, and in some cases require restructuring to establish a more realistic and sustainable repayment program. Some loans may not be able to be modified and must be written off. This process of prompt loss recognition and restructuring,

address forthrightly and transparently the threats facing the CRE markets – and the potential impact that a breakdown in those markets could have on local communities, small businesses, and individuals – the financial crisis will not end.[136]

As summarized in the July 2010 report, many smaller banks face balance sheet pressures in what remains a pervasively uncertain market. Faced with these pressures, however, smaller banks do not necessarily have the options for capital-raising available to larger banks. In particular, smaller banks have more difficulty accessing capital than larger banks for many reasons, among them that equity capital markets are more costly for smaller banks due to fixed costs associated with transactions; they are often too small to interest private equity funds; and their traditional investors, who tend to be locally based, might be unwilling to part with capital during difficult economic times.[137]

d. Transparency and Accountability

Transparency is essential because it facilitates accountability and instills confidence in and increases credibility of the decisions of Treasury and the Federal Reserve – all of which are necessary and critical for proper management of the taxpayers' involvement in the financial sector rescue. The Panel has emphasized the need for transparency in the operation and administration of the TARP since its first report. In that report, the Panel first asked whether Treasury knew what TARP recipients were doing with the money they had received from the government.[138] In the context of Treasury's bank capital programs, the Panel stressed the need for transparency in the administration of both the stress tests and the CPP and has made calls more generally for release of additional data from recipients of TARP funds.

Stress Tests. In the June 2009 report, the Panel suggested that additional information on the results of the stress tests needed to be in the public domain, including the results under the "baseline" economic scenario, or at least an explanation if Treasury and the Federal Reserve decided not to release that data. Furthermore, the Panel advocated for the release of more extensive data on the stress test results, for instance, more granular details on estimated losses by sub-categories. The Panel noted that this additional information would improve the transparency

painful as it may be, is needed to lay the foundation for recovery in CRE market. At the same time, it must be recognized that many institutions with CRE concentrations have weathered the financial crisis.").

[136] 2010 February Oversight Report, *supra* note 104, at 139.

[137] 2010 July Oversight Report, *supra* note 105, at 24-25.

[138] Congressional Oversight Panel, *December Oversight Report: Questions About the $700 Billion Emergency Economic Stabilization Funds*, at 11-12 (Dec. 10, 2008) (online at frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_senate_committee_prints&docid=f:45840.pdf) ("If the funds committed under TARP have an intended purpose and are not merely no-strings-attached subsidies to financial institutions, then it seems essential for Treasury to monitor whether the funds are used for those intended purposes. Without that oversight, it is impossible to determine whether taxpayer money is used in accordance with Treasury's overall economic stabilization strategy. Treasury cannot simply trust that the financial institutions will act in the desired ways; it must verify.").

of the process and increase confidence in the robustness of the tests.[139] The Panel also recommended that Treasury and the Federal Reserve publicly track the status of its stress tests' macro-economic assumptions, including unemployment, GDP, and housing price assumptions.[140]

Since the June 2009 report, there has not been significantly more information released regarding the results of the May 2009 stress tests. In November 2010, the Federal Reserve announced a second round of stress testing for SCAP banks.[141] The Federal Reserve requested that by January 7, 2011 these banks file a comprehensive capital plan detailing their ability to absorb losses over the next two years and to comply with new banking industry capital rules.[142] Although Secretary Geithner stated that disclosure of stress test results is an effective supervisory approach,[143] unlike the May 2009 stress tests the results of the Federal Reserve's regulatory review will not be made public.[144] Similarly, in August 2009, the Panel suggested that Treasury and relevant government agencies work together to move financial institutions toward sufficient disclosure of the terms and volume of troubled assets on banks' books so that markets can function more effectively.[145] To date, this has not occurred.

CPP. The Panel has continually advanced recommendations aimed at fostering transparency in the CPP. In the June 2009 report, the Panel urged Treasury to increase transparency in the CPP repayment process; including a recommendation that Treasury disclose

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[139] 2009 June Oversight Report, *supra* note 95, at 49.

[140] 2009 June Oversight Report, *supra* note 95, at 48-49.

[141] In November, the Federal Reserve announced that nine of the ten bank holding companies that needed to raise or improve the quality of their capital under the stress tests had done so and at the time they had sufficient capital to meet their capital requirements under the stress tests. Federal Reserve Announcement on the Supervisory Capital Assessment Program, *supra* note 79 ("The Federal Reserve Board on Monday said that 9 of the 10 Bank Holding Companies (BHCs) that were determined in the Supervisory Capital Assessment Program (SCAP) earlier this year to need to raise capital or improve the quality of their capital to withstand a worse-than-expected economic scenario now have increased their capital sufficiently to meet or exceed their required capital buffers. The one exception, GMAC, is expected to meet its remaining buffer need by accessing the TARP Automotive Industry Financing Program, and is in discussions with the U.S. Treasury on the structure of its investment."); Fed Addendum to SR Letter 09-4, *supra* note 117.

[142] Fed Addendum to SR Letter 09-4, *supra* note 117.

[143] Geithner Testimony to the Panel, *supra* note 119 (stating that disclosure is a "remarkably effective approach, because it allowed these firms to go out and raise a lot of capital much earlier").

[144] In addition, under the Dodd-Frank Act, financial institution regulators will be required to perform stress tests for financial companies with over $10 billion in assets for which they are the primary regulator. Those findings will then be reported to the Federal Reserve. The Dodd-Frank Act will not cover any financial institution with assets of below $10 billion or which is a state chartered institution. Under rules to be accepted within 18 months of the enactment of the Dodd-Frank Act, any financial company with a primary federal regulator that has over $10 billion in assets must conduct an annual stress test and report the results to the Federal Reserve. In addition, BHCs and non-bank financial Companies with assets in excess of $50 billion must conduct semi-annual stress tests. At systemically important BHCs and non-bank financial companies, the Federal Reserve must conduct annual stress tests using at least three scenarios of increasing adversity. 12 U.S.C. §5365(i).

[145] 2009 August Oversight Report, *supra* note 100, at 61-62.

information on the criteria for repayment eligibility, the approval process, and the process for valuation and repurchase of warrants. The Panel further suggested that the relationship of the stress test results to CPP repurchases should be completely transparent.[146] The Panel reiterated many of these recommendations in the July 2009 report about warrant dispositions, emphasizing that Treasury should negotiate the disposition of the warrants in a manner that is as transparent and fully accountable as possible.[147] The Panel noted that Treasury and the Federal Reserve must explain fully and clearly to the public the reasons for approval for repayment of financial assistance. The Panel also stated that Treasury must be transparent about the way warrants are valued, and clearly set forth the exit strategy for, or future use of, the TARP, including how it proposed to use repaid TARP funds.[148] Specifically, the Panel recommended that Treasury promptly provide written reports to the American taxpayer analyzing the fair market value determinations for any warrants either repurchased by a TARP recipient from Treasury or sold by Treasury through an auction, and that Treasury disclose the rationale for its choice of an auction or private sale.[149] Furthermore, in December 2009, the Panel suggested that Treasury disclose the precise number of warrants it holds for each financial institution within CPP.[150] Similarly, the Panel made several calls for additional transparency for the use of TARP funds, and noted in May 2010 that Treasury had failed to track TARP funds or require certain kinds of longitudinal lending data from TARP recipients, both of which hampered the Panel in its efforts to determine the effectiveness of CPP.[151]

Since the Panel made its recommendations for increased transparency, Treasury and the other banking regulators have released significantly more information; however, there is still room for improvement. For instance, even though federal regulators have established approval processes for CPP repayments, Treasury has not publicly issued uniform guidelines or documentation needed for meaningful oversight or to achieve transparency regarding these repayments. Additionally, while Treasury has issued some general statements on its overall repayment policy, it has not provided more detailed, case-by-case explanations for approval of financial assistance repayments. Furthermore, even though Treasury described its approach to CPP warrant dispositions in three Warrant Disposition Reports, Treasury's negotiations with the banks to repurchase the warrants are still not transparent.[152] Treasury never required the tracking

[146] 2009 June Oversight Report, *supra* note 95, at 48-49.

[147] 2009 July Oversight Report, *supra* note 92, at 44-45.

[148] 2009 July Oversight Report, *supra* note 92, at 44-45; 2009 June Oversight Report, *supra* note 95, at 49.

[149] 2009 July Oversight Report, *supra* note 92, at 44-45.

[150] 2009 December Oversight Report, *supra* note 27, at 108.

[151] 2010 May Oversight Report, *supra* note 110, at 26.

[152] 2010 February Oversight Report, *supra* note 104, at 149-152; U.S. Department of the Treasury, *Warrant Disposition Report* (Jan. 20, 2010) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/other/DocumentsOther/TARP%20Warrant%20Disposition%20Report%20v4.pdf); June 2010 Warrant Disposition Report, *supra* note 122; U.S. Department of the Treasury, *Warrant Disposition Report* (Dec. 31, 2010)

of funds and has not collected the lending data that the Panel thought was essential for effective oversight.[153]

The Panel's calls for transparency have also focused on Treasury's activities as a shareholder. In the July 2010 report, the Panel requested that Treasury explain its process for appointing board members to banks that are in arrears, including the way in which it will identify board members for those banks. The Panel added that Treasury should clearly articulate its restructuring policy and indicate to CPP participants that it will protect the priority of its investments.[154] Since the July 2010 report, Treasury has publicly released a "fact sheet" and "frequently asked questions" regarding the nomination of directors.[155] Although Treasury has not yet exercised its right to nominate board members for banks that have missed six dividend or

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(online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/other/DocumentsOther/TARP%20Warrant%20Disposition%20Report%2012.31.2010%20Update.pdf) (hereinafter "December 2010 Warrant Disposition Report").

[153] 2010 May Oversight Report, *supra* note 110, at 26. When asked how institutions used the TARP funds they were given, Treasury raised the difficulty in tracking individual dollars through an institution in response – in essence, that because money is fungible, it is not useful to track particular funds. Nevertheless, as the Panel and the Special Inspector General for the Troubled Asset Relief Program (SIGTARP) have noted, Treasury could have conditioned receipt of TARP assistance upon requirements to report the usage of those funds and the overall lending activities of the institutions in question. *See* Congressional Oversight Panel, *January Oversight Report: Taking Stock: Accountability for the Troubled Asset Relief Program*, at 3-4 (Jan. 9, 2009) (online at cop.senate.gov/documents/cop-010909-report.pdf); 2009 December Oversight Report, *supra* note 27, at 108-111. *See also* Congressional Oversight Panel, *January Oversight Report: Exiting TARP and Unwinding Its Impact on the Financial Markets*, at 5 (Jan. 14, 2010) (online at cop.senate.gov/documents/cop-011410-report.pdf) (hereinafter "2010 January Oversight Report"); Office of the Special Inspector General for the Troubled Asset Relief Program, *SIGTARP Survey Demonstrates that Banks Can Provide Meaningful Information on Their Use of TARP Funds* (July 20, 2009) (online at sigtarp.gov/reports/audit/2009/SIGTARP_Survey_Demonstrates_That_Banks_Can_Provide_Meaningfu_%20Information_On_Their_Use_Of_TARP_Funds.pdf). Further, banking industry witnesses at the Panel's Field hearing in Phoenix stated that they would support a tracking requirement for capital infusion programs. *See* Congressional Oversight Panel, Testimony of Candace Wiest, president and chief executive officer, West Valley National Bank, *Transcript: Phoenix Field Hearing on Small Business Lending* (Apr. 27, 2010) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-042710-phoenix.cfm) (hereinafter "Wiest Testimony to the Panel").

[154] 2010 July Oversight Report, *supra* note 105, at 61.

[155] In these documents released in August 2010, Treasury indicated that director nominations would be a two-step process based on the number of missed dividend or interest payments. After five missed payments, Treasury may request permission to send qualified members of its staff to observe board meetings of the institution. Then, once an institution misses six payments, Treasury will evaluate whether to nominate up to two board members. Such determinations will be based on Treasury's evaluation of the condition and health of the institution as well as the functioning of its board of directors. U.S. Department of the Treasury, *Frequently Asked Questions: Capital Purchase Program (CPP), Related to Missed Dividend (or Interest) Payments and Director Nomination* (Aug. 2010) (online at www.treasury.gov/initiatives/financial-stability/investment-programs/cpp/Documents/CPP%20Directors%20FAQs.pdf); U.S. Department of the Treasury, *Factsheet: Capital Purchase Program, Nomination of Board Observers & Directors* (Aug. 2010) (online at www.treasury.gov/initiatives/financial-stability/investment-programs/cpp/Documents/CPP%20Directors%20-%20Observer%20Fact%20Sheet.pdf). *See also* U.S. Government Accountability Office, *Report to Congressional Addressees, Troubled Asset Relief Program: Status of Programs and Implementation of GAO Recommendations*, at 18-19 (Jan. 2011) (GAO-11-74) (online at www.gao.gov/new.items/d1174.pdf). Treasury has elected two members to AIG's board of directors under the AIG Investment Program. *Id.* at 18.

interest payments, as of February 28, 2011, 31 banks have agreed to have Treasury observers attend board of directors meetings.[156] To date, 32 banks have missed at least six payments.[157] To the extent that Treasury has implemented the Panel's other recommendations, it has not announced these changes publicly.

Data Gathering and Disclosure. In pursuit of greater accountability, the Panel has called for data gathering to help review the effectiveness of Treasury's programs. In the July 2010 report, the Panel recommended that Treasury analyze the characteristics of the smaller banks that took CPP funds and the data on the smaller banks that have repaid CPP funds in order to determine commonalities among them. The Panel further urged Treasury to use those commonalities to create a strategy for exit, to help anticipate risks in the portfolio, and to evaluate the effectiveness of capital infusions for stabilizing smaller banks, given the program design of the CPP.[158] The Panel also requested that Treasury review the CPP's impact on bank consolidations and concentration in the banking sector generally.[159] While the Panel acknowledges improvements in data disclosure, many of the specific recommendations of the Panel, such as a review of the CPP's impact on bank consolidation and concentrations, have not been implemented, or at least not announced publicly.

e. CPP Profits and Accountability

Accountability and program effectiveness are of particular import with respect to returns under the CPP. The CPP was the largest of three capital injection programs under the TARP, providing 707 banks with capital injections totaling nearly $205 billion.[160] The program has to date generated returns for the government: the current CBO and Office of Management and Budget (OMB) subsidy costs for CPP are actually savings of $15 billion and $12 billion, respectively, which represents a positive rate of return. These returns come from redemptions, warrant repurchases, and dividend payments. As of March 8, 2011, 145 of the 707 banks that participated in the CPP have fully redeemed their preferred shares either through capital repayment or exchanges for investments under other government programs, including the Community Development Capital Initiative (CDCI).[161] Currently, banks can apply to the Small

[156] U.S. Department of the Treasury, *Cumulative Dividends, Interest and Distributions Report as of February 28, 2011* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/dividends-interest/DocumentsDividendsInterest/February%202011%20Dividends%20Interest%20Report.pdf) (hereinafter "Treasury's Dividends & Interest Report").

[157] *Id.* Based on information as of February 28, 2011.

[158] 2010 July Oversight Report, *supra* note 105, at 61.

[159] 2010 July Oversight Report, *supra* note 105, at 52-57. The Panel noted that although concerns about bank consolidation may not have informed the program at the outset, increasing concentration in the banking sector could have adverse effects on competition and services offered to customers, and, potentially, on systemic stability.

[160] Treasury Transactions Report, *supra* note 36.

[161] Treasury Transactions Report, *supra* note 36.

Business Lending Fund (SBLF) as a means of refinancing their preferred shares issued through CPP and CDCI.[162] In addition, Treasury receives dividend payments on the preferred shares it holds under the CPP, 5 percent per year for the first five years and 9 percent per year thereafter.[163] In total, Treasury has received approximately $30 billion in net income from warrant repurchases, dividends, interest payments, profit from the sale of stock, and other proceeds deriving from TARP investments, after deducting losses.[164] As noted above, in conjunction with its preferred stock investments under the CPP and the TIP, Treasury generally received warrants to purchase common equity.[165] As of July 2009, the Panel reported that Treasury's method for selling stock options gained through the CPP appeared to be recovering only 66 percent of the warrants' estimated worth. Treasury has subsequently changed its approach and subsequent sales recovered 103 cents on the dollar compared to the Panel's best estimate. As of March 8, 2011, 51 institutions have repurchased their warrants from Treasury at an agreed-upon price and Treasury has also sold warrants for 18 other institutions at auction. To date, income from warrant dispositions totals $8.6 billion. Treasury still holds warrants in 211 TARP recipients. The Panel's best estimate for the total value of all outstanding warrants is $2.3 billion as of March 3, 2011.[166] Figure 38 in the Annex provides further detail on the income from warrant dispositions for financial institutions that have fully repaid CPP funds and Figure 39 in the Annex breaks down the value of Treasury's current holdings of warrants by financial institution.

That CPP has had an overall rate of return that is positive is not to say that all CPP investments have been profitable. As of February 28, 2011, 161 institutions have missed at least

[162] In a pamphlet designed for community banks, Treasury explains the eligibility requirements for refinancing outstanding CPP or CDCI securities through the Small Business Lending Fund (SBLF). U.S. Department of the Treasury, *SBLF: Small Business Lending Fund - Getting Started Guide For Community Banks*, at 4-5 (online at www.treasury.gov/resource-center/sb-programs/Documents/SBLF_Getting_Started_Guide_Final.pdf).

[163] U.S. Department of the Treasury, *Capital Purchase Program* (online at www.treasury.gov/initiatives/financial-stability/investment-programs/cpp/Pages/capitalpurchaseprogram.aspx) (accessed Mar. 11, 2011). For preferred shares issued under the TIP, Treasury received a dividend of 8 percent per year. U.S. Department of the Treasury, *Targeted Investment Program* (online at www.treasury.gov/initiatives/financial-stability/investment-programs/tip/Pages/targetedinvestmentprogram.aspx) (accessed Mar. 11, 2011).

[164] This number is calculated including only the CPP and CDCI. Treasury's Dividends & Interest Report, *supra* note 156; Treasury Transactions Report, *supra* note 36. Treasury also received an additional $1.2 billion in participation fees from its Guarantee Program for MMFs. Treasury's Guarantee Program for Money Market Funds Expires, *supra* note 64.

[165] For its CPP investments in privately held financial institutions, Treasury also received warrants to purchase additional shares of preferred stock, which it exercised immediately. Similarly, Treasury received warrants to purchase additional subordinated debt that were immediately exercised along with its CPP investments in subchapter S corporations.

[166] As discussed in its July 2009 report, the Panel uses a Black-Scholes model to calculate low, high, and best valuation estimates of outstanding TARP warrants. For more details on the Panel's warrant valuation methods and inputs used in the Black-Scholes model, *see* 2009 July Oversight Report, *supra* note 92, at 20-28 and Annex A/B.

one dividend payment on outstanding preferred stock issued under the CPP. Among these institutions, 131 are not current on cumulative dividends, amounting to $187.4 million in missed payments. Another 30 banks have not paid $11.3 million in non-cumulative dividends.[167] Of the $30.9 billion currently outstanding in CPP funding, Treasury's investments in banks with non-current dividend and interest payments total $7.3 billion. A majority of the banks that are not current on dividend payments have under $1 billion in total assets on their balance sheets.[168] Under the terms of the CPP, after a bank fails to pay dividends for six periods, Treasury has the right to elect two individuals to the company's board of directors. Figure 35 in the Annex provides further details on the distribution and the number of institutions that have missed dividend payments.

Other CPP investments have been losses. As of March 8, 2011, Treasury has realized a total of $2.6 billion in losses from investments in seven CPP participants.[169] Figure 37 in the Annex details settled and unsettled investment losses from CPP participants that have declared bankruptcy, been placed into receivership, or renegotiated the terms of their CPP contracts. As of March 9, 2011, however, the average internal rate of return (IRR)[170] for all public financial institutions that participated in the CPP and TIP and fully repaid the U.S. government (including preferred shares, dividends, and warrants) was at 10 percent.

CPP Profits and the Risk of the Investments in 2008. As described above, the overall rate of return for CPP and TIP is 10 percent,[171] and Treasury often points to this positive rate of

[167] In addition, nine CPP participants have missed at least one interest payment, representing $5.6 million in cumulative unpaid interest payments. Treasury's total investments in these non-public institutions represent less than $100 million in CPP funding. Treasury's Dividends & Interest Report, *supra* note 156.

[168] There are also 19 institutions that no longer have outstanding unpaid dividends, after previously deferring their quarterly payments. Fourteen banks have failed to make six dividend payments, eleven banks have missed seven quarterly payments, six banks have missed eight quarterly payments, and one bank has missed all nine quarterly payments. These institutions received a total of $1.07 billion in CPP funding. Treasury's Dividends & Interest Report, *supra* note 156.

[169] CIT Group Inc. and Pacific Coast National Bancorp both completed bankruptcy proceedings, and the preferred stock and warrants issued by the South Financial Group, TIB Financial Corp., the Bank of Currituck, Treaty Oak Bancorp, and Cadence Financial Corp. were sold to third-party institutions at a discount. Excluded from Treasury's total losses are investments in institutions that have pending receivership or bankruptcy proceedings, as well as an institution that is currently the target of an acquisition. Treasury Transactions Report, *supra* note 36, at 14. Settlement of these transactions and proceedings would increase total losses in the CPP to $2.8 billion.

[170] The internal rate of return (IRR) is the annualized effective compounded return rate that can be earned on invested capital.

[171] That said, however, as the Panel noted in its September report, many of the banks that have yet to repay may be in weaker capital positions, and the ultimate overall returns may be less favorable. 2010 September Oversight Report, *supra* note 53, at 28 ("[B]anks that have not repaid their TARP funds may be under or could come under greater stress. Some banks that remain in the CPP may find it difficult or impossible to raise the capital necessary to meet their obligations to the taxpayers, and Treasury's rate of return may therefore decline over the life of the program.").

return.[172] As Harvard professor and economist Kenneth Rogoff noted to the Panel in connection with the September 2010 report, however, that should not be the end of the inquiry. In his words, a proper cost benefit analysis "needs to price the risk the taxpayer took on during financial crisis." Ex post accounting (how much did the government actually earn or lose after the fact) can yield an extremely misguided measure of the true cost of the bailout, especially as a guide to future policy responses."[173] Therefore the simple question of whether the program ends with a negative or positive balance does not provide a complete answer to whether the program was necessary or properly designed and implemented.[174]

The Panel first addressed the question of whether, given the risk involved, Treasury had paid a premium for the assets purchased under the CPP in February of 2009. At that time, there had been no CPP repayments: the first repayment took place in March 2009, and thus the analysis performed was made without the benefit of knowing the current CPP returns.[175] As noted above, while all of the investments under the CPP carry the same terms,[176] the first investments in the CPP were made before Treasury instituted an application process, on the publicly stated grounds that all recipients were healthy – an assertion that came into question very rapidly.[177]

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[172] In an opinion piece for *The New York Times* titled "Welcome to the Recovery," Secretary Geithner wrote that "[t]he government's investment in banks has already earned more than $20 billion in profits for taxpayers, and the TARP program will be out of business earlier than expected – and costing nearly a quarter of a trillion dollars less than projected last year." Timothy F. Geithner, *Welcome to the Recovery*, New York Times (Aug. 2, 2010) (online at www.nytimes.com/2010/08/03/opinion/03geithner.html?_r=2&dbk). *See also* U.S. Department of the Treasury, *Treasury Department Announces TARP Milestone: Repayments to Taxpayers Surpass TARP Funds Outstanding* (June 11, 2010) (online at www.treasury.gov/press-center/press-releases/Pages/tg742.aspx) (quoting Assistant Secretary Herbert Allison as saying that "TARP repayments have continued to exceed expectations, substantially reducing the projected cost of this program to taxpayers ... This milestone is further evidence that TARP is achieving its intended objectives: stabilizing our financial system and laying the groundwork for economic recovery.").

[173] Kenneth Rogoff, Thomas D. Cabot Professor of Public Policy, Harvard University, Written Answers to Questions Posed by the Congressional Oversight Panel (Aug. 2010); 2010 September Oversight Report, *supra* note 53, at 123. Professor Joseph E. Stiglitz echoed the same opinion stating that Treasury should have demanded appropriate compensation for the risk borne and that a proper evaluation should be done ex ante and take into account the risks at the time. Congressional Oversight Panel, Written Testimony of Joseph E. Stiglitz, Nobel Laureate and University Professor, Columbia Business School, Graduate School of Arts and Sciences Department of Economics and the School of International and Public Affairs, *COP Hearing on the TARP's Impact on Financial Stability*, at 3 (Mar. 4, 2011) (online at cop.senate.gov/documents/testimony-030411-stiglitz.pdf) ("The fairness of the terms is to be judged ex ante, not ex post, taking into account the risks at the time.").

[174] 2010 September Oversight Report, *supra* note 53, at 93.

[175] The February 2009 report also addressed the Systemically Significant Failing Institutions (SSFI) program, but this discussion focuses primarily on the CPP and the TIP.

[176] As noted above, the Panel addressed the effect this had on smaller banks in the CPP in July of 2010. *See* 2010 July Oversight Report, *supra* note 105, at 3.

[177] 2009 February Oversight Report, *supra* note 84, at 5 ("This program was intended for healthy banks: those that are sound and not in need of government subsidization. While a total of 317 financial institutions have received a total of $194 billion under the CPP as of January 23, 2009, eight large early investments represent $124

Shortly after the initial CPP investments, it became clear that the health of some of these initial recipients – particularly Bank of America and Citigroup – was less certain when soon after the initial CPP investments, these institutions received additional infusions through the TIP.[178] Testifying in front of the Panel, Assistant Secretary of the Treasury for Financial Stability Herb Allison stated that, "I think that Citi, and a number of other banks, many banks, would have been on the brink of failure had the system not been underpinned by actions of the government—including the Federal Reserve and the U.S. Treasury."[179] Subsequent emails made public in connection with the Financial Crisis Inquiry Commission's work made it clear that within weeks after the initial CPP investments, the regulators in various banking agencies, including the FDIC and FRBNY, were aware that Citigroup was in a "negative and deteriorating" situation and that its financial condition was "marginal."[180] Similarly, in mid-January 2009, minutes of a board meeting indicate that the FDIC was significantly concerned about Bank of America's health, describing that entity's capital situation as "strained" and expressing concern about a systemic event that disclosure of Bank of America's operating results might cause.[181]

Nor was the market unaware of these differences among the big banks: an examination of the stock prices in the fall of 2008 of these nine banks shows that the market had a fairly accurate perception of their relative health – or lack thereof. Figure 11 details the percent change in stock prices of the nine banks from December 2005. Specifically, in February 2009 the monthly stock prices of Bank of America and Citigroup were below their December 2005 levels by 91 percent and 97 percent, respectively. While all of the first nine banks to enter the CPP clearly saw dipping stock prices, two banks, Citigroup and Bank of America, consistently tracked the bottom of the group after December 2008.

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billion, or 64 percent of the total. The eight were: Bank of America Corporation, Citigroup, Inc., JPMorgan Chase & Co., Morgan Stanley, Goldman Sachs Group, Inc., PNC Financial Services Group, U.S. Bancorp, and Wells Fargo & Company.").

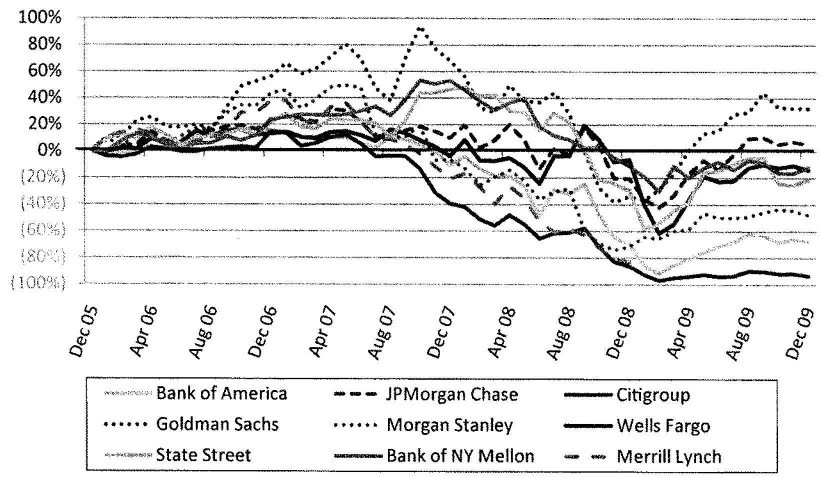
[178] 2009 February Oversight Report, *supra* note 84, at 5.

[179] Assistant Secretary Allison added that, "Citi [...] could have difficulty funding themselves at that time. Their debt spreads had widened considerably, and so, in the opinion of their management, they were facing a very serious situation." Congressional Oversight Panel, Testimony of Herbert M. Allison, Jr., assistant secretary for financial stability, U.S. Department of the Treasury, *Transcript: COP Hearing on Assistance Provided to Citigroup Under TARP*, at 27 (Mar. 4, 2010) (online at cop.senate.gov/documents/transcript-030410-citi.pdf).

[180] *See* Email from Christopher J. Spoth to Sheila C. Bair (Nov. 21, 2008) (online at c0181567.cdn1.cloudfiles.rackspacecloud.com/2008-11-21%20FDIC%20Richardson%20Email%20re%2011-21-08%20Citi%20Liquidity%20Call%20Notes.pdf). *See also* Federal Deposit Insurance Corporation, *Transcript of the Minutes of the Meeting of the Board of Directors*, at 4 (Nov. 23, 2008) (online at c0181567.cdn1.cloudfiles.rackspacecloud.com/2008-11-23%20Transcript%20of%20FDIC%20Board%20of%20Directors%20meeting,%20closed%20session.pdf); Federal Reserve Bank of New York, *Memorandum to Citigroup Board of Directors* (Jan. 14, 2009) (online at c0181567.cdn1.cloudfiles.rackspacecloud.com/2009-01-14%20FRBNY%20Summary%20of%20Supervisory%20Activity%20and%20Findings%20on%20Citi.pdf).

[181] Federal Deposit Insurance Corporation, *Transcript: Board of Directors Meeting* (Jan. 15, 2009) (online at c0181567.cdn1.cloudfiles.rackspacecloud.com/2009-01-15%20FDIC%20Board%20Meeting%20Transcript.pdf) (hereinafter "FDIC Transcript on Board of Directors Meeting").

Figure 11: Stock Price Change of the First Nine CPP Banks (December 2005-December 2009) (relative to December 2005 levels)



Accordingly, even assuming that the other large banks that received the initial CPP infusions were equally healthy, by virtue of being made on the same one-size-fits-all terms, at a minimum the Bank of America and Citigroup CPP investments appear not to have properly priced the risk of investing in those entities. As the Panel warned in its February 2009 report, when the initial CPP returns were unknown, using a one-size-fits-all investment policy, rather than using risk-based pricing more commonly used in market transactions, meant that Treasury made its investments at a substantial premium to the market value of the assets purchased under the CPP.[182] As the Panel stated:

> Treasury's emphasis on uniformity, marketability, and use of call options in structuring TARP investments helped produce a situation in which Treasury paid substantially more for its TARP investments than their then-current market value. The decision to model the far riskier investments under the TIP ... closely on the CPP transactions also effectively guaranteed that a substantial subsidy would exist for these riskier institutions. Because Treasury decided to make all healthy bank

[182] 2009 February Oversight Report, *supra* note 84, at 2.

> purchases on precisely the same terms, stronger institutions received a smaller subsidy, while weaker institutions received more substantial subsidies.[183]

Professors Luigi Zingales and Pietro Veronesi came to a similar conclusion in their evaluation of the redistributive effects of Treasury's initial investments into the first and largest banks.[184] Examining the TARP interventions on an ex-ante basis, they found that the initial CPP terms provided these banks' shareholders with a subsidy – or, as the authors put it, a gift – which they estimated to be between $21 and $44 billion. According to this study, the subsidy to the banks' bondholders was even larger: $121 billion.[185] The general effect of the intervention on enterprise value also differed: stronger institutions received lower and sometimes negative increases in enterprise value from the announcement of the TARP interventions, while weaker institutions received more.[186]

The subsequent positive returns on investment in the larger CPP banks – including Citigroup and Bank of America – should not obscure this point. Had Treasury more accurately priced the risk – and calibrated it to each investment, as a private investor would have done[187] – Treasury's upside returns would have been greater. In illustrating this principle, Professors Zingales and Veronesi compared Treasury's returns using the terms of the CPP as implemented to Warren Buffet's investment in Goldman at around the same time. Professors Zingales and Veronesi concluded that if Treasury had demanded Mr. Buffet's terms, Treasury would in most cases have captured significant gains.[188] Thus, if this analysis is correct, and although Mr. Buffet remains currently invested in Goldman and his ultimate returns are unknown, it is likely that Mr.

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[183] 2009 February Oversight Report, *supra* note 84, at 8.

[184] Luigi Zingales, Robert C. McCormack Professor of Entrepreneurship and Finance and the David G. Booth Faculty Fellow, Booth School of Business, University of Chicago. Pietro Veronesi, Roman Family Professor of Finance, Booth School of Business, University of Chicago.

[185] Zingales and Veronesi note, however, that if the goal of the plan was to get full participation and avoid signaling effects, more stringent terms might have interfered. Pietro Veronesi and Luigi Zingales, *Paulson's Gift*, Journal of Financial Economics, Vol. 97, No. 3, at 364 (Sept. 2010) (hereinafter "Zingales & Veronesi: Paulson's Gift"). At the time of the initial CPP infusion, Wells Fargo had already reached an agreement to purchase Wachovia. The Panel's reports have therefore consistently referred to the first nine banks: Professors Zingales and Veronesi refer in their paper both to the first nine and the first ten banks.

[186] *Id.* at 364.

[187] In the February report, the Panel noted that it appeared that private investors who made investments at around the same time received better terms and thus better valuations than Treasury. Two of the private transactions compared received assets worth more than their investment, and one received assets worth less than the investment, but still of greater worth than Treasury's assets (these ranged from securities worth $123 on a $100 investment to $91 on a $100 investment, as compared to Treasury's average $66 on a $100 investment). 2009 February Oversight Report, *supra* note 84, at 4, 8.

[188] Zingales & Veronesi: Paulson's Gift, *supra* note 185, at 364.

Buffet will realize more on his investment in Goldman than Treasury realized for its similar TARP investment in that institution.[189]

Treasury was not, of course, acting as a normal private investor. Secretary Geithner recently stated that, "you can't say because we priced our investments below the cost of credit that was available in the market in a time of a financial panic that we underpriced those investments. That would not be a fair way to evaluate it or a sensible way to run a financial emergency."[190] In the early days of the CPP, Treasury said that its primary goal for the program was to stabilize the financial system.[191] Thus, Treasury was acting as a government body with the goal not only of returns to taxpayers, but also of market stability. In an atmosphere of profound uncertainty as to the health of banks in general, the regulators questioned whether the market was fully prepared for the details of what the regulators knew to be true – that not all of the largest banks were alike and healthy, and that some were indeed very fragile.[192] Accordingly, the fact that Treasury's returns likely differ from those of a private investor is not, and should not, be the end of the inquiry or dispositive of future policy responses to a crisis. Nonetheless, Professor Rogoff's cautions – with which Secretary Geithner has said he agrees[193] – are not satisfied by observations that Treasury has since made money without recognizing that Treasury did not necessarily price the risk of its investments in all of the CPP recipients.

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[189] These analyses are ex-ante, and not ex-post, and it is important to note that – to the best of the Panel's knowledge – there is no current academic effort to value the private investments under discussion in this section. Further, since the private investments are ongoing, it is impossible to determine what their ultimate value will be, and an unforeseen shock to Goldman could impair Mr. Buffet's returns in the future.

[190] Geithner Testimony to the Panel, *supra* note 119.

[191] U.S. Department of the Treasury, *Interim Assistant Secretary for Financial Stability Neel Kashkari Remarks on Financial Markets and TARP Update* (Dec. 5, 2008) (online at www.treasury.gov/press-center/press-releases/Pages/hp1314.aspx).

[192] For example, in FDIC board minutes from the time, the FDIC board acknowledged that while the market was sensitive to Bank of America's losses and liabilities from Countrywide and Merrill Lynch, the extent of the losses to which it was exposed would still be a surprise. *See, e.g.*, FDIC Transcript on Board of Directors Meeting, *supra* note 181, at 22-23 ("DIRECTOR REICH: Yes, I think there's been the perception that B of A has been sort of – well, certainly their acquisitions of Countrywide and Merrill Lynch has given them greater exposure to losses, but there nevertheless has been the perception that they are among the strongest of institutions, and I think this is going to be a surprise to the market. ... DIRECTOR DUGAN: .... My only comment would be, it would be a lot more surprise if it came out with a loss in November [unclear]....I mean, I think it will be a very big surprise, indeed, the size of the loss. That's exactly the shock that I think we're all fearful of and will generate the systemic risk that can have such harmful effects and the idea is that this will counteract that perception as much as possible."); *Id.* at 5 ("MR. NEWBURY: The market reaction to Bank of America Corporation's operating results may have systemic consequences given the size of the institution and the volume of counterparty transactions involved."). *See also* Email from Jennifer Burns, Federal Reserve Bank of Richmond, to Richard Cox, FDIC, and Morgan Morris, Office of the Comptroller of the Currency, discussing Bank of America (online at c0181567.cdn1.cloudfiles.rackspacecloud.com/2009-01-11%20FDIC%20Cox%20Email%20to%20Corston,%20Hoyer%20-%20FW%20Funding%20Vulnerabilities%20Memo.pdf).

[193] In testimony before the Panel, Secretary Geithner stated that Professor Rogoff's approach was fundamentally right. Geithner Testimony to the Panel, *supra* note 119 (stating that "what [Professor Rogoff] says is fundamentally right. You have to measure, as any investor would do, you have to measure return against risk.").

3. Lessons Learned

As noted above, between February 2009 and July 2010, the Panel examined questions about the policy, strategy, and execution of the TARP's approach to bank assistance, how Treasury and the Federal Reserve allowed banks to repay TARP assistance, the financial stability of banks in the context of troubled assets and CRE losses, and small banks' ability to exit Treasury's CPP. From the Panel's recommendations common themes emerged: transparency and accountability, forward-looking risk assessment, and the fact that one size does not necessarily fit all banks. These themes are discussed below.

a. Transparency and Accountability

In the reports on banking, the Panel has been consistent in its call for greater transparency. Fuller disclosure to the public instills confidence that the steps that Treasury has implemented to buttress the financial system are being executed in a prudent and fair manner. Accountability and transparency go hand in hand: there can be no accountability without transparency in decision-making. The taxpayers are only able to assess Treasury's choices meaningfully if they get a complete picture of how those choices were made and why Treasury deemed those to be the most appropriate to recover the public's investment, stabilize financial markets, and maximize return. Such disclosure would prevent the appearance of ad hoc decision-making and give Treasury an opportunity to take credit for any positive outcomes. The Panel recognizes that occasionally there are statutory and supervisory reasons to limit transparency about certain data; however, except in those limited circumstances, Treasury should always err on the side of greater disclosure.

In some cases, and as mentioned above, this lack of transparency has made Treasury the target of criticism that it could have avoided had it been more open. Some economists believe that the TARP was the most visible of the government's actions in addressing the financial crisis, and that being the public face of the intervention has contributed to its negative reputation[194] – a difficulty that additional transparency might have alleviated. The Panel has pointed out on numerous occasions that a major source of the TARP's unpopularity was insufficient transparency and inadequate communication. For instance, in the implementation of the CPP, Treasury initially indicated it was only infusing money into healthy banks. Later, when it became apparent that some participating banks were on the brink of failure, this not only tainted all participating banks (including healthy banks), but also diminished Treasury's credibility with the public.[195] Furthermore, with regard to TARP repayments by financial institutions small and large, Treasury has only issued some general statements on its overall repayment policy, instead of more detailed, case-by-case explanations for its approval of these repayments. Given the vast amounts of money involved, the public has a right to expect transparency and to hold Treasury

[194] 2010 September Oversight Report, *supra* note 53, at 95-96.

[195] 2010 September Oversight Report, *supra* note 53, at 107.

accountable for its decisions. In addition, the lack of transparency may have contributed to the general misperceptions that exist about the TARP. Despite, for example, Treasury's recovery of much of the money taxpayers initially invested, there is the lingering belief that the TARP was an extremely costly program.[196] The transparency and accountability of Treasury's various choices in the TARP may thus have significant implications not only for the policies chosen during this crisis, but also for policymakers facing difficult questions in the future.

b. Forward-Looking Risk Assessment

Stress testing of banks was designed to assess whether banks on a forward-looking basis could withstand a variety of worst-case scenarios of economic events and still continue to be financially viable. Banking regulators have used these tests to require capital buffers to be built in advance of any problem, based on projections about the economy and its impact on banks' operating results. While it would be unwise to think that stress testing could diagnose all of potential weaknesses of the banking system, it does determine the extent of problems in the market that are reasonably foreseeable.[197] For example, although it is not known to what degree the current stress tests will take into account the effect on bank balance sheets of mortgage documentation irregularities, the Panel has urged the regulators to do so.

c. One Size Does Not Necessarily Fit All

Treasury provided capital to banks participating in the CPP under a single set of repayment terms designed at the outset of the program. However, the result has been that large banks have been much better served by the program than smaller banks. For the stress-tested banks, the CPP proved to be a short-term investment. They entered early, and most have exited early – beneficiaries of capital market confidence resulting, in part, from their "too big to fail" status. For smaller banks, by contrast, the CPP is a long-term investment, subject to market uncertainty, stigma, and pressure. Additionally, the purchase agreements between Treasury and the banks did not address differences in credit quality among various capital-infusion recipients through variations in contractual terms governing the investments. Nor did the purchase agreements impose specific requirements on a particular recipient that might have helped insure stability and soundness.

The CPP had a different impact on large and small banks in part because these banks vary in a number of fundamental ways. Small banks are often privately held or thinly traded and have limited access to capital markets.[198] Also, small banks are disproportionately exposed to CRE,

[196] The Pew Research Center, *Few Aware of TARP Repayment, Inflation Rate: Public Knows Basic Facts About Politics, Economics but Struggle with Specifics*, at 1-2 (Nov. 18, 2010) (online at people-press.org/reports/pdf/677.pdf) ("But the public continues to struggle with questions about the bank bailout program known as the TARP: Just 16 percent say, correctly, that more than half of loans made to banks under the TARP have been paid back; an identical percentage says that none has been paid back.").

[197] 2009 June Oversight Report, *supra* note 95, at 3-5.

[198] 2010 July Oversight Report, *supra* note 105, at 3.

where there remains substantial uncertainty about future performance. In addition, and finally, as small banks do not benefit from any "too big to fail" guarantee, their regulators have been quite willing to close them down. Therefore, designing a standardized program may be the quicker answer, but speed may not address differences among participants in a program.

B. Guarantees and Contingent Payments

Capital infusions were not the only tool that Treasury employed under the TARP to stabilize the banking sector. In fact, during the financial crisis of late 2008 and early 2009, the federal government dramatically expanded its role as a guarantor.[199] All told, the federal government's guarantees have exceeded the total value of the TARP, making guarantees the single largest element of the government's response to the financial crisis.

1. Background

As noted above, CPP infusions were not enough for some institutions. In a matter of weeks, two of the first nine institutions to receive CPP funds – Citigroup and Bank of America – needed additional support.[200] Citigroup faced widening credit default swap spreads and losses due to write-downs on leveraged finance investments and securities, particularly in residential real estate. Citigroup's stock price, which had been volatile, fell below $4 per share on November 21, 2008, from a high of over $14 per share just three weeks earlier. This constituted a loss of more than two-thirds of Citigroup's market capitalization during those three weeks.[201] Citigroup ultimately incurred a loss of $8.29 billion for the fourth quarter of 2008.[202] For its part, Bank of America incurred its first quarterly loss in more than 17 years in the fourth quarter of 2008. These losses were largely due to escalating credit costs (including additions to reserves), and significant write-downs and trading losses in the capital markets businesses.[203] In addition, the market feared Bank of America's liability from its purchases of Merrill Lynch and Countrywide.[204]

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[199] Created by the FDIC less than two weeks after the enactment of EESA, the TLGP was intended to promote liquidity in the interbank lending market and confidence in financial institutions. The U.S. government also developed two other initiatives with guarantee-like aspects. First, through the TALF, FRBNY served as a quasi-guarantor of the newly issued ABS by permitting participating ABS owners to default on their TALF loans without further recourse from the lender (the government). Second, the PPIP provides a quasi-guarantee to the markets by demonstrating the U.S. government's willingness to subsidize private investments and implement measures to encourage market liquidity.

[200] 2009 November Oversight Report, *supra* note 60, at 13-14.

[201] 2009 November Oversight Report, *supra* note 60, at 43-44.

[202] 2009 November Oversight Report, *supra* note 60, at 43.

[203] 2009 November Oversight Report, *supra* note 60, at 43.

[204] See Section II.A.1.a, *supra*. As noted above, in FDIC board minutes from the time, the FDIC board acknowledged that the market was sensitive to Bank of America's losses and liabilities from Countrywide and

Treasury, the Federal Reserve, and the FDIC stated that providing additional assistance to both institutions was necessary not only to keep them afloat, but also "to strengthen the financial system and protect U.S. taxpayers and the U.S. economy." Noting that at the end of 2008 no one knew what might happen to the economy next, Treasury stated that a driving force behind the decision to provide additional assistance was a fear that either institution's failure would cause the same deep, systemic damage as had Lehman Brothers' collapse.[205]

Part of the government's additional assistance to Citigroup and Bank of America was provided through the Asset Guarantee Program (AGP), which Treasury created pursuant to Section 102 of EESA to guarantee certain distressed or illiquid assets that were held by systemically significant financial institutions.[206] In Treasury's view, asset guarantees would "calm market fears about really large losses," thereby encouraging investors to keep funds in Citigroup and Bank of America.[207] Citigroup's guarantee under the AGP ended in December 2009, following the partial repayment of its TARP assistance.

In addition to the AGP, on September 19, 2008, two weeks before EESA was signed into law, Treasury announced the Temporary Guarantee Program for Money Market Funds (TGPMMF), which was designed to alleviate investors' concerns that MMFs would drop below a $1.00 net asset value, an occurrence known as "breaking the buck."[208] At the program's height, it guaranteed $3.2174 trillion in MMFs.[209] The TGPMMF ended in September 2009. Similarly, the FDIC's DGP, part of the TLGP, discussed in greater detail in Section I, placed the FDIC's guarantee behind the debt that banks issued in order to raise funds that they could use to lend to customers. The DGP closed to new issuances of debt on October 31, 2009. The FDIC will continue to guarantee debt issued prior to that date until the earlier of its maturity or June 30, 2012.

2. Summary of COP Report and Findings

The Panel's November 2009 oversight report found that the income of several government-backed guarantee programs would likely exceed their direct expenditures, and that guarantees had played a major role in calming financial markets. These same programs,

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Merrill Lynch, although the extent of the losses to which it was exposed would still be a surprise. *See, e.g.*, FDIC Transcript on Board of Directors Meeting, *supra* note 181, at 22-23.

[205] 2009 November Oversight Report, *supra* note 60, at 45.

[206] 2009 November Oversight Report, *supra* note 60, at 14, 40. Section 102 of EESA required the Secretary of the Treasury, if he created the TARP, also to "establish a program to guarantee troubled assets originated or issued prior to March 14, 2008, including mortgage-backed securities."

[207] 2009 November Oversight Report, *supra* note 60, at 24-25, 46. As discussed above, while a provisional term sheet was drafted reflecting the outlines of Bank of America's asset guarantee agreement (which was intended to resemble the Citigroup guarantee), the parties never agreed upon a finalized term sheet.

[208] 2009 November Oversight Report, *supra* note 60, at 54.

[209] 2009 November Oversight Report, *supra* note 60, at 6.

however, exposed American taxpayers to trillions of dollars in guarantees and created significant moral hazard that distorted the marketplace. Despite the guarantees' significant impact, the contingent nature of guarantees, coupled with the limited transparency with which the guarantee programs were implemented, obscured the total amount of money that was being placed at risk. Some financial stabilization initiatives outside of the TARP, such as the FDIC's DGP and Treasury's TGPMMF, carried greater potential for exposure of taxpayer funds than the TARP itself.

3. Panel Recommendations and Updates

The extraordinary scale of these guarantees, the significant risk to taxpayers, and the corresponding moral hazard led the Panel to conclude that these programs should be subject to extraordinary transparency. The Panel strongly urged Treasury to provide regular, detailed disclosures about the status of the assets backing up the Citigroup AGP guarantee, the largest single guarantee offered. The Panel called upon Treasury to disclose greater detail about the rationale behind guarantee programs, the alternatives that might have been available and why they were not chosen, and whether these programs had achieved their objectives, including an analysis of why Citigroup and Bank of America were selected for the AGP and not others. The Panel also asked Treasury to provide a legal justification for its use of the Exchange Stabilization Fund to create the TGPMMF and to provide reports of the total number of MMFs participating in the program (or the total dollar value guaranteed), for each month that the program was in existence.

To date, Treasury has not disclosed any of the information the Panel requested concerning the various guarantee programs it launched during the financial crisis, although a SIGTARP audit recently disclosed information germane to the Panel's requests.[210] As noted above, the temporary guarantee program for MMFs terminated in September 2009 and the Citigroup AGP terminated in December 2009.

4. Lessons Learned

As the Panel pointed out in its November 2009 oversight report, it is impossible to attribute specific results to a particular initiative given that so many stabilization initiatives have been in use. The guarantees provided by Treasury, the Federal Reserve, and the FDIC helped

[210] A recent SIGTARP audit provides some key disclosures relating to the AGP and the government's decision to provide additional assistance to Citigroup. Not only does this audit detail Citigroup's initial proposal for additional government assistance, but it also discusses several alternatives that were floated besides guarantees to address the lack of market confidence in Citigroup. These included the possibility of creating a conservatorship for Citigroup or creating a SPV or public-private investment fund to purchase troubled assets from Citigroup with government funds. Office of the Special Inspector General for the Troubled Asset Relief Program, *Extraordinary Financial Assistance Provided to Citigroup, Inc.*, at 17-21 (Jan. 13, 2011) (online at www.sigtarp.gov/reports/audit/2011/Extraordinary%20Financial%20Assistance%20Provided%20to%20Citigroup,%20Inc.pdf).

restore confidence in financial institutions, and did so without significant expenditure, initially at least, of taxpayer money. Moreover, as the market has stabilized and the scope of the programs has decreased, the likelihood diminishes that any such expenditure will be necessary. Additionally, the U.S. government – and thus the taxpayers – have benefited financially from the fees charged for guarantees.

This apparently positive outcome, however, was achieved at the price of a significant amount of risk. A significant element of moral hazard was injected into the financial system at that time and a very large amount of money was at risk. At its high point, the federal government guaranteed or insured $4.4 trillion in face value of financial assets under the three major guarantee programs.[211] In addition, while circumstances may have led the government into ad-hoc reactions to the financial crisis, rather than permitting it to develop clear and transparent principles, the result is that government intervention has caused confusion and muddled expectations.[212]

C. Global Context and International Effects of the TARP

Many of the banks at the center of the TARP interventions had substantial global operations. Similarly, the U.S. banking sector contains multiple financial institutions headquartered elsewhere, but active in the U.S. economy. The crisis showed that these sorts of cross-border links within the financial system could magnify rather than reduce risks. In order to examine the effects of these links on financial stability, the Panel's August 2010 report addressed the international effects of the TARP.

1. Background

In an earlier era, a mortgage crisis that started in a few regions in the United States might have ended there as well. But by 2008, the global financial system had become deeply internationalized and interconnected. Mortgages signed in Florida, California, and Arizona were securitized, repackaged, and sold to banks and other investors in Europe, Asia, and around the

[211] This figure includes the entirety of the governments exposure to the Citigroup and Bank of America guarantees, $259 billion and $97 billion respectively, as well as the maximum amount outstanding under the TLGP ($346 billion in May 2009), and the size of the money market fund at the time Treasury enacted its guarantee ($3.7 trillion). Federal Deposit Insurance Corporation, *Monthly Reports on the Temporary Liquidity Guarantee Program* (Instrument Used: Debt Issuance under Guarantee Program, Debt Outstanding) (May 31, 2009) (online at www.fdic.gov/regulations/resources/tlgp/total_issuance5-09.html). For details regarding the loss exposure for Treasury, the FDIC, and the Federal Reserve to Citigroup and Bank of America guarantees, *see* U.S. Department of the Treasury, *Master Agreement Among Citigroup Inc., Certain Affiliates of Citigroup Inc. Identified Herein, Department of the Treasury, Federal Deposit Insurance Corporation and Federal Reserve Bank of New York*, at 6-8, 13 (Jan. 15, 2009) (online at www.treasury.gov/initiatives/financial-stability/investment-programs/agp/Documents/Citigroup_01152009.pdf); Federal Deposit Insurance Corporation, *Summary of Terms* (Jan. 15, 2009) (online at www.fdic.gov/news/news/press/2009/pr09004a.pdf). IMMFA: Frequently Asked Questions, *supra* note 27.

[212] 2009 November Oversight Report, *supra* note 60, at 85.

world. At the same time, other countries experienced their own housing booms fueled by new financial products.

The conventional wisdom in the years immediately before the crisis held that banks that operated across global markets were more stable, given their ability to rely on a collection of geographically dispersed businesses. The conventional wisdom, however, was proved wrong. Using short-term liabilities (funding from the overnight and other short-term markets, often dollar-denominated) to purchase long-term assets such as RMBS, many firms simply recreated the classic problem faced by commercial banks prior to the securitization of mortgages, creating a mismatch in the length of liabilities and assets. When subprime borrowers began to default on their mortgages, banks around the world discovered that their balance sheets held the same deteriorating investments. The danger was amplified by the high leverage created by layers of financial products based on the same underlying assets. When short-term lenders began to question the ability of banks to repay their obligations, markets froze, and the international financial system verged on chaos.[213] The result was a truly global financial crisis, and the interconnections within the global financial marketplace and the significant cross-border operations of major U.S. and foreign-based firms widened the fallout of the crisis, requiring a multi-pronged response by a host of national regulators and central banks.[214]

For the most part, governments across the globe responded to the crisis on an ad hoc basis as it unfolded. What this meant was that most of the responses were tailored to address immediate problems and they tended to target specific institutions or specific markets, rather than the entire financial system. Home country regulators generally took responsibility for banks headquartered in their jurisdictions, and the evidence suggests that assistance was doled out less to stabilize the international financial landscape than to respond to potential fallout across a particular domestic market.[215] There was, however, substantial cross-border coordination between financial authorities and central banks of foreign governments to establish TARP-like programs.[216] For example, in response to market disruptions, the Federal Reserve and other central banks established reciprocal currency arrangements, or swap lines, starting in late 2007.[217] The Federal Reserve's swap line programs enhanced the ability of foreign central banks

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[213] Congressional Oversight Panel, *August Oversight Report: The Global Context and International Effects of the TARP*, at 3-4 (Aug. 12, 2010) (online at cop.senate.gov/documents/cop-081210-report.pdf) (hereinafter "2010 August Oversight Report").

[214] *Id.* at 29.

[215] *Id.* at 35.

[216] *Id.* at 3-4. Treasury also stated that it coordinated extensively with its foreign counterparts throughout the financial crisis. *Id.* at 96.

[217] A swap line functions as follows: as the borrowing central bank draws down on its swap line, it sells a specified quantity of its currency to the lending central bank in exchange for the lending central bank's currency at the prevailing market exchange rate. The two central banks simultaneously enter into an agreement that obligates the borrowing central bank to buy back its currency at a future date at the same exchange rate that prevailed at the time of the initial draw, plus interest. The borrowing central bank then lends the dollars at variable or fixed rates to

to provide U.S. dollar funding to financial institutions in their jurisdictions at a time when interbank lending was effectively frozen. Most countries ultimately intervened in similar ways and used the same basic set of policy tools: capital injections to financial institutions, guarantees of debt or troubled assets, asset purchases, and expanded deposit insurance.[218]

2. Summary of COP Report and Findings

The Panel's August 2010 oversight report examined the TARP in an international context, describing how the financial crisis that began in 2007 exposed the interconnectedness of the global financial system. By 2008, the global financial system had become deeply internationalized and interconnected. Although the crisis began with subprime mortgage defaults in the United States, its damage spread rapidly overseas and it quickly evolved into a global financial crisis. Faced with the possible collapse of their most important financial institutions, many national governments intervened. While the United States attempted to stabilize the system by flooding money into as many banks as possible – including those that had significant overseas operations – most other nations targeted their efforts more narrowly toward institutions that in many cases had no major U.S. operations. While it was difficult to assess the precise international impact of the TARP or other U.S. rescue programs because Treasury gathered very little data on how TARP funds flowed overseas, it appeared likely that America's financial rescue had a much greater impact internationally than other nations' programs had on the United States.[219]

3. Panel Recommendations and Updates

Improved Data Collection and Reporting. In its August 2010 Oversight Report, the Panel called upon Treasury to collect and report more data about how the TARP and other rescue funds flowed internationally, to document the impact that the U.S. rescue had overseas, to create and maintain a database of this information, to urge foreign regulators to collect and report similar data, and to make international regulatory bodies and their interactions with U.S. regulators open and transparent. The Panel also urged U.S. regulators to make clear to policymakers the impact that such international regulatory bodies have on the U.S. banking

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entities in its country. *Id.* at 107-108. The majority of the swap line programs established by the Federal Reserve terminated on February 1, 2010, but in response to the European sovereign debt crisis, the Federal Reserve reestablished its swap line facilities by entering into agreements with the European Central Bank and other major central banks (the Bank of England, the Swiss National Bank, the Bank of Canada, and the Bank of Japan) in May 2010 in order to counteract a shortage of dollar liquidity. These swaps were authorized through January 2011. In addition, on December 21, 2010, the Federal Reserve Board authorized an extension through August 1, 2011, of its temporary U.S. dollar liquidity swap arrangements with the Bank of Canada, the Bank of England, the European Central Bank, the Bank of Japan, and the Swiss National Bank. *See* Board of Governors of the Federal Reserve System, *Credit and Liquidity Programs and the Balance Sheet*, at 8-9 (Feb. 2011) (online at www.federalreserve.gov/monetarypolicy/files/monthlyclbsreport201102.pdf).

[218] 2010 August Oversight Report, *supra* note 213, at 117.

[219] 2010 August Oversight Report, *supra* note 213, at 3-5.

industry and broader economy. It does not appear that Treasury has acted upon this recommendation.

"War gaming" Exercises. The Panel also recommended that the international community gather information about the international financial system, identify vulnerabilities, and plan for emergency responses to a wide range of potential future crises. The Panel called upon U.S. regulators to encourage regular crisis planning and financial "war gaming."

Though no regulatory body has yet reported results from financial "war gaming," a broad array of international standard-setting bodies, including the Basel Committee on Banking Supervision and national authorities, under the coordination of the Financial Stability Board, are in the midst of quantifying and finalizing key elements of regulatory reform. The Financial Stability Board, which includes the G20 (a group of 20 nations consisting of both industrialized and emerging economies), will assess financial system vulnerabilities, promote coordination and information exchange among authorities, advise and monitor best practices to meet regulatory standards, set guidelines for and support the establishment of supervisory colleges, and support cross-border crisis management and contingency planning. At the Seoul Summit in November 2010, the G20 leaders endorsed the Financial Stability Board policy framework, including its work processes and timelines, for reducing the moral hazard of systemically important financial institutions.[220] Regulators are also working with international bodies to coordinate responses in the event of a large cross-border bank failure.[221] U.S. regulators do not have the authority to resolve foreign parents of U.S. subsidiary firms that fail in the United States and only have authority over the U.S. parent companies and U.S. subsidiaries of U.S. entities,[222] making international cooperation helpful for the successful resolution of large, transnational banks.

4. Lessons Learned

As the Panel highlighted in its August 2010 oversight report, the international response to the crisis that started in 2007 developed on an ad hoc, informal, jurisdiction-by-jurisdiction basis. Despite the limitations of international coordination, macro-economic responses taken by central banks, which had broader discretion to design liquidity facilities, were the most coordinated.[223]

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[220] *See* Sullivan & Cromwell LLP, *Basel III and FSB Proposals* (Nov. 15, 2010) (www.sullcrom.com/files/Publication/27b4dd5f-05fd-4f6b-b49e-21caae447eee/Presentation/PublicationAttachment/6cdbbb2e-1103-4c89-b0d5-23f7341d2b4c/SC_Publication_Basel_III_and_FSB_Proposals.pdf).

[221] Federal Deposit Insurance Corporation, *Statement of John Corston, Acting Deputy Director, Complex Financial Institution Branch, Division of Supervision and Consumer Protection, Federal Deposit Insurance Corporation on Systemically Important Institutions and the Issue of "Too Big to Fail"* (Sept. 1, 2010) (online at www.fdic.gov/news/news/speeches/archives/2010/spsep0110.html).

[222] *See* Simon Johnson Testimony to the Panel, *supra* note 120. *See also* Jeffrey N. Gordon, *The Dangers of Dodd-Frank* (Oct. 15, 2010) (online at www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202473381266).

[223] 2010 August Oversight Report, *supra* note 213, at 116-117.

Governments ultimately made their decisions, however, based on an evaluation of what was best for their own banking sector and their domestic economy: consideration of the specific impact of their actions on the financial institutions, banking sector, or economies of other jurisdictions was not a high priority. This was due to both the rapid and brutal pace of the crisis as well as the absence of effective cross-border crisis response structures. Ultimately, this meant that the assistance that was provided to specific troubled institutions depended very much on where they were headquartered.[224]

Although these ad hoc actions ultimately restored a measure of stability to the international system, there is no doubt that international cooperation could be improved. The internationalization of the financial system has, in short, outpaced the ability of national regulators to respond to global crises.[225]

III. Credit Markets: Small Business and Consumer Lending

As noted above, the majority of the Panel's reports have addressed topics relevant to the banking sector. Bank health and credit markets are opposite sides of the same coin, because a healthy bank with a solid balance sheet is in a better position to respond to demand for credit. Accordingly, this section discusses the impact of the financial crisis and subsequently the TARP on credit markets.

A. Background

1. Small Business Lending

Credit is critical to the ability of all businesses to purchase new equipment or new properties, expand their workforce, and fund their day-to-day operations. If credit is unavailable, businesses may be unable to meet current business demands or to take advantage of opportunities for growth.[226] In contrast to large corporations, small businesses are generally less able to access the capital markets directly and thus are more vulnerable to a credit crunch. The result of reduced access to credit can be that too few small businesses start and too many stall – a combination that can hinder economic growth and prolong an economic downturn.[227]

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[224] 2010 August Oversight Report, *supra* note 213, at 116.

[225] 2010 August Oversight Report, *supra* note 213, at 117.

[226] 2010 May Oversight Report, *supra* note 110, at 3; Congressional Oversight Panel, Written Testimony of Paul Smiley, president, Sonoran Technology and Professional Services, *Phoenix Field Hearing on Small Business Lending*, at 2 (Apr. 27, 2010) (online at cop.senate.gov/documents/testimony-042710-smiley.pdf).

[227] Congressional Oversight Panel, *May Oversight Report: Reviving Lending to Small Businesses and Families and the Impact of the TALF*, at 12 (May 7, 2009) (online at cop.senate.gov/documents/cop-050709-report.pdf) (hereinafter "2009 May Oversight Report").

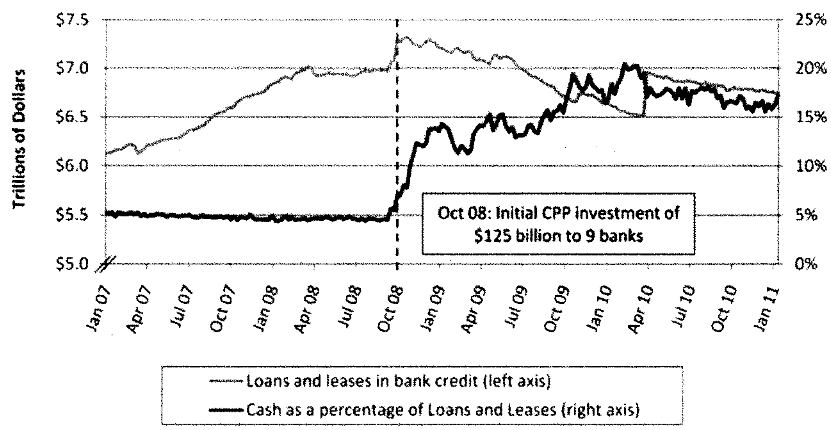
During the financial crisis, bank lending to individuals and businesses decreased across the board due to market uncertainty and continued credit quality deterioration.[228] As Figure 12 shows, the amount of loans and leases outstanding at commercial banks dropped to $6.5 trillion in the spring of 2010 from its level of $7.3 trillion outstanding in October 2008.[229] As loans and leases outstanding have declined, the amount of cash assets held as a portion of total loans and leases has increased. Following the government's initial $125 billion investment in the first nine TARP participants in October 2008, the cash to loans ratio more than doubled, from 7 percent to its December 2010 level of 16 percent.[230] While an increased cash to loan ratio is not necessarily a negative sign, as it conveys a desire to ensure adequate cash reserves, the continued decrease in loans outstanding shows that there continues to be a decrease in the amount of credit in the market.

[228] Board of Governors of the Federal Reserve System, *U.S. Credit Cycles: Past and Present*, at 4 (online at www.treasury.gov/initiatives/financial-stability/results/cpp/cpp-report/Documents/Fed%20US%20Credit%20Cycles%20072409.pdf) (accessed Mar. 11, 2011) ("...credit growth typically declines prior to and during economic downturns").

[229] The National Bureau of Economic Research, the body responsible for determining when shifts in the business cycle occur, stated that the most recent recession began in December 2007 and ended in June 2009. NBER: US Business Cycle, *supra* note 21. The sharp jump in loans and leases to $7.0 trillion in the spring of 2010 is predominantly due to the implementation of FAS 166/167, which required institutions to bring all loans held in variable interest entities onto their balance sheets. Since then, outstanding loans and leases have steadily decreased.

[230] It is difficult to isolate new lending due to reporting standards of banks. As part of the TARP, banks that received assistance were required to report on their lending. Treasury used those data to publish a survey of the top 22 CPP recipients. However, Treasury did not require TARP recipients that repaid their funds to continue reporting, thereby leaving a deficiency of data on new lending by the nation's largest banks. Treasury continued publishing the Capital Purchase Program Monthly Lending Report, which measures only three metrics of the 26 measured by the survey of the top 22 CPP recipients. 2010 May Oversight Report, *supra* note 110, at 28.

Figure 12: Lending and Cash Assets at Commercial Banks[231]



While it is difficult to gather data specifically about small business credit or to generalize across small business market participants, credit began to tighten for small businesses in early 2008 and worsened over the course of 2009.[232] For loans to small businesses, in the first quarter of 2008, 51.8 percent of the Federal Reserve's Survey of Senior Loan Officers respondents reported that they had tightened credit standards. By the fourth quarter of that year, that percentage had risen to 69.2 percent. Credit remained tight during the first part of 2009: in the first quarter, 42.3 percent of the Survey of Senior Loan Officers respondents reported that they had tightened credit standards. The numbers of Senior Loan Officers reporting tightening credit eventually leveled off, reflecting the fact that most banks had already tightened their lending

[231] The considerable increase in loans and leases outstanding in this graphic in early 2010 is due to the adoption of the Financial Accounting Standards Board's Financial Accounting Statements No. 166 and No. 167 as of the week ending March 31, 2010. These rules changed the accounting standards for financial assets and led to domestically chartered commercial banks consolidating approximately $377.8 billion in assets and liabilities on their balance sheets at the end of the first quarter 2010. Financial Accounting Standards Board, *FASB Issues Statements 166 and 167 Pertaining to Securitizations and Special Purpose Entities* (June 16, 2009) (online at www.fasb.org/cs/ContentServer?c=FASBContent_C&pagename=FASB/FASBContent_C/NewsPage&cid=1176156240834); Board of Governors of the Federal Reserve System, *Assets and Liabilities of Commercial Banks in the United States – Notes on the Data* (Apr. 9, 2010) (online at www.federalreserve.gov/releases/h8/h8notes.htm#notes_20100409); Treasury Transactions Report, *supra* note 36.

[232] A source of information on trends is the Federal Reserve's Senior Loan Officer Opinion Survey on Bank Lending Practices, which is based on quarterly data reported by the Survey of Senior Loan Officers respondents and addresses changes in the supply of and demand for loans to businesses and households. *See* Board of Governors of the Federal Reserve System, *January 2011 Senior Loan Officer Opinion Survey on Bank Lending Practices*, at 7 (Jan. 31, 2011) (online at www.federalreserve.gov/boarddocs/snloansurvey/201102/fullreport.pdf) (hereinafter "January 2011 Senior Loan Officer Survey").

standards.[233] Unable to find credit, many small businesses shut their doors, and some of the survivors are still struggling to find adequate financing.[234] At an acute phase of the crisis, the Panel found compelling reports of slowed lending at its April 2009 field hearing in Milwaukee, Wisconsin. On the one hand, small business owners discussed their lack of access to credit at that hearing. Anecdotally, small business owners who testified suggested that their banks, which had received TARP injections, had been unable to fulfill their credit needs, which ranged from additional loans to restructuring or even sustaining existing lines of credit. On the other hand, the community bankers who testified at the field hearing highlighted their efforts to extend credit to their small business customers. Two witnesses representing community banks emphasized that they were continuing to lend throughout the crisis, while acknowledging that they had no choice but to pursue new opportunities cautiously.[235]

During the crisis, many larger banks pulled back from the small lending market.[236] Some borrowers looked to community banks to pick up the slack, but smaller banks remained strained by both their exposure to CRE, which continued to pose a risk to the economic viability of banks, and other liabilities.[237] In addition, many of the government programs aimed at banks were arguably designed more to provide relief for the kinds of assets held by larger banks, and have had little effect on the smaller banks now bearing a greater share of small business lending. Even now, with a cautious recovery under way in many sectors, standards for small business lending have remained tight, easing only very slightly by the fourth quarter of 2010.[238]

2. Consumer Lending

Leading into the financial crisis, families were deep in debt, including mortgages, auto loans, credit cards and student loans. Families were left with little savings, while declines in the value of housing and in the stock market further shrunk household net worth. As wages

[233] 2010 May Oversight Report, *supra* note 110, at 17.

[234] 2010 May Oversight Report, *supra* note 110, at 3.

[235] 2009 May Oversight Report, *supra* note 227, at 13-14; Congressional Oversight Panel, *Hearing on the Credit Crisis and Small Business Lending* (Apr. 29, 2009) (online at cop.senate.gov/hearings/library/hearing-042909-milwaukee.cfm) (full audio recording).

[236] 2010 May Oversight Report, *supra* note 110, at 62-63.

[237] The withdrawal of consumer and small business loans because of a disproportionate exposure to commercial real estate capital creates a "negative feedback loop" that suppresses economic recovery. See Section II.

[238] 2009 May Oversight Report, *supra* note 227, at 4, 12-13. According to the Federal Reserve Board's January 2011 Senior Loan Officer Opinion Survey on Bank Lending Practices, a small fraction of banks reported they were continuing to ease standards for commercial and industrial (C&I) loans over the fourth quarter of 2010 to large and medium-size firms, but few reported changing standards on such loans to small businesses. January 2011 Senior Loan Officer Survey, *supra* note 232, at 4, 13. While the respondents reported a moderate increase in demand for C&I loans, there was little if any change in demand for other types of loans. Reports of strengthened demand for C&I loans were more widespread than in the previous survey. Approximately 5 percent of banks reported increased demand from small businesses. *Id.*

stagnated and unemployment rose, the ability of households to manage ever-larger debt loads became increasingly difficult.

During late 2008 and into 2009, consumer credit indicators showed the tightening of the credit markets and the effect on household borrowing. This reduction in credit availability can be seen through rising interest rates and higher lending standards, as well as through reductions in the rate and overall volume of lending. In the fourth quarter of 2008, consumer spending on goods and services fell 4.3 percent – a decline responsible for nearly half of the reported 6.2 percent annualized contraction in GDP. This was the largest spending decrease in 29 years.[239] At the same time, the recession impacted demand for borrowing, as households paid down debts built up during the boom years, which contributed to the economic contraction. Overall, the trend across the sector was one of debt reduction, credit limit decreases, rising delinquencies, and tightening lending standards.[240] The aggregate decline in consumer lending was likely due to a combination of deleveraging by households and reduced access to credit.

3. Government Efforts to Stimulate Small Business and Consumer Lending

Since the onset of the financial crisis, the federal government has instituted a series of programs designed to support lending and liquidity in the consumer and small business credit markets. Since the TARP's inception, Treasury has announced almost $60 billion in funding for TARP programs for small business-related initiatives, but it has reduced that commitment to approximately $5.2 billion over the past year.[241] The government initiatives predominantly

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[239] 2009 May Oversight Report, *supra* note 227, at 19-20.

[240] 2009 May Oversight Report, *supra* note 227, at 25-30.

[241] In April 2010, Treasury reduced its planned investment commitments for the Consumer and Business Lending Initiative from $60 billion to $52 billion. The $52 billion of the Consumer and Business Lending Initiative was comprised of $20 billion for the TALF, $30 billion reserved for the SBLF (separate from the TARP through legislation), not more than $1 billion for the CDCI Program, and not more than $1 billion for the SBA 7(a) Securities Purchase Program. U.S. Department of the Treasury, *Troubled Asset Relief Program Monthly 105(a) Report – March 2010*, at 7 (Apr. 12, 2010) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/105/Documents105/March%202010%20105(a)%20monthly%20report_final.pdf).

Before and after passage of the Dodd-Frank Act, Treasury announced changes in the planned commitments under the TARP, including changes to its small business-related initiatives. Treasury reserved $5.48 billion for the Consumer and Business Lending Initiative in July 2010, of which (i) $4.3 billion was allocated to TALF, (ii) $337 million was disbursed from the $400 million allocated for SBA 7(a) securities purchases, and (iii) $570 million was disbursed from the $780 million allocated for the CDCI. *See* U.S. Department of the Treasury, *Troubled Asset Relief Program Monthly 105(a) Report – July 2010*, at 4-6 (Aug. 10, 2010) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/105/Documents105/July%202010%20105(a)%20Report_Final.pdf). As of the expiration of Treasury's authority to make new financial commitments under the TARP on October 3, 2010, its Consumer and Business Lending Initiative commitment stood at approximately $5.2 billion. *See* U.S. Department of the Treasury, *Troubled Asset Relief Program Monthly 105(a) Report – December 2010*, at 3 (Jan. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/105/Documents105/December105(a)%20report_FINAL_v4.pdf) (hereinafter "TARP Monthly 105(a) Report – December 2010").

included additional support for Small Business Administration (SBA) programs, capital infusions for smaller banks, and various efforts to stimulate secondary markets for bank assets in hopes of easing the stresses on bank balance sheets and freeing banks to make more loans.

a. SBA Programs

In stable credit markets, the government's effort to facilitate small business lending relies chiefly on programs run by the SBA. The SBA acts as direct lender or, more often, guarantor in the small business lending sector. Guarantees, which comprise the bulk of the SBA's outstanding loan portfolio, derive from the agency's 7(a) and 504 loan programs and its Small Business Investment Company Program. Under its 7(a) program, the SBA is authorized to guarantee loans for working capital. Under its 504 program, the SBA is authorized to guarantee loans for the development of small assets such as land, buildings, and equipment that will benefit local communities. Direct loans originate from the SBA's microloan and disaster loan programs. While SBA programs have helped promote lending to small businesses, SBA-guaranteed loans constitute only a small percentage of total small business lending.[242]

During the financial crisis, however, SBA lending declined considerably, even though those loans can be a fallback for business owners who fail to obtain conventional loans. The tightening of credit in the SBA lending markets mirrored the tightening of credit in conventional markets for small business loans, with loan volume decreasing over the course of 2008. In the fall of 2008, the secondary market for SBA 7(a) loans froze altogether. Unable to shed the associated risk from their books and free up capital to make new loans through securitization, commercial lenders significantly curtailed both their SBA lending and other lending activities. The decline in SBA lending became even more pronounced in the early months of 2009 while commercial lending remained very constricted, thus leading to few sources of credit for small businesses.[243]

In an effort to increase SBA lending, the American Recovery and Reinvestment Act (ARRA) included a provision that reduced the risk to private lenders by temporarily increasing the government guarantee on loans issued through the SBA's 7(a) loan program to as much as 90 percent.[244] The SBA began implementing the increased guarantee program in March 2009.[245]

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[242] 2010 May Oversight Report, *supra* note 110, at 42.

[243] 2009 May Oversight Report, *supra* note 227, at 14, 30-42.

[244] 2010 May Oversight Report, *supra* note 110, at 45.

[245] Moreover, ARRA temporarily eliminated up-front fees that the SBA charges on 7(a) loans that increase the cost of credit for small businesses, and temporarily eliminated certain processing fees typically charged on 504 loans. ARRA also included a Business Stabilization Program that allowed the SBA to guarantee fully loans to "viable" small businesses experiencing short-term financial difficulty (up to $35,000).

Pursuant to H.R. 5297, the Small Business Jobs Act of 2010, the SBA loan guarantee enhancement provisions relating to guarantees and fees were extended through December 31, 2010.

b. Capital Infusions

i. CDCI

On October 21, 2009, the White House announced a small business lending initiative under the TARP, the CDCI, to invest lower cost capital in community development financial institutions (CDFIs). As of the CDCI's close in September 2010, Treasury had provided to 84 community development financial institutions approximately $570.1 million (approximately $363.3 million of this amount was a result of exchanges from CPP by 28 institutions) of the $780.2 million it originally allocated for this program.[246] Treasury did not require community development financial institutions to use the capital to increase small business lending as a condition of participating in CDCI.

ii. SBLF

On September 27, 2010, President Barack Obama signed the Small Business Jobs and Credit Act of 2010 into law.[247] This legislation created the SBLF, which was created outside the TARP and aims to stimulate small business lending by providing capital to participating community banks at interest rates keyed to small business lending levels.[248] The capital is in the form of a preferred stock investment with a variable dividend rate: it starts at 5 percent and can be reduced to as low as 1 percent or increased to as high as 7 percent, depending on small business lending levels. As small business lending increases, a bank will receive a reduced dividend rate on the funds borrowed. If small business lending fails to increase, the bank will pay increased dividend rates on the funds borrowed. After four and a half years, the dividend rate will increase to 9 percent regardless of the change in small business lending levels. The SBLF will be open to banks that received funds from the TARP's CPP as well as those that did not. The legislation limits participation in the SBLF to banks with under $10 billion in assets, and it prohibits participation by institutions on the FDIC's Problem Bank List and by TARP

[246] U.S. Department of the Treasury, *Troubled Asset Relief Program: Two Year Retrospective*, at 33 (Oct. 5, 2010) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/agency_reports/Documents/TARP%20Two%20Year%20Retrospective_10%2005%2010_transmittal%20letter.pdf) (hereinafter "TARP: Two Year Retrospective").

[247] *Small Business Jobs and Credit Act of 2010*, Pub. L. No. 111-240 (2010).

[248] For further discussion concerning the SBLF, see Section III, *infra*. On December 20, 2010, Treasury issued guidance under which CDCI recipients can refinance into the SBLF. Banks that participate in the SBLF will not be able to continue to participate in the CDCI, must be in compliance with all the terms, conditions, and covenants of the CDCI in order to refinance, and must be current in their dividend payments owed to Treasury under the CDCI. U.S. Department of the Treasury, *Resource Center – Small Business Lending Fund* (Dec. 20, 2010) (online at www.treasury.gov/resource-center/sb-programs/Pages/Small-Business-Lending-Fund.aspx) (hereinafter "Treasury Resource Center – SBLF").

recipients that have missed more than one dividend payment.[249] Generally speaking, the SBLF will provide capital on terms that are more favorable than the CPP offered.

c. Supporting Secondary Markets

Starting in November 2008, Treasury and the FRB emphasized revival of the securitization markets, not simply basic bank lending, to restore the flow of credit to small businesses and families. The government developed numerous initiatives for supporting secondary lending markets. Secondary markets allow depository institutions either to sell or securitize loans, converting potentially illiquid assets into cash and shifting assets off their balance sheets. From the outset, however, this approach raised a variety of issues, including whether the program would meaningfully affect access to credit for small businesses because only a small fraction of small business loans are securitized, limiting the effectiveness of secondary market-driven programs for small business loans.[250]

i. TALF

Driven by the ABS market freeze in the fall of 2008, the Federal Reserve and Treasury announced the creation of the TALF in late November 2008. The TALF was designed to promote renewed issuance of consumer and business ABS at more normal interest rate spreads. As demonstrated in Figure 13 below, the majority of TALF ABS issuances were consumer lending-related, but only a small percentage of transactions occurred in the small business sector. When the TALF program was closed on June 30, 2010, there were $43 billion in loans outstanding. Accordingly, on July 20, 2010, Treasury reduced the credit protection provided for the TALF from $20 billion to $4.3 billion, constituting 10 percent of the total outstanding TALF loans.[251]

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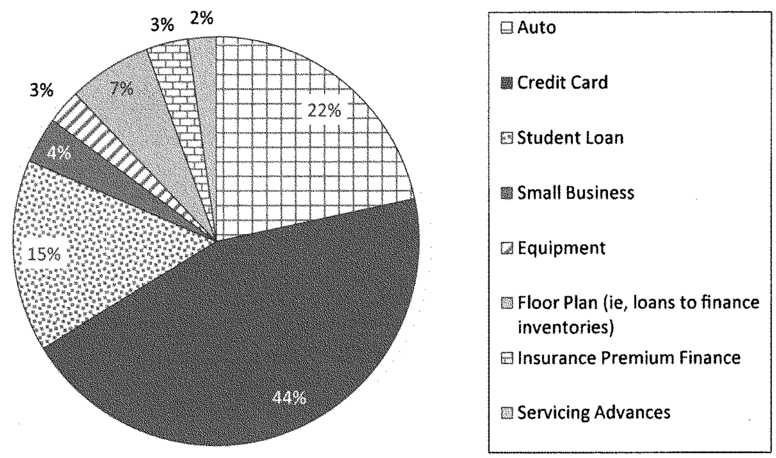
[249] H.R. 5297 § 4103(d)(4), 111th Cong. (2010); H.R. 5297 § 4103(d)(7)(B), 111th Cong. (2010). Banks may be put on the Problem Bank List for a number of reasons, including failure to achieve certain capital ratios, the issuance of cease and desist orders, and other regulatory actions.

[250] Generally, only SBA-guaranteed loans are securitized, and they constitute only a small fraction of small business lending. 2010 May Oversight Report, *supra* note 110, at 42; 2009 May Oversight Report, *supra* note 227, at 50-58.

[251] Federal Reserve Bank of New York, *Term Asset-Backed Securities Loan Facility: Terms and Conditions* (July 21, 2010) (online at www.newyorkfed.org/markets/talf_terms.html); Board of Governors of the Federal Reserve System, *Press Release* (July 20, 2010) (online at www.federalreserve.gov/newsevents/press/monetary/20100720a.htm).

Figure 13: TALF ABS Issuances by Sector[252]



ii. SBA 7(a) and 504 Securities Purchase Programs

In addition to the TALF, Treasury created a program to make direct purchases of securities backed by the government-guaranteed portion of SBA 7(a) loans and the non-government-guaranteed first lien mortgage loans affiliated with the SBA's 504 loan program in hopes of unlocking the small business loan market. Treasury announced its SBA 7(a) initiative in March 2009 to help restart small business credit markets and provide an additional source of liquidity designed to foster new lending. Despite stating that 7(a) and 504 purchases would begin by May 2009, Treasury did not implement the program until March 19, 2010.[253] Treasury initially allocated $15 billion in TARP funds for the purchases, but this was revised to just $1 billion, and was again reduced to $400 million.[254] As of the program's close in September 2010,

[252] The TALF provided investors with non-recourse loans secured by certain types of ABS, including credit card receivables, auto loans, equipment loans, student loans, floor plan loans, insurance-premium finance loans, loans guaranteed by the SBA, residential mortgage servicing advances, and commercial mortgage-backed securities (CMBS). The chart reflects all TALF ABS issuances, but does not reflect CMBS issuances.

[253] 2010 May Oversight Report, *supra* note 110, at 41.

[254] 2010 September Oversight Report, *supra* note 53, at 53-54.

Treasury had made 31 purchases of SBA 7(a) securities totaling about \$357 million.[255] Treasury never purchased any 504 securities through this initiative.

d. Other Government Programs

Some programs, like the PPIP, discussed above in Section II.A.1.b, were initially expected to help stimulate small business and consumer lending but ultimately did not. The PPIP was designed to allow banks and other financial institutions to shore up their capital by removing troubled assets from their balance sheets. Since the PPIP did not ultimately purchase the whole loans that many smaller banks hold on their books, it had little effect on the banks responsible for a disproportionate amount of small business lending. Many state and local entities also have programs to support small business lending within their geographic boundaries. These programs generally mirror, on a smaller scale, tools employed by SBA, including both direct lending and loan guarantees.[256]

B. Summary of COP Reports and Findings

In May 2009, the Panel addressed small business lending and evaluated the impact of FRBNY's and Treasury's TALF. The report examined the design of the TALF, which was intended to restart securitization markets, and questioned whether any securitization program could help meet the credit needs of small businesses. The report also examined other sources of small business credit, including credit cards and informal credit sources, such as angel investors, family, and friends. The report noted Treasury's assertion that restoring access to credit has multiplier effects throughout the economy and examined the difficulties that small businesses were having in obtaining credit of any kind.

The Panel's examination of small business credit at the beginning of 2009 showed credit terms tightening and loan volume dropping, based on the limited data available. Small businesses found themselves in a contradictory position: they needed credit to operate, but the drop in demand for their products or services as a result of the country's economic difficulties likely made lenders unwilling to give them that credit except on terms that small businesses could not accept. While noting that the TALF, if successful, could improve access to lending for families and small businesses, the Panel found that there was reason for caution in predicting the ultimate impact of the TALF, though the program could succeed in improving investor demand for ABS.

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[255] TARP: Two Year Retrospective, *supra* note 246, at 43.

Securities purchased by Treasury comprised approximately 700 loans ranging across approximately 17 industries including retail, food services, manufacturing, scientific and technical services, health care, and educational services. The program supported loans from 39 of the 50 states.

[256] 2010 May Oversight Report, *supra* note 110, at 46-47, Annex II.

In May 2010, the Panel re-examined the contraction in small business lending and noted that although Treasury had launched several programs aimed, in whole or in part, at improving small business credit availability, it was not clear that they had had any significant impact on small business lending, which remained severely constricted. Numerous factors – bank strength or weakness, number of creditworthy borrowers, soft demand for goods and services, and deleveraging, among other things – can all cause low lending levels, and the relative importance of these factors in the overall mix can shift over time. As demand and supply shift and interact, low lending levels can be difficult to analyze.[257] For example, at the Panel's April 2010 field hearing in Phoenix, Arizona, Candace Wiest, President and CEO of the West Valley National Bank, noted that "we want to loan"[258] but "it is difficult to find anyone who has not been impacted [by the recession] and remains creditworthy."[259] FDIC San Francisco Regional Director Stan Ivie noted, however, that "many banks have financial difficulties right now with their credit quality and they need to reserve their capital for losses and future losses which results in less capital and liquidity to lend ... to borrowers."[260] In focusing on measures to increase the supply of small business loans, the Panel's report noted that Treasury's actions may ultimately be ineffective if the demand for small business loans fails to keep pace. While government intervention in the form of capital infusions, for example, might foster additional lending if the recipient institutions are facing depleted capital, a bank might not necessarily use an unrestricted capital infusion to increase leverage if low lending volume is in fact the result of constrictions in demand.

The Panel also evaluated the proposed SBLF,[261] which the Administration sent to Congress shortly before publication of the Panel's May report. The Panel found that even if enacted by Congress the prospects of the SBLF in its draft form were far from certain. Not only would the program require legislative approval (and even if Congress had acted immediately, the program would not be fully operational for some time), but the Panel also noted the possibility that banks could shun the program for fear of being stigmatized by its association with the TARP, or avoid taking on SBLF liabilities in such troubled economic times.

[257] 2010 May Oversight Report, *supra* note 110, at 47-57.

[258] Wiest Testimony to the Panel, *supra* note 153.

[259] Congressional Oversight Panel, Written Testimony of Candace Wiest, president and chief executive officer, West Valley National Bank, *Phoenix Field Hearing on Small Business Lending*, at 61-62 (Apr. 27, 2010) (online at cop.senate.gov/documents/transcript-042710-phoenix.pdf).

[260] Congressional Oversight Panel, Testimony of Stan Ivie, San Francisco regional director, Federal Deposit Insurance Corporation, *Transcript: Phoenix Field Hearing on Small Business Lending* (Apr. 27, 2010) (online at cop.senate.gov/documents/transcript-042710-phoenix.pdf).

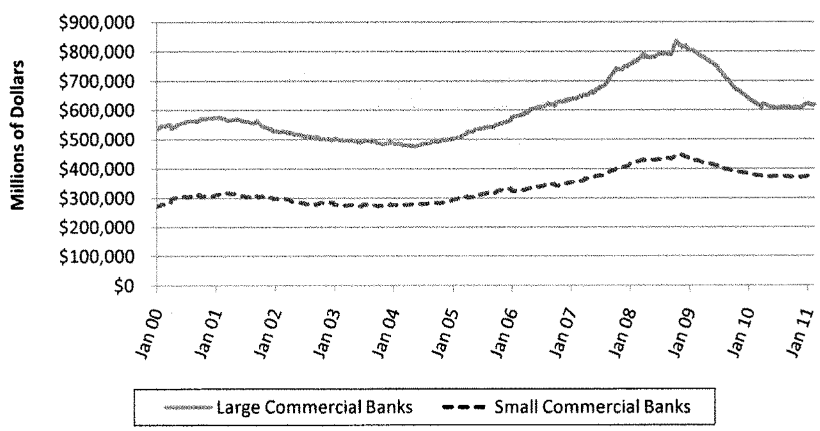
[261] On May 7, 2010, the Administration provided Congress with revised proposed legislation for the SBLF program, and the discussion of the SBLF in the Panel's May 2010 oversight report was based upon that proposal. This revised proposed legislation modified the Administration's original proposal in some respects, and is different from the version that ultimately was passed by both houses of Congress and signed into law by President Obama in September 2010. For further discussion of the final SBLF legislation, see Section III.A.3.b.ii, *supra*.

C. Panel Recommendations and Updates

1. Current State of Commercial and Industrial Lending

After declining or stagnating consistently through 2008 and 2009, commercial and industrial (C&I) lending at domestic commercial banks began to increase slightly towards the end of 2010.[262] As of February 23, 2011, there were approximately $620 billion in outstanding C&I loans at large banks, while small banks had $374 billion in outstanding C&I loans.[263] Figure 14 below illustrates the level of outstanding C&I loans from 2000 to 2011.

Figure 14: Commercial and Industrial Loans Outstanding at Domestic Commercial Banks (2000-2011)[264]



[262] Board of Governors of the Federal Reserve System, *Monetary Policy Report to Congress*, at 12 (Mar. 1, 2011) (online at www.federalreserve.gov/monetarypolicy/files/20110301_mprfullreport.pdf).

[263] Board of Governors of the Federal Reserve System, *H.8 Assets and Liabilities of Commercial Banks in the United States: Data Download Program* (Instruments: Large Domestically Chartered Banks, Small Domestically Chartered Banks; Frequency: Weekly; Seasonally-Adjusted) (online at www.federalreserve.gov/datadownload/Choose.aspx?rel=H.8) (accessed Mar. 10, 2011) (hereinafter "Federal Reserve H.8"). Large banks are defined as the top 25 domestically chartered commercial banks. As of December 2009, these banks had more than $65 billion in total assets. Board of Governors of the Federal Reserve System, *Assets and Liabilities of Commercial Banks in the United States – H.8: About the Release* (Apr. 9, 2010) (online at www.federalreserve.gov/releases/h8/about.htm) (hereinafter "Federal Reserve H.8: About the Release").

[264] Federal Reserve H.8, *supra* note 263. Large banks are defined as the top 25 domestically chartered commercial banks. As of December 2009, these banks had more than $65 billion in total assets. Federal Reserve H.8: About the Release, *supra* note 263.

Despite the slight increase in loans, data from the January 2011 Senior Loan Officer Opinion Survey offered mixed responses from banks regarding the state of C&I lending over the fourth quarter in 2010. More large banks were reporting easing standards for both large/middle-market and small firms, while responses from small banks show that loan standards remained largely unchanged for all firms. Respondents cited increased competition from other banks and nonbank lenders, as well as "a more favorable or less uncertain" economic horizon, as reasons for easing lending standards. With regard to loan demand, the net percentage of large banks reporting stronger demand for C&I loans from large/middle-market firms was 53 percent. However, a lesser percentage indicated stronger demand from small firms. Small banks, on the other hand, reported weaker overall demand for C&I loans.[265]

2. Consideration of Alternatives

In its May 2009 Oversight Report, the Panel recommended that if Treasury's efforts to revive securitization failed to expand small business access to credit, then the administration should consider: (1) reviving SBA direct loans without going through bank intermediaries; and/or (2) devoting more funds directly to business lending rather than securitization, given that secondary markets may have limited impact on the financing of small and medium-sized firms.[266] Treasury's new programs, the CDCI and the SBLF, however, while not dependent on the SBA or securitization, still focused on bank intermediaries and capital infusions. The Panel also recommended that Treasury and relevant federal regulators establish a rigorous data collection system or survey that examines small business finance that would include demand- and supply-side data along with data from banks of different sizes (both TARP recipients and non-TARP recipients). The Panel also recommended that Treasury require reporting obligations as part of any future capital infusion program, some of which were addressed through the SBLF.

3. Small Business Lending Fund

In its May 2010 report, the Panel evaluated a proposed draft of the SBLF and made multiple recommendations about aspects of the program, many of which appear to have informed the final legislation. The Panel recommended that Treasury consider mandating minimum standards for underwriting SBLF loans in order to ensure that the incentives embedded in any program do not spur imprudent lending; and evaluate whether the SBLF could be implemented

[265] The Senior Loan Officer Opinion Survey on Bank Lending Practices reviews changes in lending terms and standards, as well as demand for loans to businesses and households at approximately 60 domestic banks and 22 U.S. branches and agencies of foreign banks. The survey defines large and middle-market firms as firms with more than $50 million in annual sales. Also, large banks are defined as banks with at least $20 billion in total assets as of October 31, 2010. January 2011 Senior Loan Officer Survey, *supra* note 232, at 3-5. For measures of C&I loan standards and demand, *see id.* at 12-13, 24.

[266] 2009 May Oversight Report, *supra* note 227, at 58.

quickly enough to make any difference at all in small business lending. The SBLF as enacted,[267] several months after the Panel's May 2010 report, contains some key provisions relating to several of the Panel's recommendations. It mandates minimum standards for underwriting SBLF loans to ensure that the incentives embedded in any program do not spur imprudent lending.[268] The SBLF as enacted also improved tracking and reporting over the draft reviewed by the Panel. It requires the Secretary of the Treasury to report to the appropriate congressional committees on key SBLF metrics, including the duty to provide a written report detailing how SBLF participants have used the funds they received within seven days after the end of each calendar quarter in which transactions are made under the SBLF.[269] Similarly, as part of their application form, prospective SBLF participants must submit a "small business lending plan" of approximately two pages to their primary federal regulator and to their state regulator, if applicable.[270]

The terms for the SBLF have been made available, and the application deadline is March 31, 2011. As of March 8, 2011, Treasury had received 336 applications.[271]

D. Lessons Learned

Several important lessons can be identified through the Panel's examinations of Treasury's efforts to support small business and consumer lending.

First, FRB and Treasury's emphasis on the securitization markets as an avenue to restore small business and consumer credit and creation of the TALF to regenerate investor interest in those markets illustrate the complexities and difficulties of making predominant use of any single approach to reviving credit for small businesses and families.[272] While the revival of the securitization markets, which are an important part of the nation's financial sector, can be a part of any effective strategy for restarting the credit markets, this cannot be the primary means to stimulate credit for small business lending because of the relatively small number of small business loans that are securitized. Therefore, it is also critical to consider bank lending without regard to securitization. Ultimately, keeping the credit markets open in a fair – and economically

[267] *See* the *Small Business Jobs and Credit Act of 2010*, Pub. L. No. 111-240 (2010). President Obama signed the law on September 27, 2010. Although the SBLF evolved from a 2009 administration proposal to use $30 billion in TARP funds to spur small business lending, the latest incarnation of the SBLF is separate from the TARP.

[268] H.R. 5297 § 4103(d)(10), 111th Cong. (2010).

[269] H.R. 5297 § 4103(3), 111th Cong. (2010).

[270] The "small business lending plan" must detail how the institution would use the SBLF funds to increase small business lending in their community, their expected increase in small business lending after receipt of SBLF funds, and proposed outreach efforts to inform community members about how to apply for small business loans. Treasury Resource Center – SBLF, *supra* note 248.

[271] Data provided by Treasury (Mar. 9, 2011).

[272] 2009 May Oversight Report, *supra* note 227, at 62-63.

healthy – manner to small businesses requires a mix of policies that reflect the realities that borrowers face.[273]

Second, while it is easier and arguably more efficient for Treasury and other government actors to use regulated entities like banks as conduits to small businesses since small businesses are so heterogeneous, this does not come without cost. Not only are the intermediary's incentives and challenges not identical to the government's in this approach, but also the form of the government's involvement depends entirely upon the assets the intermediary holds. For example, the government can use an intermediary to help provide guarantees and secondary market support only if that intermediary holds assets that can be securitized or guaranteed.[274]

Third, when adopting any particular small business and consumer lending program, the government should consider whether approaches that are less dependent on healthy bank balance sheets (i.e., state-level consortia and programs in which banks take first losses and first profits with a public backstop), might more likely effectuate Treasury's stated objectives.[275]

Finally, the lack of aggregated, timely, and consistent data collection regarding small business lending undermines the development of sound policy and fails to reflect the importance of small business to the economy. One problem in trying to analyze small business lending, or in identifying and designing programs for spurring small business lending, arises from the heterogeneity of small businesses (which makes it difficult to determine what, precisely, constitutes a small business). "Small business" has been variously defined by Congress and several agencies, including the SBA, the Federal Reserve, and others.[276] The myriad definitions not only complicate any discussion of small business but also make it difficult to compare data and results across studies and surveys in a field in which, as an added complication, data are notoriously hard to obtain. The wide variety among small businesses also makes it difficult to collect data, target individual trends, and effectively stimulate small business lending. Furthermore, in the absence of a rigorous data collection system or survey that examines small business finance and includes timely and consistent data, the federal government's efforts to develop sound policies to address small business lending will remain significantly hampered.

IV. Foreclosure Mitigation

Given the importance of foreclosure mitigation to families and communities and the impact of foreclosures on bank balance sheets and financial stability, the Panel has devoted more attention to this topic than any other single area under the TARP. The Panel issued its first

[273] 2009 May Oversight Report, *supra* note 227, at 62-63.

[274] 2010 May Oversight Report, *supra* note 110, at 81-82.

[275] 2010 May Oversight Report, *supra* note 110, at 82-83.

[276] These definitions depend on sector, assets, number of employees, and revenue. 2010 May Oversight Report, *supra* note 110, at 8-9.

foreclosure mitigation report in March 2009, coinciding with the announcement of Treasury's Making Home Affordable initiative, and released three update reports, approximately every six months after the initial program announcement and report. The Panel produced a fifth foreclosure mitigation report in November 2010, focusing specifically on the foreclosure irregularities that had come to light. The body of foreclosure mitigation work was shaped by information obtained at field hearings held in Clark County, Nevada, Prince George's County, Maryland, and Philadelphia, as well as a hearing in Washington, DC.

A. Background

As the housing boom peaked and began its long downward slide in 2006, millions of families began entering foreclosure, with serious implications for the housing markets and broader financial stability. Policymakers appeared to take for granted that the housing market would not require government intervention. Theoretically, loan modifications should be in the self-interest of lenders, since they are typically less costly than foreclosure, and should therefore need no inducement. But lenders did not engage in the anticipated number of modifications due to a number of factors that the Panel has examined in its reports. In particular, incentives built into the mortgage servicing system often make foreclosure more attractive than modification.[277]

As millions of borrowers continued moving into foreclosure, the federal government made several attempts to address the foreclosure problem, generally with minimal impact. In the wake of the financial crisis of late 2008, and incorporating lessons from these unsuccessful foreclosure mitigation efforts, Treasury developed the Home Affordable Modification Program (HAMP) to fulfill the foreclosure prevention mandate in TARP's authorizing legislation, EESA.[278] At the time, policymakers were concerned about both the social and economic effects of mass foreclosures and the systemic risk to the banking system caused by non-performing mortgages.

Prior to the introduction of HAMP in March 2009, there were several federal foreclosure mitigation initiatives, but they met with little success. One of the earliest of these initiatives was endorsement of the HOPE NOW Alliance, a voluntary coalition of mortgage companies and industry organizations designed to centralize and coordinate private foreclosure mitigation

[277] The Panel has looked at the disincentives for servicers to employ HAMP modifications in several reports. *See, e.g.*, Congressional Oversight Panel, *April Oversight Report: Evaluating Progress on TARP Foreclosure Mitigation Programs*, at 70-76 (Apr. 14, 2010) (online at cop.senate.gov/documents/cop-041410-report.pdf) (hereinafter "2010 April Oversight Report"). Some of the more notable of these include: misalignment of servicer and investor interests, including lack of servicer funds at risk and servicing fees that are not tied to investment performance; impediments to loan modification in pooling and servicing agreements that, even if they can be overcome, create additional cost and complication for servicers; lack of investor supervision of servicers to encourage financially beneficial modifications; and the possible negative assessment of modifications by credit rating agencies.

[278] See *Emergency Economic Stabilization Act of 2008 (EESA)*, Pub. L. No. 110-343, at §109 (2008) (online at thomas.loc.gov/cgi-bin/query/z?c110:H.R.1424.enr:).

efforts. Although both Treasury and the Department of Housing and Urban Development were consulted and strongly promoted the effort, the federal government is not an official sponsor.[279] HOPE NOW reports that it has modified over 3 million loans to date,[280] but little information is available about the monthly savings those modifications provide to homeowners.

The outcome of several federal programs influenced the design of HAMP. The first official federal government foreclosure mitigation program was FHA Secure, announced in August 2007, which refinanced adjustable-rate mortgages into fixed-rate mortgages insured by the Federal Housing Administration (FHA). FHA Secure ended in late 2008. Although the program refinanced nearly half a million loans, only about 4,000 of these were delinquent at the time of refinancing. The Panel has previously attributed FHA Secure's failure to its restrictive borrower criteria.[281]

HOPE for Homeowners was established by Congress in July 2008 to permit the FHA to insure refinanced distressed mortgages. HOPE for Homeowners was initially expected to help 400,000 homeowners, but it managed to refinance only a handful of loans. This was likely due to the program's poor initial design, lack of flexibility, and its reliance on voluntary principal write-downs, which lenders were very reluctant to make, a pattern also seen in HAMP.[282]

Also in July 2008, the FDIC took over IndyMac, one of the nation's largest subprime lenders. Soon afterward, the FDIC announced a loan modification program to assist the 65,000 delinquent borrowers with loans in IndyMac's non-securitized portfolio. The FDIC instituted a number of similar efforts for loans owned by other, smaller failed banks, which have been moderately successful in mitigating foreclosures at those particular lenders.[283]

Figure 15 below shows a timeline of foreclosure mitigation efforts and the number of new foreclosure actions each month from January 2007 to the present. It is important to note that although foreclosure actions have declined in recent months, this likely is due to voluntary foreclosure suspensions put in place in the fall of 2010 in response to the documentation

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[279] *See* U.S. Department of the Treasury, *Statement by Secretary Henry M. Paulson, Jr. on Announcement of New Private Sector Alliance – HOPE NOW* (Oct. 10, 2007) (online at www.treasury.gov/press-center/press-releases/Pages/hp599.aspx).

[280] HOPE NOW Alliance, *HOPE NOW: Mortgage Servicers Completed 1.76 million Loan Modifications for Homeowners in 2010* (Feb. 2, 2011) (online at www.hopenow.com/press_release/files/HN%202010%20Full%20Data_FINAL.pdf).

[281] Congressional Oversight Panel, *March Oversight Report: Foreclosure Crisis: Working Toward a Solution*, at 35 (Mar. 6, 2009) (online at cop.senate.gov/documents/cop-030609-report.pdf) (hereinafter "2009 March Oversight Report").

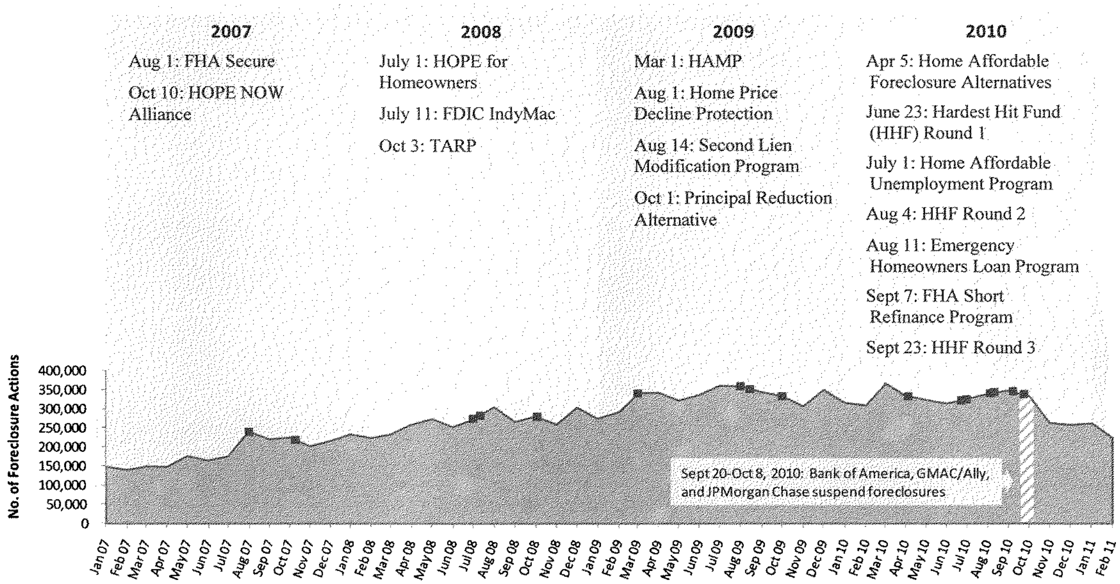
[282] *See id.* at 36.

[283] For more discussion of the FDIC's IndyMac program, *see* Congressional Oversight Panel, *December Oversight Report: A Review of Treasury's Foreclosure Prevention Programs*, at 92 (Dec. 14, 2010) (online at cop.senate.gov/documents/cop-121410-report.pdf) (hereinafter "2010 December Oversight Report").

irregularities situation. At that time many of the government initiatives were still relatively new and would not reasonably be expected to cause a significant decline in the foreclosure rate.[284]

[284] For statistics on how many borrowers Treasury's programs have helped to date, see Figure 19 and footnote 336.

Figure 15: Timeline of Foreclosure Mitigation Programs and Foreclosure Actions[285]



[285] Foreclosure action data compiled by RealtyTrac, and accessed through Bloomberg Financial Data Service (accessed Mar. 10, 2011). Foreclosure actions are defined as default notices, scheduled auctions, and bank repossessions. RealtyTrac, *Foreclosures Frozen in February* (Mar. 9, 2011) (online at www.realtytrac.com/content/press-releases/foreclosure-activity-decreases-14-percent-in-february-6420) (hereinafter "RealtyTrac: Foreclosures in February"). The dates for programs shown in this figure are the dates the programs became effective or funding became available rather than the date the programs were announced.

B. Summary of COP Reports and Findings

The Panel's first report on foreclosures was published in March 2009, roughly concurrent with the announcement of HAMP.[286] The report, *Foreclosure Crisis: Working Toward a Solution*, described major impediments to mortgage modifications, including the presence of second liens and incentive problems for mortgage servicers caused by the securitization process. The report called for the collection and public dissemination of more nationwide mortgage performance data. And it established eight questions on which to evaluate a foreclosure mitigation program:[287]

- Will the plan result in modifications that create affordable monthly payments?
- Does the plan deal with negative equity?
- Does the plan address junior mortgages?
- Does the plan overcome obstacles in existing pooling and servicing agreements that may prevent modifications?
- Does the plan counteract mortgage servicer incentives not to engage in modifications?
- Does the plan provide adequate outreach to homeowners?
- Can the plan be scaled up quickly to deal with millions of mortgages?
- And finally, will the plan have widespread participation by lenders and servicers?

The report did not specifically evaluate the administration's initial foreclosure-prevention plan, since Treasury announced it shortly before the Panel's report went to press, and it had not yet become operational.

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[286] HAMP is designed to provide a path to modifying mortgages and provides subsidies to lenders, servicers, and homeowners to encourage such modifications. Once approved for assistance through HAMP, a borrower must successfully complete a trial period, typically three months, during which the borrower makes payments on the modified mortgage. A borrower who remains current through the trial period becomes eligible for a permanent modification, under which the terms of the trial modification remain in effect for a period of five years. After the five-year term is up, the interest rate on the loan can increase by a maximum of 1 percent per year until it reaches the prevailing Freddie Mac average interest rate at the time the HAMP modification was made.

[287] These criteria were considerably influenced by the testimony of foreclosure prevention experts and borrowers facing foreclosure in the Panel's field hearings on foreclosures in Clark County, Nevada, and Prince George's County, Maryland. *See* Congressional Oversight Panel, *COP Field Hearing: Clark County, NV: Ground Zero of the Housing and Financial Crisis* (Dec. 16, 2008) (online at cop.senate.gov/hearings/library/hearing-121608-firsthearing.cfm); Congressional Oversight Panel, *Coping with the Foreclosure Crisis: State and Local Efforts to Combat Foreclosures in Prince George's County, MD* (Feb. 27, 2009) (online at cop.senate.gov/hearings/library/hearing-022709-housing.cfm).

The Panel's October 2009 report, *An Assessment of Foreclosure Mitigation Efforts After Six Months*, provided a preliminary evaluation of HAMP, which at the time was still in its early stages. The report expressed concern that HAMP was not designed to deal with the evolving nature of the foreclosure crisis; in particular, the report raised questions about the ability of HAMP to prevent foreclosures caused by unemployment or negative equity. The report questioned whether HAMP would be able to attain the scale necessary to deal with the millions of foreclosures that were expected. Finally, the report questioned whether or not HAMP would merely forestall foreclosure for many homeowners, since only a small percentage of HAMP trial modifications had converted into five-year, so-called permanent modifications, and also because even those that became permanent modifications carried the risk that the homeowner would redefault.

The Panel again assessed HAMP in April 2010. The report applauded Treasury for beginning to address the problems that the Panel highlighted during the previous year and in particular for taking steps to address the ways in which unemployment, second liens, and negative equity may lead to foreclosure. Foreclosures continued at a rapid pace, however, and the report found that Treasury's response continued to lag well behind the pace of the crisis. The April 2010 report highlighted in particular the role of unemployment as a driver of delinquencies and foreclosures. However, the program as structured at that time did not meet the needs of the unemployed. First, many unemployed individuals were unable to qualify for HAMP because they could not pass the net present value test for program admittance. Second, borrowers who have lost their jobs and have no income are rarely able to pay their mortgages for long, even if they receive favorable concessions from their lender; therefore, a program premised on moderate, long term payment relief did not provide the deep, short term relief necessary to keep unemployed borrowers temporarily without income in their homes. Finally, the unemployed are also often forced to move to take advantage of better job opportunities. This can undermine many loan modifications designed to prevent foreclosure, since these modifications are generally based on an assumption that the borrower will stay in place for several years. The Panel stated the best foreclosure mitigation initiative would be a sound economy with low unemployment.[288]

The Panel articulated three major concerns with HAMP in the April 2010 report: (1) its failure to deal with the foreclosure crisis in a timely way; (2) the unsustainable nature of many HAMP modifications, given the large debt burdens and negative equity that many participating homeowners continued to carry; and (3) the need for greater accountability in HAMP, particularly with regard to the activities of participating servicers.

Following the release of the Panel's April 2010 report, Treasury implemented certain previously announced changes to HAMP, but the Panel remained concerned that the choices made by Treasury in terms of program structure, transparency, and data collection did not leave

[288] See 2010 April Oversight Report, *supra* note 277, at 18-20, 134-139.

borrowers well served. In a December 2010 report, the Panel estimated that HAMP would prevent only 700,000 to 800,000 foreclosures if it continues on its current trajectory – far fewer than the three to four million foreclosures that Treasury initially aimed to prevent, and vastly fewer than the eight to 13 million foreclosures expected by 2012. The Panel attributed many of the problems plaguing HAMP to the program's design, including its failure to address adequately the incentive structures for loan servicers and the obstacles to modifications created by second liens. Because Treasury's authority to restructure HAMP ended on October 3, 2010, the Panel noted that HAMP's prospects were unlikely to improve substantially in the future.

In the December 2010 report, the Panel again raised concerns that Treasury refused to specify meaningful goals by which to measure HAMP's progress. The program's sole initial goal – to prevent 3 to 4 million foreclosures – had been repeatedly redefined and watered down.[289] When the stated objectives of a program are limited or not meaningful, the scope of oversight and analysis is narrowed. However, as of the publication of this report, with fewer than 1.5 million total trial modifications started and only about 540,000 permanent modifications in place, it is clear that Treasury is going to fall well short of its initial goal, no matter how that goal is defined.[290]

The Panel further noted in December 2010 that the problem of evaluating HAMP was exacerbated by Treasury's failure to collect and analyze data that would explain its shortcomings. Absent a dramatic and unexpected increase in HAMP enrollment, it appears that many billions of dollars set aside for foreclosure mitigation will be left unused. Yet Treasury continues to state that $30 billion in TARP funding will be expended under HAMP. Because Treasury's authority to restructure HAMP ended, the Panel noted in December 2010 that it was too late for Treasury to revamp its foreclosure prevention strategy, but that meaningful steps could be taken to wring every possible benefit from the program.

The Panel also focused on possible conflicts of interest and their impact on servicer compliance in the December 2010 report. Treasury has essentially outsourced the responsibility for overseeing servicers to Fannie Mae and Freddie Mac, but both companies have critical business relationships with the very same servicers, calling into question their willingness to conduct stringent oversight. Freddie Mac in particular has hesitated to enforce some of its contractual rights related to the foreclosure process, arguing that doing so "may negatively

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[289] *See* 2010 December Oversight Report, *supra* note 283, at 42-48. For an example of Treasury's articulation of HAMP goals and expectations in the early months of the program, *see* Congressional Oversight Panel, *Transcript: Hearing with Herbert M. Allison, Jr., Assistant Secretary of the Treasury for Financial Stability*, at 30-33 (Oct. 22, 2009) (online at cop.senate.gov/documents/transcript-102209-allison.pdf).

[290] U.S. Department of the Treasury, *Making Home Affordable Program: Servicer Performance Through January 2011*, at 2 (Jan. 31, 2011) (online at www.treasury.gov/initiatives/financial-stability/results/MHA-Reports/Documents/Jan_2011_MHA_Report_FINAL.PDF) (hereinafter "MHA Program: Servicer Performance January 2011").

impact our relationships with these seller/servicers, some of which are among our largest sources of mortgage loans."[291]

A complex group of issues that came to light in the summer and fall of 2010 related to documentation "irregularities" in recent foreclosure actions added further to the factors impeding HAMP success and recovery of the housing market. These widely reported problems include improper mass "robo-signing" of mortgage documents by servicers, lost promissory notes and other documents that call into question the proper legal ownership of mortgage loans, and related securitization issues. The Panel's November 2010 report examined these issues and considered their implications for HAMP, the housing market, and the stability of the economy and the banking system. As of the date of publication, a group comprised of Treasury, bank regulators, and attorneys general of all 50 states and the District of Columbia are engaged in negotiations over resolution of the documentation irregularity situation with a group representing servicers and lenders.

Although the ultimate implications of these irregularities remain unclear, it is possible that the irregularities may conceal deeper problems in the mortgage market that could potentially threaten financial stability and undermine foreclosure prevention efforts.[292]

The Panel observed that in the coming years, in the best-case scenario, mortgage documentation irregularities may prove to be relatively rare paperwork errors that can be easily corrected, and have little impact on the housing and financial markets. However, the Panel also found that if future revelations show that documentation problems are pervasive, investors and others will have reason to doubt the legal ownership of pooled mortgages, which could have severe consequences. In this scenario, borrowers may be unable to determine whether they are sending their monthly payments to the right people. Judges may block any effort to foreclose, even in cases where borrowers have failed to make regular payments. Multiple banks may attempt to foreclose on the same property. Borrowers who suffered foreclosure may seek to regain title to their homes and force any new owners to move out. Would-be buyers and sellers could find themselves in limbo, uncertain about whether they can safely buy or sell a home.[293]

Should foreclosure irregularities cause such wide-scale disruptions in the housing market, financial institutions may suffer significant harm, and the stability of the financial system may be at risk. For example, if a bank were to discover that, due to shoddily executed paperwork, it still owns many defaulted mortgages that it thought it sold off years ago, it could face substantial unexpected losses. This could disrupt foreclosure prevention efforts such as HAMP. This

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[291] 2010 December Oversight Report, *supra* note 283, at 5.

[292] Congressional Oversight Panel, *November Oversight Report: Examining the Consequences of Mortgage Irregularities for Financial Stability and Foreclosure Mitigation*, at 83 (Nov. 16, 2010) (online at cop.senate.gov/documents/cop-111610-report.pdf) (hereinafter "2010 November Oversight Report").

[293] *Id.* at 84.

situation has the potential to reduce public trust substantially in the entire real estate industry, especially in the legitimacy of important legal documents and the good faith of other market participants, particularly if foreclosure irregularities prove to be very common or to involve deliberate fraud.[294]

C. Panel Recommendations and Program Updates

After examining various issues related to the foreclosure crisis and Treasury's response throughout the last two years, the Panel provided a series of specific recommendations designed to improve the modification process, the structure of Treasury's foreclosure programs, their transparency, and their accountability.[295] Treasury's response to these recommendations has been mixed. Treasury followed some suggestions, ignored some, and partially or unsuccessfully followed others. Overall, Treasury's response thus far has been disappointing.

1. Transparency

In order to provide a source of comprehensive information about loan performance and foreclosure mitigation initiatives, the Panel concluded in its March 2009 report that Congress should create a national mortgage loan performance reporting requirement applicable to banking institutions and other mortgage servicers. In subsequent reports, the Panel repeatedly recommended that Treasury collect more loan-level data on borrowers facing foreclosure.[296] In particular, the Panel stated that Treasury does not collect sufficient information to determine why loans are moving to foreclosure rather than workouts, nor does it monitor closely enough any loan modifications performed outside of HAMP.[297] Since the Panel published those recommendations, federal banking regulators have not implemented a national mortgage loan performance reporting requirement. After being surveyed by the Panel, the OCC and OTS did create a quarterly report that contains a limited amount of aggregate information about mortgage performance across the country, but this information falls far short of the loan-level data that is needed.

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[294] *Id.* at 84.

[295] SIGTARP released a report in January 2011 that echoed many of the Panel's recommendations for HAMP, particularly in the fields of transparency, servicer accountability, and goals. *See* Office of the Special Inspector General for the Troubled Asset Relief Program, *Quarterly Report to Congress*, at 10-13 (Jan. 26, 2011) (online at www.sigtarp.gov/reports/congress/2011/January2011_Quarterly_Report_to_Congress.pdf).

[296] Treasury officials have predicted that upcoming "dramatic" changes in the servicing industry will lead to a comprehensive database of mortgages in foreclosure, but have provided no indication of when these changes will occur, or whether Treasury will take any specific actions on this front. Congressional Oversight Panel, *Transcript: COP Hearing on TARP's Impact on Financial Stability* (Mar. 4, 2011) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-030411-final.cfm) (hereinafter "COP Transcript: Hearing on TARP's Impact on Financial Stability").

[297] 2010 December Oversight Report, *supra* note 283, at 107.

In April 2010, the Panel recommended that Treasury commit to providing regular and publicly available data reports on all HAMP modifications through the end of their five-year modification period. In addition, the Panel called on Treasury to release more data collected by its program administrator, Fannie Mae, and its compliance agent, Freddie Mac, so that Congress, the TARP oversight bodies, and the public can better evaluate the effectiveness of HAMP.[298] In late January 2011, Treasury for the first time released loan-level data on HAMP participants, fulfilling the Panel's recommendation. This information provides a great deal of raw data that could reveal insights that could then be used to improve HAMP. The data include information on the gross income of applicants, the loan balances of HAMP participants after they receive permanent modifications, the credit scores of HAMP participants, and the race and ethnicity of HAMP participants, as well as other information. However, the timing of the data release provides limited time for oversight bodies or academics to draw any conclusions from the data before HAMP expires at the end of 2012.

The Panel expressed concern about the impact of redefaults of HAMP permanent modifications on the program's ultimate success, and the related need for the collection of better data specifically on redefaults. At the Panel's October 2010 hearing, Guy Cecala, publisher of *Inside Mortgage Finance*, emphasized the danger that redefaults pose to the housing market as a whole. "Even a re-default rate at the lower end of estimates would put more than 600,000 additional distressed properties into the housing market at time when it is struggling to unload an already high inventory," Cecala stated.[299] In order to understand which HAMP participants are most at risk of redefault and thereby improve the program's success rate, the Panel believes that Treasury should focus its data analysis on identifying borrower characteristics that positively correlate to a higher risk of redefault. To maximize the effectiveness of their data collection efforts, Treasury's metrics should be comprehensive, and the results should be disaggregated by lenders and servicers and made publicly available.[300] Treasury has begun to release a limited amount of aggregate data on HAMP redefaults, but despite the Panel's urging, it has not made public any analysis that identifies borrower characteristics that positively correlate to a higher risk of redefault. Nor has Treasury made public data on redefaults that is disaggregated by servicer, or that shows redefault rates for more than 12 months after the permanent modification begins. Such information is crucial for evaluating the extent to which redefaults are undermining HAMP's performance.

[298] 2010 April Oversight Report, *supra* note 277, at 88.

[299] Congressional Oversight Panel, Written Testimony of Guy Cecala, chief executive officer and publisher, Inside Mortgage Finance Publications, Inc., *COP Hearing on TARP Foreclosure Mitigation Programs* (Oct. 27, 2010) (online at cop.senate.gov/documents/testimony-102710-cecala.pdf).

[300] Congressional Oversight Panel, *October Oversight Report: An Assessment of Foreclosure Mitigation Efforts After Six Months*, at 112 (Oct. 9, 2009) (online at cop.senate.gov/documents/cop-100909-report.pdf) (hereinafter "2009 October Oversight Report"); 2010 April Oversight Report, *supra* note 277, at 90.

The Panel made a number of specific recommendations related to publicly available information. In October 2009, the Panel called on Treasury to provide borrowers and housing counselors with access to its net present value model.[301] Contrary to the Panel's recommendations, Treasury has never made the net present value model fully or even substantially public. Treasury has provided borrowers and housing counselors with greater access to its net present value model, but the model remains less than fully transparent.

In December 2010, the Panel urged Treasury to determine which sorts of modifications have proven to be most successful in practice. Treasury could then encourage servicers to make more of these types of modifications and fewer of the types of modifications that tend to end in redefault.[302] Treasury has thus far shown no indication that it has studied or understands which types of loan modifications tend to be most effective and sustainable. Without this knowledge, it is impossible for Treasury to press servicers to favor more effective types of modifications over others.

The Panel also called on Treasury to provide detailed public information related to its selection and use of Fannie Mae as a financial agent and HAMP administrator and Freddie Mac as compliance agent.[303] Treasury has not provided this information. In January 2010, the Panel recommended that Treasury release a legal opinion on its HAMP authority.[304] Although Treasury did provide a legal opinion on its HAMP authority to the Panel and allowed the Panel to quote from the document, it objected to the Panel making the entire document public.

2. Compliance

Treasury has struggled to ensure that HAMP servicers comply with the program's rules. In describing the ineffectiveness of the current system, which provides few real "sticks" to punish noncompliance, Professor Katherine Porter, University of Iowa College of Law, testified before the Panel that, "servicers ... have gorged themselves at a buffet of carrots, and they're still not doing what we want them to do."[305] In October 2009, the Panel stressed that Treasury needed an appropriate monitoring mechanism to ensure that servicers were accurately reporting

[301] 2009 October Oversight Report, *supra* note 300, at 47. HAMP relies on a net present value calculation performed by the loan servicer to determine whether or not a modification is warranted. This consists of a comparison of the net present value of an unmodified delinquent loan to the net present value of a modification of that same delinquent loan. If the net present value of the modified loan is greater than the net present value of the unmodified loan, then a modification is value maximizing for the investors in the loan. The Panel's October 2009 report examined Treasury's model and models used by similar programs. *Id.* at 45-47, 83, 106, 113-116, 129-131.

[302] 2010 December Oversight Report, *supra* note 283, at 109-110.

[303] 2010 April Oversight Report, *supra* note 277, at 78.

[304] 2010 January Oversight Report, *supra* note 153, at 12.

[305] Congressional Oversight Panel, Testimony of Katherine Porter, professor of law, University of Iowa College of Law, *Transcript: COP Hearing on TARP Foreclosure Mitigation Programs* (Oct. 27, 2010) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-102710-foreclosure.cfm).

the reasons for denial or cancellation and that those who did not received meaningful sanctions for noncompliance.[306] The Panel stated that these sanctions should include the use of Treasury's authority to withhold or claw back incentive payments.[307] Following the Panel's recommendations, Treasury has not permanently withheld or clawed back any incentive payments as a result of noncompliance.

In addition to meaningful monetary penalties for noncompliance, the Panel stated that foreclosures should be stayed until an independent analysis of the application or trial could be performed, with the servicer paying the cost of the evaluation.[308] The Panel also stressed that information on eligibility and denials should be clearly and promptly communicated to borrowers, and that denial information should be reported to the public. The Panel reiterated these recommendations in April 2010 and again in December 2010, stressing that denials should be subject to a meaningful, independent appeals process managed by either the Office of Homeowner Advocate or an ombudsman. While Treasury made progress in ensuring that HAMP applicants receive clear and prompt notice on why they are being denied a modification, it has not stayed any foreclosures until an independent analysis of the application has been performed. Furthermore, Treasury has not implemented the Panel's recommendation that HAMP denial be made subject to a meaningful, independent appeals process. And while Treasury collects data on why modifications are being denied or cancelled, it still lacks a monitoring mechanism to ensure that those reasons are being reported accurately, and that servicers that make inaccurate reports face meaningful sanctions.

3. Goals

The Panel repeatedly requested that Treasury announce firmer goals for HAMP. Specifically, the Panel recommended that Treasury produce a clear metric of how many foreclosures it expects HAMP to prevent, since foreclosures prevented is the only real measure of the program's success.[309] To date, Treasury has not released any goals or estimates for how many foreclosures will be ultimately prevented by HAMP since its original goal of 3 to 4 million.[310] Although Treasury has made some additional data on the program available to the public, and also asserts that HAMP has yielded indirect benefits by establishing industry-wide

[306] 2009 October Oversight Report, *supra* note 300, at 9, 96.

[307] 2010 December Oversight Report, *supra* note 283, at 109.

[308] 2010 April Oversight Report, *supra* note 277, at 53.

[309] 2010 December Oversight Report, *supra* note 283, at 106.

[310] 2010 December Oversight Report, *supra* note 283, at 106. *See also* Congressional Oversight Panel, Testimony of Timothy F. Geithner, secretary, U.S. Department of the Treasury, *Transcript: COP Hearing with Treasury Secretary Timothy Geithner*, at 55 (June 22, 2010) (online at cop.senate.gov/documents/transcript-062210-geithner.pdf) ("Well, again, what HAMP does and what HAMP is designed to do – it was not designed to prevent all foreclosures. It could not be designed to do that. ... What HAMP is designed to try to do is to make sure that a set of people facing the risk of foreclosure have the chance of being able to afford the challenges of staying in their home.").

standards for mortgage modifications,[311] the lack of clearly articulated goals still hampers evaluation of the program.

In addition, the Panel recommended that Treasury be clearer about exactly how much TARP money it intends to spend on HAMP.[312] Treasury has not provided a realistic estimate of how much it expects to spend. Treasury continues to insist that it will use the entire $30 billion allocated to HAMP, a highly unlikely outcome considering the program's meager performance to date and the looming expiration of HAMP in December 2012, after which no new trial modifications can begin.[313] More realistically, CBO estimated that Treasury will spend a total of $12 billion among Treasury's three foreclosure-prevention programs – HAMP, the Hardest Hit Fund, and the FHA Short Refinance Program. The Panel further estimated that as little as $4 billion may be spent on HAMP.

4. Streamlining

The Panel repeatedly urged Treasury to improve and streamline communications with borrowers, and to make it easier for them to apply for HAMP assistance. For instance, the Panel recommended that Treasury establish an ombudsman and dedicated case staff to help borrowers cut through red tape and resolve servicer problems.[314] Treasury did not implement this recommendation. The Panel also requested that Treasury standardize the paperwork that HAMP applicants must submit in order to document their income.[315] The shift in June 2010 to requiring that servicers verify borrower income upfront for all trial modifications was an important step in this direction, but it would not be accurate to call the current system "standardized."

The Panel focused on the slow rollout of the HAMP borrower web portal, which allows borrowers to apply for modifications and to track their application status online. The Panel repeatedly encouraged Treasury to get the portal operational, ensure that it is user-friendly, and

[311] Congressional Oversight Panel, Written Testimony of Timothy G. Massad, acting assistant secretary for the Office of Financial Stability, U.S. Department of the Treasury, *COP Hearing on the TARP's Impact on Financial Stability*, at 8 (Mar. 4, 2011) (online at cop.senate.gov/documents/testimony-030411-massad.pdf) (hereinafter "COP Hearing on the TARP's Impact on Financial Stability") ("Moreover, many more homeowners have been helped indirectly as a result of the standards that HAMP has catalyzed across mortgage modifications industry-wide."). The Panel has encouraged Treasury to collect and release information on non-HAMP proprietary loan modifications. Treasury has stated that it has suggested to several servicers that they submit such information, but it has made no commitments to the Panel. COP Transcript: Hearing on TARP's Impact on Financial Stability, *supra* note 296.

[312] 2010 April Oversight Report, *supra* note 277, at 5.

[313] As of February 25, 2011 Treasury has expended $1.038 billion under HAMP.

[314] 2009 October Oversight Report, *supra* note 300, at 112.

[315] 2009 October Oversight Report, *supra* note 300, at 111.

press servicers to use it as the primary point of entry for applications.[316] The Panel also called on Treasury to enforce borrower outreach and communication standards and timelines.[317] Although the servicer portion of the HOPE LoanPort web portal finally rolled out in November 2010, a development the Panel applauded, the "borrower portal" portion, which would allow borrowers to interact directly with the LoanPort system by uploading documents and information without working through housing counselors, has not been implemented due to cost reasons. The Panel sees this as a significant problem.

Overall, Treasury made some progress in making the program more accessible and understandable to borrowers, improving communications with HAMP participants, and streamlining the HAMP process. For example, Treasury instituted a campaign of televised public service announcements. Treasury implemented firmer timelines and standards for the servicers, although as discussed above, servicer compliance remains a major challenge. But there are several indications that Treasury has more work to do in this area: the low number of new trial modifications in recent months; the long average time that it takes for a trial modification to convert into a permanent modification; the still considerable, though much reduced number of trial modifications that remain in the conversion pipeline for many months; and anecdotal evidence that many borrowers remain confused and frustrated.

5. Program Structure

Since the inception of HAMP, the Panel made numerous recommendations regarding the structure of the program, in order to address problems that became apparent during the program's implementation. Although Treasury made some modest progress in increasing participation and reducing the redefault rate, it adopted relatively few of the Panel's recommendations thus far.

The Panel repeatedly called on Treasury to modify the program to address three areas of major concern: second lien mortgages, unemployed borrowers, and borrowers with negative equity. In response to criticisms by the Panel and other observers, Treasury developed several new HAMP-related programs intended to deal with these issues directly, which the Panel applauded. Unfortunately, as of the publication of this report, these efforts have not demonstrated a track record of success.

The Panel addressed the problems caused by second-lien mortgages in each of its reports on HAMP. The Panel encouraged Treasury to investigate and find a solution to the obstacles

[316] The web portal, officially the HOPE LoanPort, is operated by the HOPE Alliance, a consortium of private lenders and other mortgage industry firms. 2009 October Oversight Report, *supra* note 300, at 111; 2010 April Oversight Report, *supra* note 277, at 96; 2010 December Oversight Report, *supra* note 283, at 78, 198.

[317] 2010 April Oversight Report, *supra* note 277, at 96.

that second liens often present to first-lien mortgage modifications.[318] The Panel recommended that Treasury explore the implications of adding borrower-specific junior lien information directly into HAMP's net present value model, which is a key tool that servicers use to determine whether applicants are eligible for the program. The Panel also recommended that Treasury consider the effect these additional debts have on the number of borrowers served by HAMP and the impact they have on the sustainability of HAMP modifications.[319]

On April 28, 2009, Treasury announced the Second Lien Modification Program to address the problem of second liens. The program went into effect on August 14, 2009. Borrowers are eligible after their corresponding first liens have been modified under HAMP. Although servicer participation is voluntary, once they sign a participation agreement, servicers must modify or extinguish the second liens of all eligible borrowers. Servicers, borrowers, and second-lien investors all receive incentive payments for their participation. Although the second lien modification program is a welcome development, the program has so far seen relatively little use.

The Panel repeatedly urged Treasury to find a way to provide assistance to unemployed borrowers, and Treasury attempted to do so by instituting several new programs. The Panel commends Treasury for creating the Home Affordable Unemployment Program. This program, announced on March 26, 2010, and effective July 1, 2010, assists unemployed homeowners by granting temporary forbearance of a portion of their monthly mortgage payments. During the forbearance period, which lasts a minimum of three months, unless the homeowner finds a job, payments fall to no more than 31 percent of the borrower's gross monthly income, including unemployment benefits. Once borrowers are in the program, the forbearance ends when they find work.

Another Treasury program designed in part to deal with the problem of unemployed homeowners is the Hardest Hit Fund. This program, announced on February 19, 2010, provides TARP money to state-run foreclosure mitigation programs in specific states hit hardest by home value decreases and unemployment. Eighteen states and the District of Columbia are eligible for funding. Before receiving the funds, eligible states must submit and receive approval for their plans to use the money. Many of the proposed Hardest Hit Fund programs aim to help low- to moderate-income families. Some states, such as Arizona, developed programs intended to help any struggling homeowner with a demonstrated hardship who meets certain qualifications. To date, Treasury allocated $7.6 billion to the states in four rounds of funding. All states receiving these funds are using at least a portion of the money to aid unemployed homeowners.

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[318] 2009 March Oversight Report, *supra* note 281, at 38-39. *See also* 2010 April Oversight Report, *supra* note 277, at 16, 126; 2010 December Oversight Report, *supra* note 283, at 109.

[319] 2010 April Oversight Report, *supra* note 277, at 16; 2010 December Oversight Report, *supra* note 283, at 109.

The Panel also suggested that Pennsylvania's successful Homeowners' Emergency Mortgage Assistance Program, which provides short-term loans to unemployed homeowners, could serve as a model for a nationwide program.[320] Although it is not part of HAMP, Congress authorized and the Department of Housing and Urban Development is implementing the Emergency Homeowners' Loan Program, which will assist unemployed borrowers. Despite these new programs, however, unemployed borrowers continue to account for many foreclosures.[321]

Negative equity constituted another longstanding area of concern for the Panel, since there is a correlation between negative equity, or owing more on your mortgage than your home is worth, and delinquency.[322] In December 2009, the Panel encouraged Treasury to consider incentivizing servicers to use principal reduction to deal with these "underwater" borrowers.[323] Since then, Treasury has attempted to deal with negative equity in several ways.

Treasury created the HAMP Principal Reduction Alternative, which attempts to incentivize servicers to write down underwater loans voluntarily. The program was announced on June 3, 2010, and went into effect on October 1, 2010. The Principal Reduction Alternative operates much like HAMP, except that instead of postponing payments on a portion of the mortgage, the program forgives that portion altogether. Servicers are required to consider loans that are HAMP-eligible and have loan-to-value ratios greater than 115 percent. This evaluation involves comparing the amount of money that a modification involving principal reduction would generate to the amount generated by a modification that does not involve principal reduction. The final decision on whether to grant a principal reduction is ultimately up to the servicer. Participating investors receive standard incentive payments as well as a percentage of each dollar forgiven.

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[320] 2009 October Oversight Report, *supra* note 300, at 89-90; 2010 April Oversight Report, *supra* note 277, at 20.

[321] In September 2009, the Panel visited Philadelphia's Mortgage Foreclosure Diversion Pilot Program, a court sponsored mediation program for borrowers in foreclosure created by Judge Annette Rizzo of the Philadelphia Court of Common Pleas. This program, instituted in April 2008, requires "conciliation conferences" in all foreclosure cases involving residential properties with up to four units that were used as the owner's primary residence, based on the idea that bringing borrowers into the same room with lenders' representatives will foster a compromise that is in both parties' best interests. The program was also discussed in the Panel's September Field Hearing. *See* Congressional Oversight Panel, Written Testimony of Judge Annette M. Rizzo, Court of Common Pleas, First Judicial District, Philadelphia County, Philadelphia Mortgage Foreclosure Diversion Program, *Philadelphia Field Hearing on Mortgage Foreclosures* (Sept. 24, 2009) (online at cop.senate.gov/documents/testimony-092409-rizzo.pdf); Congressional Oversight Panel, Testimony of Judge Annette M. Rizzo, Court of Common Pleas, First Judicial District, Philadelphia County, Philadelphia Mortgage Foreclosure Diversion Program, *Transcript: Philadelphia Field Hearing on Mortgage Foreclosures*, at 46-47, 103-105 (Sep. 24, 2009) (online at cop.senate.gov/documents/transcript-092409-philadelphia.pdf).

[322] *See* First American CoreLogic, *Underwater Mortgages On the Rise According to First American CoreLogic Q4 2009 Negative Equity Data* (Feb. 23, 2010) (online at www.corelogic.com/uploadedFiles/Pages/About_Us/ResearchTrends/Q4_2009_Negative_Equity_FINAL.pdf).

[323] 2010 December Oversight Report, *supra* note 283, at 67.

The Principal Reduction Alternative also includes an equity sharing option, in which the investor may be able to share the benefits of a subsequent appreciation in the home's value. Based on this option, the Panel suggested that Treasury monitor the Principal Reduction Alternative to determine whether equity sharing increased program participation. If so, the Panel suggested that Treasury should consider authorizing equity sharing arrangements in other programs.[324] Although the Principal Reduction Alternative program allows equity sharing, it is not required, and it is unclear at this time if this feature will be extensively used or will significantly boost overall program performance. Treasury has not implemented any additional equity sharing arrangements. Although the Principal Reduction Alternative is a welcome additional tool to prevent foreclosures, it does not yet have a demonstrated track record of success, and Treasury has not made much data available on its performance.

Treasury's Home Affordable Foreclosure Alternative and the FHA Short Refinance Program are also intended to address problems caused by negative equity. The Home Affordable Foreclosure Alternative program, announced on November 30, 2009, but not effective until April 5, 2010, seeks to encourage the use of short sales and deeds-in-lieu of foreclosure for HAMP-eligible borrowers who are underwater and unable to qualify for modifications. Servicers agree to forfeit the ability to seek a deficiency judgment in exchange for allowing borrowers to make short sales or issue a deed-in-lieu. Essentially, a servicer agrees to accept the property itself in satisfaction of a borrower's mortgage obligation. All parties receive TARP financial incentives.

The FHA Short Refinance Program, which was announced on March 26, 2010 and went into effect on September 7, 2010, offers a similar option. This TARP-funded program allows for the refinancing of non-FHA-insured underwater mortgages into positive equity, FHA-insured mortgages. Program participation is voluntary for servicers on a case-by-case basis. As with the Principal Reduction Alternative, both the Home Affordable Foreclosure Alternative program and the FHA Short Refinance program are relatively new and have not been used extensively so far.

The Panel also recommended that Treasury consider allowing borrowers whose monthly mortgage payments are currently less than 31 percent of their monthly incomes to enter HAMP, thereby capturing additional at-risk borrowers, especially those who owe large amounts in overdue payments.[325] In the Panel's October 2010 hearing on foreclosures, Faith Schwartz, senior adviser for the HOPE NOW Alliance, testified that HAMP's 31 percent minimum eligibility standard was considered "aggressive" when HAMP was first rolled out, but that even

[324] 2010 December Oversight Report, *supra* note 283, at 109.

[325] 2009 October Oversight Report, *supra* note 300, at 112.

this level of mortgage payment to income is too high for many homeowners who wind up in foreclosure.[326] Treasury has not taken action on this suggestion.

6. Document Irregularities

The Panel's November 2010 report on foreclosure irregularities included several recommendations for Treasury. Treasury stated at the Panel's October 2010 hearing that based on the information it had at the time, foreclosure irregularities posed no systemic threat to the financial system. The Panel challenged this view and asked Treasury to explain why it saw no danger. The Panel also encouraged Treasury to monitor closely the impact of foreclosure irregularities and publicly report its findings. Further, the Panel's November 2010 report stated that Treasury should develop contingency plans to prepare for the potential worst-case scenario.[327] Treasury indicated that as of the publication of this report, it has not found evidence of a systemic threat. However, the 11 member federal agency working group, of which Treasury is a member, continues to investigate. Rather than conducting an independent monitoring effort, Treasury has chosen to monitor the situation through its participation with the interagency working group and updates from various regulators. Finally, Treasury has not yet prepared any contingency plans for a worst case scenario, but is awaiting the findings of the interagency investigations to decide what action, if any, it should take.[328]

So far, the most comprehensive federal response to the Panel's concerns came from the OCC, which, along with other federal banking regulators, conducted examinations of foreclosure processing at the 14 largest federal regulated servicers during the fourth quarter of 2010. These examinations found "critical deficiencies and shortcomings in foreclosure governance process, foreclosure document preparation process, and oversight and monitoring of third party law firms and vendors" that "have resulted in violations of state and local foreclosure laws, regulations, or rules that have had an adverse effect on the functioning of the mortgage markets and the U.S. economy as a whole." The examinations also found "[a] small number of foreclosure sales" that "should not have proceeded" for various reasons, but also that "servicers maintained documentation of ownership and had a perfected interest in the mortgage to support their legal standing to foreclose."[329]

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[326] Congressional Oversight Panel, Written Testimony of Faith Schwartz, senior advisor, HOPE NOW Alliance, *COP Hearing on TARP Foreclosure Mitigation Programs*, at 7 (Oct. 27, 2010) (online at cop.senate.gov/documents/testimony-102710-schwartz.pdf).

[327] 2010 November Oversight Report, *supra* note 292, at 6, 83-84; Congressional Oversight Panel, *COP Hearing on TARP Foreclosure Mitigation Programs* (Oct. 27, 2010) (online at cop.senate.gov/hearings/library/hearing-102710-foreclosure.cfm).

[328] Information provided by Treasury (Mar. 9, 2011).

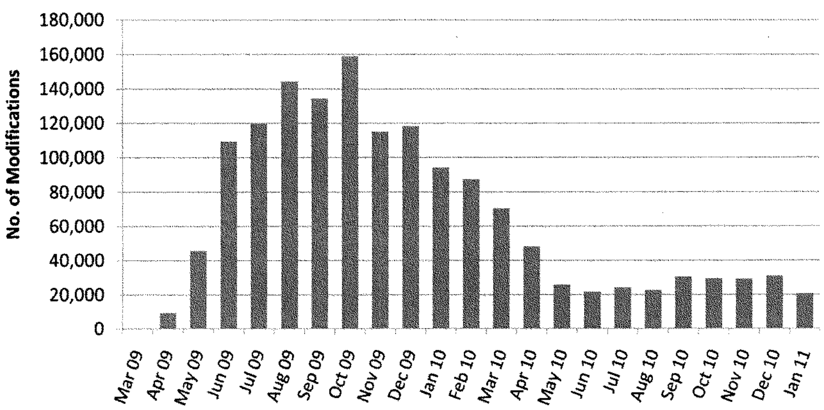
[329] Senate Committee on Banking, Housing, and Urban Affairs, Written Testimony of John Walsh, acting comptroller of the currency, Office of the Comptroller of the Currency, *Oversight of Dodd-Frank Implementation: A Progress Report by the Regulators at the Half-Year Mark*, at 13-15 (Feb. 17, 2011) (online at

D. Data Updates

1. Treasury's Foreclosure Mitigation Programs

Treasury announced its broad foreclosure mitigation initiative, headlined by HAMP, more than two years ago. Since that time, what results has the effort produced? HAMP began in 2009 with a major push to get at-risk homeowners into trial modifications. As early enrollees either converted into permanent modifications or dropped out of the program, the number of new trial modifications began to fall. As a result, the pipeline of new trial modifications has slowed considerably since 2009. Unless this trend reverses, which appears unlikely, the program will fall far short of Treasury's initial goal of 3 million to 4 million foreclosures prevented. Figure 16 shows the number of trial modifications started each month since the program's inception.

Figure 16: Number of New Trial Modifications since HAMP's Inception by Month[330]



According to Treasury, most of the decline in new trial modifications has been due to Treasury's decision, instituted in June 2010, to require that servicers verify upfront the income of HAMP applicants. Prior to June 2010, homeowners were able to qualify for trial modifications by verbally providing their incomes to servicers over the phone. As the Panel observed in the December 2010 report, however, this change cannot completely explain the decrease, since the number of new trial modifications began dropping off long before the upfront verified documentation standard was implemented. The Panel also considered the possibility that HAMP

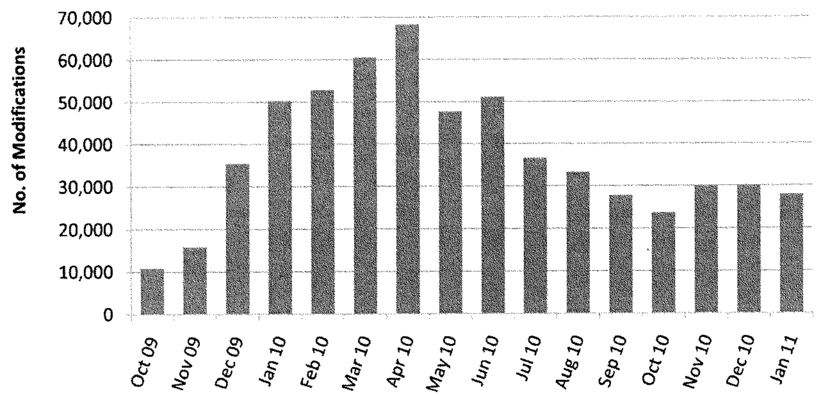
banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=99d7b6a8-d834-46e6-a088-f463fb740cf0).

[330] Trial modifications are categorized by the month in which homeowners made their first reduced trial payment. Data provided by Treasury (Feb. 28, 2011).

has already reached the majority of eligible borrowers who can be helped.[331] In the early months of the program, there was a large pool of borrowers awaiting help. Once many of these homeowners entered HAMP or other programs, there were simply fewer potential applicants who met HAMP criteria.[332]

While new trials are an important metric for determining the maximum number of borrowers the program may be able to assist, a trial modification that fails to convert to a permanent modification can hardly be called a success. The pipeline of new permanent modifications expanded in late 2009 and early 2010 as Treasury made a major push to convert trial modifications into permanent ones. Between January and June 2010, Treasury recorded an average of about 55,000 new permanent modifications each month. But since then, the numbers have fallen, as Figure 17 shows, to an average of around 30,000 new permanent modifications per month.

Figure 17: Number of New Permanent Modifications since HAMP's Inception by Month[333]



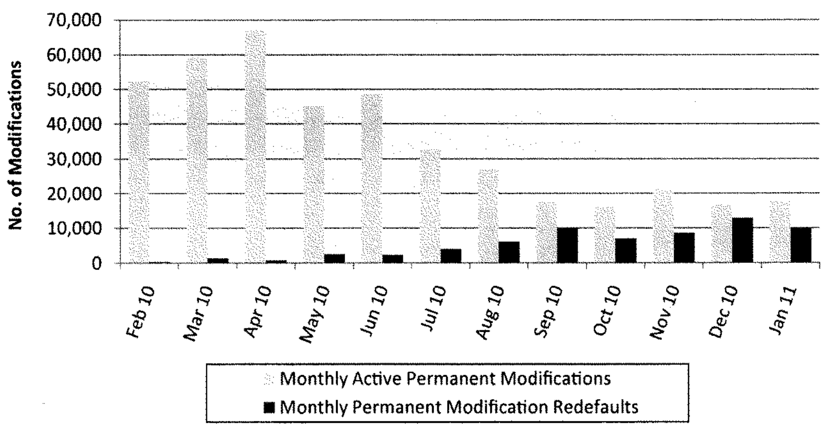
[331] 2010 December Oversight Report, *supra* note 283, at 20.

[332] Office of the Comptroller of the Currency and Office of Thrift Supervision, *Mortgage Metrics Report, Second Quarter 2010*, at 22 (Sept. 2010) (online at www.ots.treas.gov/_files/490019.pdf). *See also* Fitch Ratings, *U.S. RMBS: Still Under a Shadow*, at 5 (Nov. 1, 2010) (noting that "the number of remaining borrowers eligible for a loan modification appears to be declining, as new loan modification activity has declined from its peak in 2009").

[333] From May 2009 to September 2009, new permanent modifications totaled 4,742. Monthly new permanent modifications are derived from "All Permanent Modifications Started" levels from October 2009 to January 2011, which are recorded in the Making Home Affordable Program's monthly Servicer Performance Reports. For these monthly reports, *see* U.S. Department of the Treasury, *Program Results, Making Home Affordable Reports* (online at www.treasury.gov/initiatives/financial-stability/results/MHA-Reports/Pages/default.aspx) (accessed Mar. 3, 2011) (hereinafter "MHA: Program Results").

The number of permanent modifications is not a complete indicator of program success either, since HAMP participants who redefault after conversion to permanent modifications not only face foreclosure once again, but also represent an unsuccessful expenditure of taxpayer dollars. The Panel in its December 2010 report expressed concern about HAMP redefaults, since they have the potential to undermine the program's success. As Figure 18 illustrates, the gap between the number of redefaults and the new monthly permanent modifications narrowed in recent months.

Figure 18: Monthly HAMP Permanent Modifications and Redefaults[334]



As noted earlier, Treasury set a goal in March 2009 of assisting 3-4 million homeowners avoid foreclosure through HAMP, although Treasury's definition of "assist" has been somewhat unclear. Figure 19 shows the number of households currently being assisted by HAMP, as measured by active trial and permanent modifications, along with the number of households currently being assisted by the other TARP foreclosure prevention programs. It is important to note that some HAMP trial modifications will not convert to permanent modifications and some permanent modifications will end in redefaults; therefore, not all of these households will avoid foreclosures.

[334] "Monthly Active Permanent Modifications" and "Monthly Permanent Modification Redefaults" are derived from cumulative "Active Permanent Modifications" and "Permanent Modifications Canceled" (excluding loans paid off) from February 2010 to January 2011, as recorded in the Making Home Affordable Program's monthly Servicer Performance Reports. For these monthly reports, *see* MHA: Program Results, *supra* note 333.

Figure 19: Number of Households Currently Being Assisted By TARP Foreclosure Prevention Programs[335]

Program	Households Receiving Assistance
HAMP[336]	684,753
FHA Short Refinance Program[337]	64
Hardest Hit Fund[338]	757
Total	**685,574**

To achieve these results, Treasury has spent $1.2 billion out of the $45.6 billion in TARP funds allocated for foreclosure mitigation programs, or 2.6 percent of the funds available.[339] Spending on these programs will continue until 2018, but given the current pace of outlays, Treasury seems unlikely to spend anywhere near $45.6 billion.[340] CBO estimates that Treasury

[335] In light of the number of households assisted to date by Treasury's foreclosure prevention programs, some members of Congress have introduced legislation proposing the repeal of various TARP foreclosure prevention programs. *See* H.R. 430, *The HAMP Repeal and Deficit Reduction Act of 2011*, 112th Cong. (online at www.gpo.gov/fdsys/pkg/BILLS-112hr430ih/pdf/BILLS-112hr430ih.pdf) (accessed March 11, 2011); H.R. 839, The HAMP Termination Act of 2011, 112th Cong. (online at www.gpo.gov/fdsys/pkg/BILLS-108hr839ih/pdf/BILLS-108hr839ih.pdf) (accessed March 11, 2011).

Treasury has stated that it is "very concerned" about HAMP repeal legislation, and believes that if the program was terminated, "many, many Americans who otherwise could be helped into an affordable mortgage will not have that opportunity to do so." Massad Testimony to the Panel, *supra* note 122.

The Panel has taken no position on this issue.

[336] This figure is the sum of 539,493 active permanent modifications and 145,260 active trial modifications. Both numbers are as of Jan. 31, 2011. MHA Program: Servicer Performance January 2011, *supra* note 290, at 2. Treasury also reports that 21,043 households have received assistance through HAMP's Principal Reduction Alternative, HAMP's Unemployment Program, HAMP's Second Lien Program, the Home Affordable Foreclosure Alternatives Program, and the Home Price Decline Protection Program. It is likely, however, that at least some of these households are among those in active HAMP trial and permanent modifications, and that some of the households are not currently receiving assistance. Treasury data provided to the Panel (Feb. 28, 2011).

[337] Data provided by Treasury (Mar. 10, 2011).

[338] The Hardest Hit Fund data show the number of applications approved through December 31, 2010. The data is sourced from seven of the 19 states participating in the program. Treasury data provided to the Panel (Feb. 28, 2011).

[339] Treasury estimates that over time each HAMP permanent modification will cost the federal government $20,000. Massad Testimony to the Panel, *supra* note 122.

[340] Although HAMP expires on December 31, 2012, and new trial modifications after that date are prohibited, existing trial modifications can continue to convert. Considering the five-year term of HAMP assistance, the program should continue to expend funds into 2018.

will ultimately spend only about $12 billion on these programs.[341] Figure 20 shows Treasury's expenditures to date for its TARP foreclosure mitigation programs.

Figure 20: Expenditures for TARP Foreclosure Mitigation Programs[342]

Program	Expenditures
HAMP	$1.0 billion
FHA Short Refinance Program	53.9 million
Hardest Hit Fund	125.1 million
Total	**$1.2 billion**

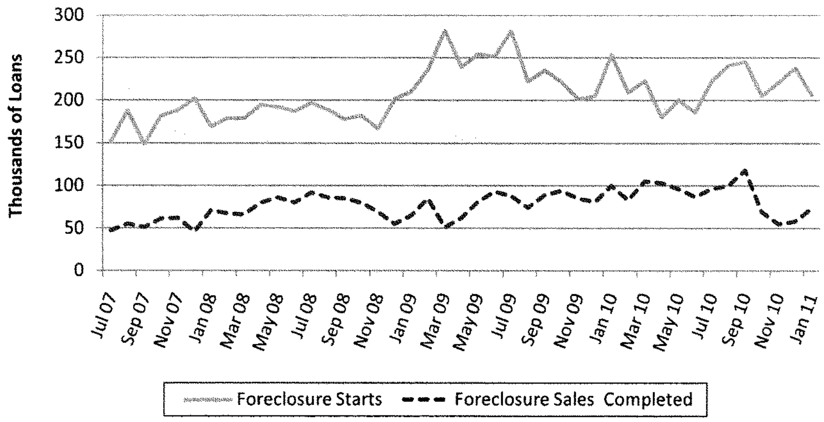
2. Housing Market

Treasury introduced the foreclosure mitigation programs in an effort to prevent foreclosures and stabilize the housing markets. Yet, foreclosures have remained at very high levels over the last two years. In December 2010, there were 232,000 foreclosure starts, while there were 56,000 foreclosure sales. This compares to 282,000 foreclosure starts and 51,000 foreclosure sales in March 2009, when HAMP was introduced. (Foreclosure sales dipped in late 2010 as a result of a number of large mortgage servicers suspending foreclosures in order to review their internal foreclosure procedures, but these numbers will likely increase in the coming months as these servicers resume their foreclosures.) Figure 21 shows foreclosure starts and completions by month since March 2009. The 685,574 households currently receiving TARP housing assistance – shown in Figure 19– represent roughly the same number of households that move into foreclosure proceedings every three months, based on the current rate.

[341] Congressional Budget Office, *Report on the Troubled Asset Relief Program – November 2010*, at 4 (Nov. 29, 2010) (online at www.cbo.gov/ftpdocs/119xx/doc11980/11-29-TARP.pdf) ("CBO Report on TARP – November 2010").

[342] The HAMP expenditures are as of February 25, 2011, while the expenditures for the other two programs are as of February 28, 2011. Treasury data provided to the Panel (Feb. 28, 2011).

Figure 21: Foreclosure Starts and Completions[343]

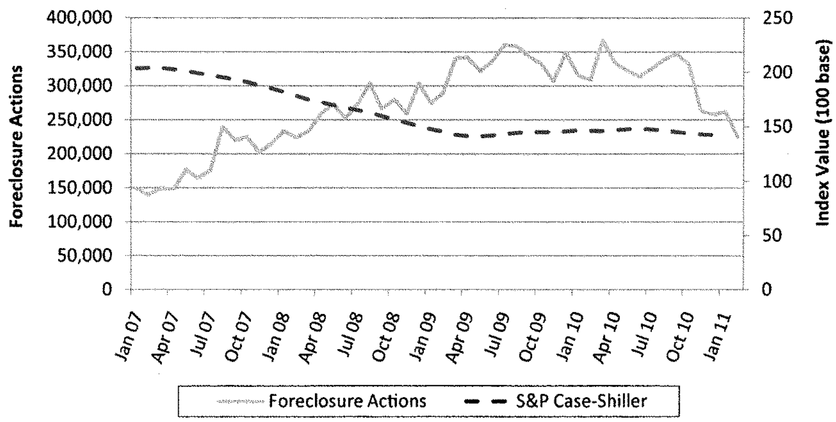


As foreclosure starts and completions have remained at a persistently high level, home prices have continued to fall. The S&P/Case Shiller index, which measures residential real estate prices nationwide, began declining in 2007, and the index's fall continued through the financial crisis of 2008 and beyond. After stabilizing in early 2010, home prices continued their decline in the second half of last year. Since the TARP was enacted in October 2008, nationwide home prices have declined by 9.1 percent. Since their peak in February 2007, nationwide home prices

[343] HOPE NOW Alliance, *Appendix – Mortgage Loss Mitigation Statistics: Industry Extrapolations (Quarterly from Q1-2007 to Q1-2009)*, at 4 (online at www.hopenow.com/industry-data/HOPE%20NOW%20National%20Data%20July07%20to%20April09.pdf) (accessed Mar. 11, 2011); HOPE NOW Alliance, *Appendix – Mortgage Loss Mitigation Statistics: Industry Extrapolations (Monthly for Dec 2008 to Nov 2009)*, at 2 (online at www.hopenow.com/industry-data/HOPE%20NOW%20National%20Data%20July07%20to%20Nov09%20v2%20(2).pdf) (accessed Mar. 11, 2011); HOPE NOW Alliance, *Industry Extrapolations and Metrics (May 2010)*, at 8 (June 28, 2010) (online at www.hopenow.com/industry-data/HOPE%20NOW%20Data%20Report%20(May)%2006-21-2010.pdf); HOPE NOW Alliance, *Industry Extrapolations and Metrics (September 2010)*, at 8 (Oct. 31, 2010) (online at hopenow.com/industry-data/HOPE%20NOW%20Data%20Report%20(September)%2010-31-2010%20v2.pdf); HOPE NOW Alliance, *Industry Extrapolations and Metrics (December 2010)*, at 8 (Feb. 2, 2011) (online at www.hopenow.com/industry-data/HOPE%20NOW%20Data%20Report%20(December)%2002-01-2011%20v2.pdf).

have fallen by 30.2 percent.[344] Figure 22 shows that this decline in home prices has happened simultaneous with the rise in foreclosures.[345]

Figure 22: Foreclosure Actions and Home Prices[346]



Putting additional pressure on housing prices is a glut of unsold homes. According to one estimate, there are currently more than six million unsold housing units in the United States, as compared to a pre-crisis level of 3.8 million.[347] Figure 23 shows the overhang of housing

[344] S&P/Case Shiller Index data, which runs through December 2010, accessed through Bloomberg Financial Data Service (accessed Mar. 4, 2011).

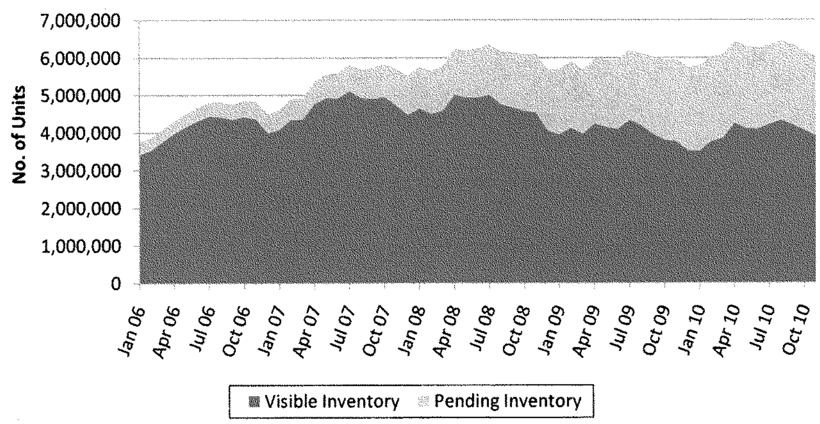
[345] At the Panel's March 4, 2011, hearing, Assistant Secretary Massad noted that foreclosures put downward pressure on the prices of neighboring homes. "A foreclosure for any family that goes through it is obviously a terrible economic loss," he stated. "It's also a great social and – or great psychological and emotional loss. It's a loss to the community. The community suffers from it because neighboring house prices fall. Particularly where you have a vacant home that can then be subject to vandalism. ... So you know this situation is a drag on our economy as a whole." Massad Testimony to the Panel, *supra* note 122. Patrick Lawler, the FHFA's chief economist, made a related point, noting that foreclosures can result in additional losses for government sponsored enterprises Fannie Mae and Freddie Mac. Speaking about HAMP and other foreclosure-prevention programs, he stated: "These programs have benefited the enterprises by mitigating risks and reducing both direct losses on loans where foreclosure is avoided and indirect losses on properties where housing markets are stabilized, which reduces defaults on other loans." Congressional Oversight Panel, Testimony of Patrick Lawler, chief economist and head of the Office of Policy Analysis and Research, Federal Housing Finance Agency, *Transcript: COP Hearing on the TARP's Impact on Financial Stability* (Mar. 4, 2011) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-030411-final.cfm).

[346] The metric "foreclosure actions," as used by RealtyTrac, encompasses default notices, scheduled auctions and bank repossessions. RealtyTrac: Foreclosures in February, *supra* note 285. S&P/Case Shiller Index data accessed through Bloomberg Financial Data Service (accessed Mar. 4, 2011).

[347] Data provided by CoreLogic (Feb.16, 2011).

inventory in the market. The chart distinguishes between visible inventory and pending inventory, which is a measure of potential additions to the sales inventory from homes that are in the foreclosure process or have mortgages that are seriously delinquent. There are currently 16 months of visible housing supply, as compared to an average of 7.3 months of visible inventory in 2006.[348]

Figure 23: Visible and Pending Housing Inventory[349]



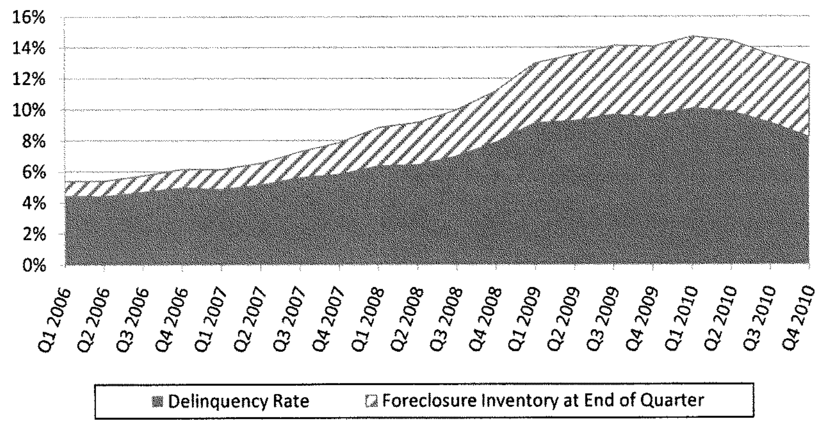
Because borrowers entering foreclosure have been delinquent on their mortgage payments for several months, delinquencies are an indicator of likely future trends in foreclosures. HAMP's declining trial modification production is therefore troubling in relation to the current high level of delinquencies. While mortgage delinquencies have declined over the past three quarters, they remain near historically high levels. At the end of 2010, loans that were 30, 60, or 90 or more days delinquent represented approximately 8.2 percent of all outstanding loans – down from 10.1 percent during the first quarter of 2010, which was the peak during the current crisis, but still above 7.8 percent rate in the fourth quarter of 2008. Mortgages in the foreclosure inventory, meaning those currently in the foreclosure process, represent 4.6 percent of outstanding loans – which equals the highest level since 2006 and is well above the 3.3 percent rate in the fourth quarter of 2008. The delinquency rate remains 18 percent above its

[348] Even though the pending nationwide inventory increased only from 3.4 million in January 2006 to 3.9 million in November 2010, the rate at which the inventory was clearing slowed down, which explains why the rate at which the pending inventory is expected to clear has more than doubled during the same nearly five-year period. Data provided by CoreLogic (Feb. 15, 2011).

[349] Data provided by CoreLogic (Feb.16, 2011).

level at the time the TARP was enacted, and the foreclosure inventory rate is 56 percent above its level from that period.[350] Figure 24 shows delinquency and foreclosure inventory rates since before the foreclosure crisis began.

Figure 24: Delinquency and Foreclosure Inventory Rates[351]

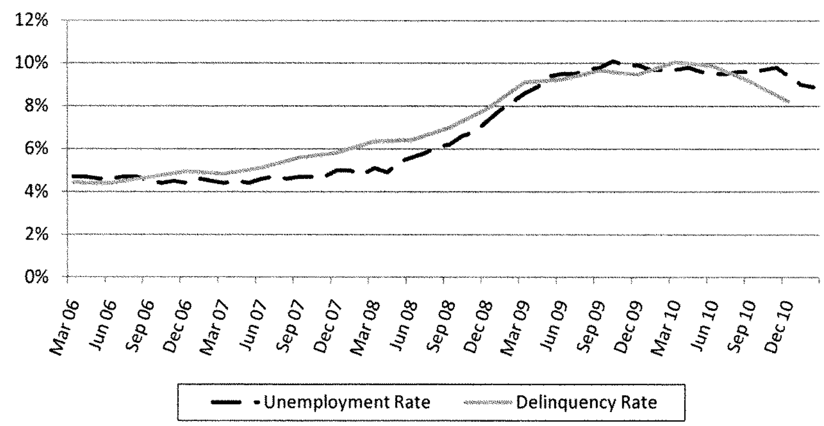


Unemployment rates remain problematic as well, given the link between joblessness and mortgage delinquency. Figure 25 shows that the nationwide delinquency rate and the U.S. unemployment rate have followed similar trends since early 2006.

[350] National Delinquency Survey – 2010 4th Quarter, *supra* note 4.

[351] National Delinquency Survey – 2010 4th Quarter, *supra* note 4.

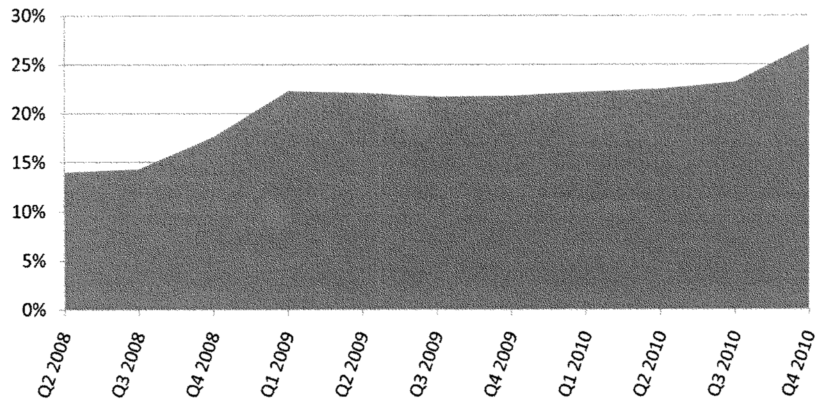
Figure 25: Unemployment and Delinquency Rates[352]



Negative equity, a situation in which homeowners owe more than their homes are worth, is another factor that may contribute to foreclosures. Figure 26 shows that the percentage of homeowners who are underwater has risen by more than 10 percentage points since the second quarter of 2008.

[352] Data accessed through Bloomberg Financial Data Service (accessed Mar. 4, 2011).

Figure 26: Percentage of Homeowners who are Underwater[353]



While we cannot know what the state of the housing market would be in the absence of HAMP, we do know that despite the implementation of HAMP and other foreclosure mitigation efforts, foreclosures remain high, and the housing market shows continuing signs of stress.

E. Lessons Learned

The first step in crafting a successful mortgage modification program is to have an accurate empirical picture of the mortgage market. As the Panel has noted with other TARP programs, insufficient data collection undermines the development of good policies. The lack of comprehensive, reliable data also makes it difficult for policymakers to identify successful loan modifications or make apples-to-apples comparisons among programs. This information is crucial for understanding the changing nature of the mortgage market and crafting informed, targeted policy responses.

It is important to ensure that modified mortgages be affordable to borrowers. Because the HAMP requirement that homeowners spend 31 percent of their monthly income on their first-lien mortgage payments does not take into account local conditions, overdue payments, second liens, and other borrower debt, the Panel has questions about the sustainability of many HAMP modifications. Future mortgage modification programs should consider the best way to measure overall affordability.

[353] Data provided by Zillow.com (Feb. 18, 2011).

The problems that Treasury has encountered with HAMP underscore the importance of a timely, decisive response to any future foreclosure crisis. When HAMP was introduced in early 2009, the foreclosure crisis was already well under way, and HAMP was not well designed to address the coming waves of foreclosures, which were increasingly driven by unemployment and negative equity. Over the next two years, Treasury provided increasingly generous incentives to participating borrowers, lenders, and servicers, which gave them reason to hold out for a better offer. While the constant flux of new programs, new standards, and new requirements reflected Treasury's efforts to respond to recommendations made by oversight bodies, the shifting ground also led to confusion among servicers and borrowers. Any future foreclosure mitigation programs should be forward-looking and attempt to address new and emerging problems before they reach crisis proportions.

Future policymakers should be mindful that the incentives of mortgage servicers are different from those of the government, and design any foreclosure mitigation program with that reality in mind. Borrower eligibility must depend on criteria set forth in the foreclosure mitigation program, rather than on the willingness of servicers or lenders to participate. If incentive payments are used to drive servicer participation, those payments must be sufficient to offset the financial incentives for servicers to push for foreclosure. Modification programs should also include an appropriate monitoring mechanism to ensure that servicers are accurately reporting the reasons for denials and cancellations, and there should be meaningful sanctions for noncompliance.

The need for better communication with homeowners is another important lesson to be drawn from HAMP. Because servicers generally first contact borrowers in a debt-collection role, any future foreclosure mitigation program that relies on servicers would benefit from a government-run outreach campaign designed to inform borrowers of their options for preventing foreclosure. A uniform and streamlined modification process would allow housing counselors to be more effective and allow borrowers and servicers to navigate the system more easily. Foreclosure mitigation efforts that rely on servicers should also make increasing servicer capacity an early priority.

It is also important that policymakers focus on ensuring good outcomes for homeowners, rather than becoming bogged down in process-related concerns. HAMP has a dizzying number of rules. In its oversight of Fannie Mae, HAMP's administrator, and Freddie Mac, HAMP's compliance agent, Treasury has seemed to focus more on ensuring that its rules are followed than on addressing the individual concerns of the people that the program is supposed to help.

Finally, the current crisis shows how closely foreclosure prevention is intertwined with efforts to ensure bank solvency. Delinquent mortgages continue to weigh on the U.S. banking system, and government efforts to remedy either the debt facing homeowners or the weakness of the banking system can have significant effects on the other problem. Principal write-downs on a large scale, for example, would help homeowners but hurt the banks. Over the last two years, Treasury has designed housing programs that aim to avoid fully facing this trade-off, by providing assistance to homeowners without restructuring bank balance sheets.[354] The limitations of that approach are apparent in the problems that Treasury has encountered.

V. Automotive Industry Assistance

A. Background

The automotive industry has traditionally accounted for a significant portion of U.S. domestic output and employment. As recently as 2004, the industry produced nearly 4 percent of U.S. GDP.[355]

Even prior to the financial crisis, the industry had begun to experience severe strain. Foreign competitors were steadily increasing market share at the expense of domestic manufacturers. Legacy costs and poor strategic decisions added to the problems of General Motors Corporation (GM) and Chrysler. Between 2000 and 2008, employment in the industry fell by roughly 34 percent, from a high of 1,254,900 in February 2001 to 822,900 in October 2008.[356]

In the fall of 2008, a combination of rising gasoline prices, tightening credit markets, eroding consumer confidence, high unemployment, and a decline in consumer discretionary spending led to a significant downturn in automobile sales in the United States and abroad. U.S. automobile sales fell to a 26-year low.[357] By early December 2008, GM and Chrysler were struggling to secure the credit they needed to conduct their day-to-day operations.

Additionally, the freeze in credit markets in late 2008 resulted in lenders experiencing increased difficulty in raising capital to finance auto loans. At that time, GMAC/Ally Financial had already suffered third quarter losses and was facing even greater fourth quarter losses, due

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[354] *See, e.g.*, Congressional Oversight Panel, Written Testimony of Timothy F. Geithner, secretary, U.S. Department of the Treasury, *COP Hearing with Treasury Secretary Timothy Geithner*, at 6 (Apr. 21, 2009) (online at cop.senate.gov/documents/testimony-042109-geithner.pdf) ("Falling home prices are a major financial challenge for many families. At the same time, financial losses related to the housing sector adjustment continue to be a significant headwind for banks and other financial institutions. Foreclosures are particularly problematic because they not only impose significant financial and emotional burdens on families, they are also costly for communities and banks. For all these reasons, addressing the housing crisis and reducing foreclosures is an important objective.").

[355] Bureau of Economic Analysis, *National Income and Product Accounts Table: Table 1.5.5 – Gross Domestic Product, Expanded Detail* (online at www.bea.gov/national/nipaweb/TableView.asp?SelectedTable=35&ViewSeries=NO&Java=no&Request3Place=N&3Place=N&FromView=YES&Freq=Year&FirstYear=1990&LastYear=2008&3Place=N&Update=Update&JavaBox=no) (accessed Mar. 11, 2011).

[356] Bureau of Labor Statistics, *Automotive Industry: Employment, Earnings, and Hours* (online at data.bls.gov/pdq/SurveyOutputServlet?series_id=CEU3133600101&data_tool=XGtable) (accessed Mar. 11, 2011).

[357] IHS Global Insights, *U.S. Executive Summary* (Aug. 2009).

largely to their hemorrhaging residential mortgage unit, ResCap. The contraction of the credit markets and the shaky financial condition of the companies had an especially severe impact on their automotive lending businesses. Since substantially all wholesale purchases by automobile dealers and about three quarters of retail consumer purchases are financed with borrowed funds,[358] GM and Chrysler faced additional losses in sales due to potential customers' inability to find credit.

The CEOs of Chrysler and GM appeared before Congress in December of 2008 to plead for government assistance to keep them from going under.[359] The House of Representatives responded on December 10 by passing legislation that would have provided a total of $14 billion in loans to Chrysler and GM, but the bill was blocked in the Senate on December 11.[360] The Bush administration then reversed its previous stance that had precluded TARP funding for the auto industry, and on December 19 announced that Chrysler and GM would both be provided TARP assistance. This was justified in part on the basis that allowing them to fail would result in a more than 1 percent reduction in real GDP growth and about 1.1 million workers losing their jobs.[361]

Meanwhile, on November 20, 2008, GMAC/Ally Financial requested the approval of FRB to become a BHC, contingent on the conversion of GMAC Bank to a commercial bank.[362] Becoming a BHC would make GMAC/Ally Financial eligible for access to both the FDIC's TLGP and the TARP's CPP. GMAC/Ally Financial's management also maintained that

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[358] Senate Committee on Banking, Housing, and Urban Affairs, Written Testimony of Ron Bloom, senior advisor, U.S. Department of the Treasury, *The State of the Domestic Automobile Industry: Impact of Federal Assistance* (June 10, 2009) (online at banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=40341601-355c-4e6f-b67f-b9707ac88e32). As of December 2009, 26 percent of all retail automobile purchases were cash transactions. This figure has been relatively constant over the past five years, fluctuating between 22 and 32 percent. Data provided to the Panel by J.D. Power and Associates.

[359] The President and Chief Executive Officer of Ford Motor Company also testified at this hearing. Senate Committee on Banking, Housing, and Urban Affairs, Written Testimony of Richard Nardelli, chairman and chief executive officer, Chrysler LLC, *State of the Domestic Automobile Industry: Part II* (Dec. 4, 2008) (online at banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=c41857b2-7253-4253-95e3-5cfd7ea81393).

[360] The money would have been re-allocated from a pre-existing Department of Energy program for advanced vehicle technology. H.R. 7321, *Auto Industry Financing and Restructuring Act*, 110th Cong. (2008). The Senate failed to invoke cloture on the proposed legislation by a vote of 52 to 35. U.S. Senate, Roll Call Vote on the Motion to Invoke Cloture on the Motion to Proceed to Consider H.R. 7005 (Dec. 11, 2008) (online at www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=2&vote=00215) (52 yeas, 35 nays).

[361] The George W. Bush White House Office of the Press Secretary, *Fact Sheet: Financing Assistance to Facilitate the Restructuring of Auto Manufacturers to Attain Financial Viability* (Dec. 19, 2008) (online at georgewbush-whitehouse.archives.gov/news/releases/2008/12/20081219-6.html) (hereinafter "White House Fact Sheet: Assistance to Auto Manufacturers").

[362] GMAC, LLC, *GMAC Files Application With Federal Reserve to Become Bank Holding Company* (Nov. 20, 2008) (online at media.gmacfs.com/index.php?s=43&item=288).

conversion to a BHC addressed a weakness in the company's business model by providing it with access to deposits for liquidity. FRB expedited GMAC/Ally Financial's BHC application, citing "emergency conditions," although the 4-1 split in the vote of FRB was unusual for these kinds of actions.[363]

1. Initial Treasury Action

The Automobile Industry Financing Program (AIFP) was announced on December 19, 2008. Its first acts were to provide Chrysler and GM with bridge loans of $4 billion and $13.4 billion, respectively, under separate loan and security agreements. Treasury, asserting that GM and Chrysler could not survive without access to GMAC/Ally Financial's and Chrysler Financial's financial underpinning, further provided GMAC/Ally Financial with $5 billion in emergency funding under the AIFP on December 29, 2008. Another $887 million lent to GM was used to buy GMAC/Ally Financial shares in a $2 billion equity rights offering to current shareholders. Additionally, Chrysler Financial was provided with a $1.5 billion loan on January 16, 2009.

A key component of the receipt of this federal aid required each company to demonstrate that the assistance would allow it to achieve "financial viability."[364] Both companies were required to submit viability plans incorporating "meaningful concessions from all involved in the automotive industry."[365] These plans were submitted to the Obama administration in February 2009, and on February 15, 2009, President Obama announced the creation of the interagency Presidential Task Force on the Auto Industry, to assume responsibility for reviewing the Chrysler and GM viability plans. In addition, the President named two advisors, Ron Bloom and Steven Rattner, to lead the Treasury auto team in reviewing the viability plans and negotiating the terms of any further assistance.[366]

The results of the auto team's review were announced by President Obama on March 30, 2009. The team found GM's plan "not viable as it is currently structured" due largely to overly optimistic assumptions about prospects for the macroeconomy and GM's ability to generate sales. GM was provided 60 days of working capital in order to submit a substantially more

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[363] Board of Governors of the Federal Reserve System, *Order Approving Formation of Bank Holding Companies and Notice to Engage in Certain Nonbanking Activities*, at 2, 15 (Dec. 24, 2008) (online at www.federalreserve.gov/newsevents/press/orders/orders20081224a1.pdf).

[364] "Financial viability" was defined as "positive net value, taking into account all current and future costs, and [the ability to] fully repay the government loan." White House Fact Sheet: Assistance to Auto Manufacturers, *supra* note 361.

[365] The George W. Bush White House Office of the Press Secretary, *President Bush Discusses Administration's Plan to Assist Automakers* (Dec. 19, 2008) (online at georgewbush-whitehouse.archives.gov/news/releases/2008/12/20081219.html).

[366] The missions and personnel of the Presidential Task Force on the Auto Industry and Treasury auto team – a joint Treasury-National Economic Council team that staffs the Task Force – overlap considerably; therefore, these entities are often cited interchangeably.

aggressive plan.[367] The team found that Chrysler had an even poorer outlook than GM and concluded that Chrysler was not viable outside of a partnership with another automotive company. Chrysler was offered working capital for 30 more days in order to seek an agreement with Fiat.[368]

Unable to reach agreement in 30 days, Chrysler filed for bankruptcy on April 30. Forty-two days later, the sale of the majority of its assets to a newly formed entity, Chrysler Group LLC (new Chrysler), closed. Treasury provided a total of $8.5 billion in working capital and exit financing to support Chrysler through the bankruptcy and restructuring process.[369]

GM followed Chrysler into bankruptcy on June 1, 2009. On July 5, 2009, the sale of the "good" assets of GM to the new government-owned General Motors Company (new GM) closed. Treasury provided $30.1 billion of financing to facilitate an expedited Chapter 11 proceeding and restructuring.[370]

GMAC/Ally Financial, in the interim, one of the 19 large entities subject to stress tests, had failed the stress test and was unable to raise capital in the private markets. Accordingly, Treasury extended a further $7.5 billion in TARP financing in May of 2009, and another $3.8 billion in December 2009.

Meanwhile, in July 2009, Chrysler Financial repaid its $1.5 billion loan in full with all interest and an additional $15 million note. GMAC/Ally Financial had taken over its floor plan business in May 2009. The remaining platform of Chrysler Financial was owned by Chrysler Holding LLC, which was in turn owned by Cerberus Management. Through Treasury's investment in Chrysler Holding LLC, Treasury remained entitled to proceeds Chrysler Holding LLC received from Chrysler Financial: the greater of either $1.375 billion, or 40 percent of the equity value of Chrysler Financial.[371]

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[367] U.S. Department of the Treasury, *GM February 17 Plan: Viability Determination* (Mar. 30, 2009) (online at www.whitehouse.gov/assets/documents/GM_Viability_Assessment.pdf).

[368] The White House, *Obama Administration New Path to Viability for GM & Chrysler* (Mar. 30, 2009) (online at www.whitehouse.gov/assets/documents/Fact_Sheet_GM_Chrysler_FIN.pdf).

[369] Treasury Transactions Report, *supra* note 36, at 18.

[370] The White House, *Remarks by the President on General Motors Restructuring* (June 1, 2009) (online at www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-General-Motors-Restructuring/); Treasury Transactions Report, *supra* note 36, at 18.

[371] For more discussion of how Treasury potentially left money on the table in the Chrysler Financial deal, *see* Congressional Oversight Panel, *January Oversight Report: An Update on TARP Support for the Domestic Automotive Industry*, at 15-16 (Jan. 13, 2011) (online at cop.senate.gov/documents/cop-011311-report.pdf) (hereinafter "2011 January Oversight Report").

2. Additional Initiatives and Actions

In addition to the assistance provided to the automotive industry described above, several other initiatives were undertaken to support the industry, both within and outside of the TARP.

On March 19, 2009, Treasury announced the Auto Supplier Support Program (ASSP), a TARP initiative. At the time it was announced, Treasury stated that up to $5 billion in financing would be available to auto suppliers, to be funded through participating automotive companies. Under this program, auto suppliers could obtain government-backed protection on receivables to provide a safety net for those who may not receive payment for their shipments. Auto suppliers were also able to sell their receivables into the program at a discount to provide immediate liquidity for suppliers in need of cash to continue operations. This facility was reduced to $3.5 billion, and ultimately only $413 million was used.[372] On the same day, as part of ARRA, the Obama administration announced a grant of up to $2 billion for competitively awarded cost-shared agreements for manufacturing of advanced batteries and related drive components, plus another $400 million for transportation electrification demonstration and deployment projects.[373]

To help spur automotive sales, Congress created the Car Allowance Rebate System (nicknamed "cash for clunkers") to be administered through the Department of Transportation. The program, announced on July 27, 2009, offered rebates for new car buyers who were trading in older cars for newer, more efficient models. The program attracted interest and resulted in a brief surge in sales in the summer of 2009, with federal disbursements of $2.9 billion.

The Energy Independence and Security Act of 2007 established a $25 billion loan program to encourage the development of advanced technology vehicles – primarily those that meet certain energy efficiency criteria – and associated components in the United States. The program, administered by the Department of Energy, had completed a little over $2 billion in loans as of the end of 2010. Before declaring bankruptcy, GM applied for a loan under this program and was rejected. The new GM later resubmitted the old GM's applications but ultimately withdrew these, saying it had enough liquidity of its own to modernize its facilities and build fuel-efficient vehicles.[374] Chrysler is still awaiting a determination on its application for a total of $3 billion in loans to be disbursed over three years.

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[372] Treasury Transactions Report, *supra* note 36.

[373] U.S. Department of Energy, *President Obama Announces $2.4 Billion for Electric Vehicles* (Mar. 19, 2009) (online at apps1.eere.energy.gov/news/daily.cfm/hp_news_id=159).

[374] General Motors Company, *GM Withdraws Federal Loan Application* (Jan. 27, 2011) (online at www.gm.com/news-article.jsp?id=/content/Pages/news/us/en/2011/Jan/0127_federal_loan.html).

B. Summary of COP Reports and Findings

In September 2009, the Panel issued its first report on the use of TARP funds in supporting the domestic automotive industry.[375] In that report, the Panel examined several key considerations relating to the commitment of $85 billion in TARP funds, including: Treasury's justification for extending TARP funds to the automotive sector, how exactly this money had been used, and whether Treasury had properly and publicly articulated its objectives and taken action in furtherance of those objectives. The report also examined Treasury's role in the bankruptcy of Chrysler Holding LLC (Chrysler) and (GM, how Treasury planned to protect taxpayers' interests while the government controlled these companies, and how Treasury intended to maximize taxpayers' returns when the government divested itself of ownership.

The Panel compared Treasury's dealings with the automotive companies with its dealings with banks under the CPP and similar programs, and found that Treasury's financial assistance to the automotive industry differed significantly from its assistance to the banking industry. In particular, assistance provided to the banks carried less stringent conditions, and money was made readily available without a review of business plans and without any demands that shareholders forfeit their stake in the company, or that top management lose their jobs. By contrast, the Panel found that Treasury was a tough negotiator as it invested taxpayer funds in the automotive industry, requiring the companies to file for bankruptcy, wiping out their old shareholders, cutting their labor costs, reducing their debt obligations and replacing some top management. While this stance may have provided better protection for Treasury's investment, the Panel noted that it may have raised other issues related to the government's role as shareholder in private companies. The report recommended that Treasury consider placing the government's shares in a trust that could be managed in a more hands-off manner, effectively removing the concern that direct management by Treasury itself could have undesirable consequences.

The Panel also examined the bankruptcy processes each of the companies underwent and concluded, with the assistance of outside bankruptcy experts, that the government's intervention in the bankruptcies raised questions about the long-term effects of such intervention on credit markets, but that it was too early to determine what those effects might be. Although the Panel also discussed the legal justification for using the TARP to support the automotive industry, the Panel took no position on whether this use was authorized by EESA.

At the time of the Panel's 2009 report, the prospects for a return of the $85 billion invested in the automotive industry were not favorable. Projected losses on TARP investments in the auto industry at that time varied from Treasury's estimate that approximately $23 billion

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[375] Congressional Oversight Panel, *September Oversight Report: The Use of TARP Funds in the Support and Reorganization of the Domestic Automotive Industry* (Sept. 9, 2009) (online at cop.senate.gov/documents/cop-090909-report.pdf).

of the initial loans made would be subject to "much lower recoveries" to an estimate of $40 billion in losses from CBO.[376] Although Treasury at times stated its definition of success was whether taxpayers saw a return of their money, at other times it defined success in terms of preserving jobs or preventing the disorganized bankruptcy of systemically significant institutions that could potentially destabilize all or a sector of the fragile economy. Treasury's inability to articulate a clear objective, the Panel noted, made it difficult to determine whether the program had been a success even by Treasury's own standards.

In March 2010, the Panel examined Treasury's use of TARP funds to rescue GMAC/Ally Financial.[377] Although the Panel took no position on whether Treasury should have rescued GMAC/Ally Financial, it found that Treasury missed opportunities to increase accountability and better protect taxpayers' money. Treasury did not, for example, condition access to TARP money on the same kinds of sweeping changes that it required from GM and Chrysler: it did not wipe out GMAC/Ally Financial's equity holders; it did not require GMAC/Ally Financial to create a viable plan for returning to profitability; nor did it require a detailed, public explanation of how the company would use taxpayer funds to increase consumer lending. Treasury's explanations for the need to rescue GMAC/Ally Financial were also at times inconsistent, casting the decision sometimes as a part of the wider automotive industry rescue and at other times as a part of the stress tests, and therefore a part of the effort to backstop the nation's financial sector. If the rescue of GMAC/Ally Financial was necessitated by its inclusion in the stress tests, it was not clear why Treasury turned to the AIFP, a program intended to support the automotive sector, for financing instead of using the Capital Assistance Program (CAP), which was devised specifically to provide additional capital to those BHCs that did not pass the stress tests.

Whatever the reason for rescuing GMAC/Ally Financial, the report questioned Treasury's assertion that bankruptcy was not a viable option in 2008.[378] The report concluded that, in connection with the Chrysler and GM bankruptcies, Treasury might have been able to orchestrate a strategic bankruptcy for GMAC/Ally Financial.[379] This bankruptcy could have preserved GMAC/Ally Financial's automotive lending functions while winding down its other, less significant operations, dealing with the ongoing liabilities of the mortgage lending operations, and putting the company on more sound economic footing. The Panel also expressed

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[376] *Id.* at 5.

[377] Congressional Oversight Panel, *March Oversight Report: The Unique Treatment of GMAC Under the TARP* (Mar. 11, 2010) (online at cop.senate.gov/documents/cop-031110-report.pdf) (hereinafter "2010 March Oversight Report").

[378] Ron Bloom, senior advisor to the Secretary of the Treasury, testified that the administration considered bankruptcy in April and May 2009. He did not state whether bankruptcy was considered before Treasury made the December 2008 investment. Congressional Oversight Panel, Testimony of Ron Bloom, senior advisor, U.S. Department of the Treasury, *Transcript: COP Hearing on GMAC Financial Services*, at 23-24 (Feb. 25, 2010) (online at cop.senate.gov/documents/transcript-022510-gmac.pdf).

[379] 2010 March Oversight Report, *supra* note 377, at 5.

concern that Treasury had not given due consideration to the possibility of merging GMAC/Ally Financial back into GM, a step which would have restored GM's financing operations to the model generally shared by other automotive manufacturers, thus strengthening GM and eliminating other money-losing operations.[380] The Panel expressed no doubt that Treasury's actions to preserve GMAC/Ally Financial played a major role in supporting the domestic automotive industry.[381] These same actions, however, reinforced GMAC/Ally Financial's dominance in automotive floor plan financing, perhaps obstructing the growth of a more competitive lending market. The report also examined the great public expense incurred by this rescue, noting that the federal government had spent $17.2 billion to bail out GMAC/Ally Financial and now owned 56.3 percent of the company. At the time, OMB estimated that $6.3 billion or more may never be repaid.

The Panel also noted that Treasury's avowed hands-off approach to managing its sizeable stake in the company could have unintended consequences, such as creating a power vacuum that would allow smaller shareholders a disproportionate influence.[382] Because both GM and GMAC/Ally Financial were at the time majority-owned by Treasury and subject to its hands-off policy, the potential for a governance vacuum was amplified. This meant that the parties who wished to operate GMAC/Ally Financial in GM's interests had the potential to become proportionately more powerful, inasmuch as GM has extraordinary commercial influence over GMAC/Ally Financial, and there may not have been countervailing pressure from involved shareholders. The report repeated the suggestion made in the September 2009 report that Treasury consider placing the government's shares in a trust to help alleviate this concern. The Panel concluded, however, that although the rescue of GMAC/Ally Financial appeared to be one of the more baffling decisions made under the TARP, since the company itself posed no systemic risk, when viewed as a piece of either the automotive industry or the group of banks involved in the stress tests, Treasury's objectives become clearer.[383]

In its oversight report for January 2011, the Panel revisited Treasury's support of the domestic automotive industry as Treasury began the process of unwinding its stakes in GM, Chrysler, and GMAC/Ally Financial.[384] Of those companies, GM is furthest along in the process of repaying taxpayers. It conducted an initial public offering (IPO) on November 18, 2010, and Treasury used the occasion to sell a portion of its GM holdings for $13.5 billion. This sale represents a major recovery of taxpayer funds, but it is important to note that Treasury received a price of $33.00 per share – well below the $44.59 needed to be on track to recover fully

[380] 2010 March Oversight Report, *supra* note 377, at 5.

[381] 2010 March Oversight Report, *supra* note 377, at 5.

[382] 2010 March Oversight Report, *supra* note 377, at 121.

[383] 2010 March Oversight Report, *supra* note 377, at 122.

[384] 2011 January Oversight Report, *supra* note 371, at 15-16.

taxpayers' money. Pricing the GM IPO below the break-even price likely had the effect of greatly reducing the likelihood that taxpayers will be fully repaid, as full repayment will not be possible unless the government is able to sell its remaining shares at a far higher price. However, it is impossible to know if a longer-term investment horizon by the government (via an IPO at a later date) would have allowed Treasury to sell its shares at a more favorable price, closer to its breakeven cost basis. The Panel recognized that delaying the IPO would have exposed Treasury to the risk that the price that buyers were willing to pay for GM stock would fall. Moreover, such a delay would have run contrary to the government's stated objective of disposing of its shares "as soon as practicable."[385]

The report also discussed the status of Treasury's investments in Chrysler, Chrysler Financial, and GMAC/Ally Financial. The report noted that Treasury will likely require an IPO to redeem its investment in Chrysler. The need for an IPO presents a challenge since Treasury does not have a controlling stake in Chrysler and, even if it did, it is unlikely given Treasury's hands-off management approach that it would use this leverage. Meanwhile, it appears that GMAC/Ally Financial is moving closer to an IPO and Treasury has had significant leverage over the IPO's timing due to its preferred stock holdings. Regrettably, however, Treasury has been inconsistent in acknowledging this leverage. Treasury's reluctance to recognize its own influence may represent an effort to claim a coherent hands-off shareholder approach, despite the unique circumstances that apply to GMAC/Ally Financial.[386] Finally, another source of concern explored in this report was Treasury's unwinding of its position in Chrysler Financial, in which taxpayer returns appear to have been sacrificed in favor of an accelerated exit, further compounded by apparently incomplete due diligence. Although Treasury's hands-off approach may have reassured market participants about the limited scope of government intervention, it may also have forced Treasury to leave unexplored options that would have benefited the public.

While the Panel had previously questioned the government's perception of its policy choices during various stages of the crisis, there is little doubt that in the absence of massive government assistance, GM, Chrysler, and GMAC/Ally Financial faced the prospect of bankruptcies and potential liquidation, given the apparent dearth of available financing from the private sector.[387] The Panel noted that in the context of a fragile economy and the financial crisis (which severely restricted both corporate and consumer credit), the failure of these companies could have had significant near-term consequences in terms of job losses and the performance of the broader U.S. economy. Further, although the assets of GM and Chrysler (plants and equipment, employees, brand recognition) would have had value to other firms over the longer term, it was in the context of these adverse near-term consequences that both the Bush and Obama administrations provided assistance to the auto sector. As in its September 2009 report,

[385] 2011 January Oversight Report, *supra* note 371, at 47.

[386] 2011 January Oversight Report, *supra* note 371, at 5.

[387] 2011 January Oversight Report, *supra* note 371, at 115.

the Panel took no position on the decision to support the auto industry. Despite the recent GM IPO and improving financials at the other companies, the Panel noted that there is still a long road ahead, particularly for GMAC/Ally Financial and Chrysler, before the final outcome of these programs can be determined.

C. Panel Recommendations and Updates

The Panel's recommendations in its three reports on the automotive industry and GMAC/Ally Financial focused on four key areas in need of improvement:

- Transparency on the part of Treasury and the companies' management;
- Accountability;
- Improved balance among Treasury's roles as shareholder in private enterprise and government policymaker; and
- Continuing oversight to ensure that the American people are not again called upon to rescue the automotive industry.

To date, only a handful of recommendations made by the Panel have been implemented and even those have been implemented only partially.

1. Transparency

The Panel consistently requested that Treasury and the automotive companies provide detailed information about Treasury's investments and the companies' management and strategic planning but has received only a partial response to these requests. In September 2009, the Panel recommended that Treasury ensure that the automotive companies' bylaws and policies provide for full disclosure of all dealings with significant shareholders, including the government, and that the two new companies, when filing their planned periodic reports with the U.S. Securities and Exchange Commission (SEC), ensure that these reports conform to the standards of disclosure required for SEC reporting companies. While GM and GMAC/Ally Financial have released such reports, Chrysler has reported only its consolidated financial statement and notes. In March 2010 and again in January 2011, the Panel also recommended that the administration enhance disclosure in the budget and financial statement for the TARP by reporting on the valuation assumptions for the individual companies. The Panel's recommendations in March 2010 focused on the specific lack of transparency with regard to the government's investment in GMAC/Ally Financial, encouraging Treasury to go to greater lengths to explain its approach to the treatment of legacy shareholders. Treasury has provided no such additional explanation. Finally, the Panel requested that Treasury provide a legal opinion justifying the use of TARP funds for the automotive industry rescue. In response, Treasury directed the Panel to certain materials associated with the automotive companies' bankruptcies. These materials did not provide a sufficiently robust analysis of Treasury's legal justification and so constitute, at most, only a partial response to the Panel's recommendation.

2. Accountability

In each of its three reports on the industry, the Panel called for Treasury to articulate clear goals and benchmarks by which progress could be measured. Treasury, however, has never articulated a clear set of goals for these programs. Instead, it has articulated a number of goals at different times, many of which may ultimately be conflicting. For example, at a Panel hearing in June 2009, then-Panel Chair Elizabeth Warren asked Assistant Secretary Allison, "Can you explain in some general strokes, the strategic thinking on the part of your team in terms of what we are trying to accomplish with the auto industry?"[388] Assistant Secretary Allison responded:

> What we're trying to do is to allow the automobile industry and encourage the automobile industry to restructure so that it is again a highly-competitive sector of our economy and can grow and create more jobs over time and that's the reason why the Administration – actually, they were asked to take part in this. That's the reason why they've decided it was necessary to do so. The outlook here is very important to the whole economy and I think that's been the underlying reason why the Administration has acted in the way it has.[389]

In a later hearing on the automotive industry, senior Treasury advisor Ron Bloom defined success as primarily a question of return on investment: "the greater percentage of the money that we invested that we get back, the greater success."[390] These differing and potentially conflicting goals make it difficult to determine whether the TARP's interventions in the auto industry should be judged to be successful. Instead, the articulation of multiple goals, without specification of their priority, allows Treasury to claim success if the program achieves any one of these goals.

The Panel also called on Treasury to provide a detailed plan for exiting its position in each company. In particular, in its March 2010 report, the Panel urged Treasury to require greater accountability on the part of GMAC/Ally Financial by insisting that the company produce a viable business plan showing a path toward profitability. Given that a GMAC/Ally Financial IPO, which is likely to occur later this year, would provide an opportunity for Treasury to sell its GMAC/Ally Financial holdings, Treasury should clearly outline its proposed strategy

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[388] Congressional Oversight Panel, Testimony of Herbert M. Allison, Jr., assistant secretary for financial stability, U.S. Department of the Treasury, *Transcript: COP Hearing with Assistant Treasury Secretary Herb Allison*, at 23 (June 24, 2009) (online at cop.senate.gov/documents/transcript-062409-allison.pdf).

[389] *Id.* at 24.

[390] Congressional Oversight Panel, Testimony of Ron Bloom, senior advisor, U.S. Department of the Treasury, *Transcript: COP Field Hearing on the Auto Industry*, at 38 (July 27, 2009) (online at cop.senate.gov/documents/transcript-072709-detroithearing.pdf).

for divesting itself of some or all of its position as the IPO approaches. There remain, in addition, certain obstacles that Treasury must overcome before it can successfully and fully exit its position in all of these companies and, as discussed in the Panel's January 2011 report, Treasury has yet to articulate a clear plan for addressing these challenges. The Panel also recommended that Treasury require that any entity receiving TARP funds be subject to more stringent criteria and due diligence to establish that it would become a profitable concern, and that any such entity be subject to use of funds disclosure requirements. Specifically, the Panel suggested that Treasury take these steps retroactively with regard to its investment in GMAC/Ally Financial. Treasury has never acted to implement this recommendation.

3. Improved Balance among Treasury's Roles

While Treasury has insisted that it adheres to a hands-off policy in managing its TARP investments to assuage concerns about government intervention in private enterprise, the Panel warned against an unduly rigid policy that could jeopardize both taxpayers' investment and the longer-term goals of the TARP. In September 2009, the Panel recommended that Treasury provide more detail about its corporate governance policies, including how the government would deal with conflicts of interest between its role as an equity holder or creditor and as regulator. The Panel also suggested that Treasury establish policies prohibiting Treasury employees from accepting employment with the automotive companies for a period of at least one year following termination of their employment with Treasury. The Panel is not aware that Treasury has acted on any of these recommendations. The Panel also recommended that Treasury consider placing its holdings in a trust that could be managed by an independent trustee whose actions would not raise the same concerns that similar actions by Treasury might raise. There has not been any indication that Treasury seriously considered creating such a trust. In March 2010, the Panel recommended that Treasury consider affirmatively promoting a merger between GM and GMAC, a step that Treasury may have been unwilling to consider in light of its hands-off management policy. There has been no indication that Treasury has altered its stance on this issue.

While the Panel recommended in each of its reports that Treasury unwind its positions in the companies quickly, the Panel also cautioned against an exit that would be unduly detrimental to the value of the taxpayers' investment. Based on the steps it has taken thus far to sell portions of its holdings, it appears that Treasury has been mindful of this concern but, because of its avowed "hands-off" stance, may not have fully considered all options that would provide the best return.

4. Continued Oversight

In its last report on the industry in January 2011, the Panel recommended, in order to prevent the need for a future government rescue, that Congress commission independent researchers to periodically assess the long-term fallout from the collapse of the auto industry and the subsequent government intervention, including the risk to taxpayers stemming from future disruptions to the auto market from economic, credit market or other potential threats.

5. Updates

Since the Panel's most recent report on the industry in January 2011, Treasury announced on March 1, 2011, that it was planning a public offering of its trust preferred securities holdings in GMAC/Ally Financial.[391] The offering is not to include any of Treasury's $5.9 billion of mandatory convertible preferred stock in Ally nor does it include any of Treasury's current holdings of 74 percent of the shares of Ally's common stock. On March 2, 2011, Treasury announced the pricing of the offering, stating that the securities would be offered at par, for a total of $2.7 billion.[392] This offering closed on March 7, 2011.

Also on March 1, 2011, GM released its annual report, showing the company made meaningful gains in 2010, posting a profit of $4.7 billion for the year.[393]

D. Lessons Learned

It is clear that GM and Chrysler were in dire straits in late 2008. Although it is difficult to say whether government intervention was the best option, the TARP funds the companies received provided them with at least some short-term stability. Whether the programs aimed at helping the automotive industry can be called "successful" will be difficult to determine since Treasury has never clearly stated its goals in assisting the companies. To the extent that success is defined as a return of taxpayer money, it remains somewhat unlikely that all TARP funds invested will be returned. Although the outlook is currently much better than it was when the Panel released its first report on the industry in late 2009, certain factors, including the loss locked in by the GM IPO price, must be overcome before taxpayers see a complete return of the money invested.

Even if TARP funds are fully repaid, the government's intervention in this industry may have lasting effects. In an effort to reduce the impact of its intervention in private industry, Treasury has consistently stated that it is acting as a "reluctant shareholder" and has committed to maintaining a hands-off approach to management of the companies. This position, however, may have served principally to highlight the difficult role Treasury occupied as shareholder, creditor, and regulator of the companies. Furthermore, Treasury's unwillingness to influence management even in its role as a large shareholder may ultimately have put the government's

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[391] U.S. Department of the Treasury, *Treasury Announces Public Offering of Ally Financial, Inc., TruPS* (Mar. 1, 2011) (online at www.treasury.gov/press-center/press-releases/Pages/tg1081.aspx).

[392] U.S. Department of the Treasury, *Treasury Announces Pricing of $2.7 billion of Ally TruPS* (Mar. 2, 2011) (online at www.treasury.gov/press-center/press-releases/Pages/tg1086.aspx).

[393] General Motors Company, *Form 10-K for the Fiscal Year Ended December 31, 2010*, at 142 (Mar. 1, 2011) (online at www.sec.gov/Archives/edgar/data/1467858/000119312511051462/d10k.htm).

investment at greater risk than was necessary. Finally, it is too soon to say what the TARP's ultimate impact on the automotive industry, and these companies in particular, will be. The domestic automotive industry was trending downward before the financial crisis hit and it is unclear whether the TARP will ultimately reverse that trend in the long term.

Even if these companies were to become extremely successful in the coming years, paying back the funds invested by Treasury and creating jobs and revenue for the American people, there may be lingering and potentially harmful effects from the programs. The Panel has frequently cited the potential moral hazard if large companies, and the markets in which they operate, believe that they will be rescued by the government if they falter. Although the TARP seemed originally to target only those companies whose financial operations made them a potential risk to systemic stability, the use of the TARP to support the automotive industry suggests that a company may be considered "systemically significant" merely because it employs a certain number of workers. Whether and to what extent these issues become manifest can only be determined as future events unfold.

VI. AIG

The magnitude of AIG's operations and the company's far-flung linkages across the global financial system led to multiple rounds of exceptional assistance from the government. Only Fannie Mae and Freddie Mac, institutions in government conservatorship, received more assistance during this period.[394] Accordingly, AIG's unique position in the financial system and the significant investment of taxpayer dollars required to avert the company's collapse warranted particular scrutiny from the Panel relative to other recipients of TARP assistance. In addition to the Panel's June 2010 report, which focused solely on AIG, the Panel also held a hearing to explore the rescue of AIG, its impact on the markets, and the outlook for the government's significant investment in the company.[395]

A. Background

At its peak, AIG was one of the largest and most successful companies in the world. With over $1 trillion in assets and a AAA credit rating, AIG generated over $100 billion in annual revenues, serving 76 million customers in more than 130 countries. However, the scale of and linkages across AIG's operations posed unique managerial and regulatory challenges. Accordingly, a poor risk management structure, combined with a lack of regulatory oversight, led AIG to accumulate staggering amounts of risk, especially in its Financial Products

[394] Unlike AIG, Fannie Mae and Freddie Mac were not TARP participants. See Section II.B for further discussion of the combined federal efforts.

[395] *See* Congressional Oversight Panel, *June Oversight Report: The AIG Rescue, Its Impact on Markets, and the Government's Exit Strategy* (June 10, 2010) (online at cop.senate.gov/documents/cop-061010-report.pdf) (hereinafter "2010 June Oversight Report"); Congressional Oversight Panel, *Transcript: COP Hearing on TARP and Other Assistance to AIG* (May 26, 2010) (online at cop.senate.gov/documents/transcript-052610-aig.pdf).

subsidiary, AIG Financial Products (AIGFP).[396] Among its other operations, AIGFP sold credit default swaps to investors, instruments that would pay off if certain financial securities, particularly those made up of subprime mortgages, defaulted. As long as the mortgage market remained sound and AIG's credit rating remained stellar, these instruments did not threaten the company's financial stability.

The financial crisis, however, fundamentally changed this equation. As subprime mortgages began to default, the complex securities based on those loans threatened to topple both AIG and other long-established institutions. During the summer of 2008, AIG faced increasing demands from its credit default swap customers for cash security – known as collateral calls – totaling tens of billions of dollars. These costs put AIG's credit rating under pressure, which in turn led to even greater collateral calls, creating even greater pressure on AIG's credit.

The trigger and primary cause of AIG's collapse came from inside AIGFP. This business unit was responsible for unrealized valuation losses and collateral calls that ultimately engulfed AIG. While the risk overhang in this business would have likely been sufficient to bring down the firm on its own, AIG's securities lending operations,[397] which involved securities pooled from AIG's domestic life insurance subsidiaries, contributed to a "double death spiral."[398] The problems in AIGFP exacerbated the problems in securities lending, and vice versa, as collateral demands from both sets of counterparties quickly imperiled the company's liquidity position as it struggled to meet its cash demands. Meanwhile, the company's insurance operations were incapable of generating the requisite cash either through normal operations or asset sales to fund the parent company. The threats within both of these businesses emanated from outsized

[396] AIG's product and regional diversity was predicated on maintaining an exceptional credit rating, which helped bolster its insurance operations and allowed the company to use its low cost of funds as leverage to boost non-insurance business lines, including aircraft leasing and consumer finance. AIG's longtime AAA credit rating also increased its attractiveness as a counterparty in the capital markets, helping the company further expand its product base in the United States and around the world. The product and geographic breadth of AIG's operations, however, were not matched by a coherent regulatory structure to oversee its business. The Office of Thrift Supervision (OTS), a federal agency that regulates the U.S. thrift industry, was specifically charged with overseeing the parent and it failed to do so. Whether the OTS or a more coherent regulatory framework could have prevented the build-up in risks that the company's own management team failed to recognize or understand is unlikely, but this does not obscure the point that AIG's holding company regulator had the power and the duty to spot and require the company to curtail its risk. 2010 June Oversight Report, *supra* note 395, at 21-24.

[397] Securities lending normally provides a low-risk mechanism for insurance companies and other long-term investors in the financial markets to earn modest sums of money on assets that would otherwise be sitting idle. However, rather than investing the cash collateral from borrowers in low-risk short-term securities in order to generate a modest yield, AIG invested in more speculative securities tied to the RMBS market. Consequently, these investments posed a duration mismatch (securities lending counterparties could demand a return of their collateral with very little notice) that was exacerbated by valuation losses and illiquidity in the mortgage markets that impaired AIG's ability to return cash to its securities lending counterparties. 2010 June Oversight Report, *supra* note 395, at 7, 271-272.

[398] Assessment of Marshall Huebner of Davis Polk & Wardwell (a law firm that represented FRBNY). FRBNY and Treasury briefing with the Panel and Panel staff (Apr. 12, 2010).

exposure to the deteriorating mortgage markets, owing to grossly inadequate valuation and risk controls, including insufficient capital buffers as losses and collateral calls mounted.

By early September 2008 AIG had reached a crisis point.[399] AIG sought more capital in a desperate attempt to avoid bankruptcy. When the company could not arrange its own funding, then-FRBNY President Timothy Geithner told AIG that the government would attempt to orchestrate a privately funded solution in coordination with JPMorgan Chase and Goldman Sachs. However, this approach failed to materialize, forcing the government's hand.

1. Government Assistance

In the wake of the collapse of Lehman Brothers, FRBNY abandoned its effort at a private solution, announcing an $85.0 billion taxpayer-backed Revolving Credit Facility (RCF) for AIG on September 16, 2008.[400] These funds would later be supplemented by $49.1 billion from Treasury under the TARP, as well as additional funds from FRBNY, aggregating to total assistance of $133.3 billion. At the height of the government support, AIG and its affiliates received $89.5 billion in loans from the Federal Reserve, $49.1 billion from Treasury, and $43.8 billion from the Federal Reserve to capitalize two SPVs for AIG asset purchases (i.e., Maiden Lane II and III), totaling $182.4 billion.[401] As discussed below, FRBNY underwrote the initial two rounds of government assistance (September and November 2008) before Treasury provided TARP funds for subsequent efforts by the government (November 2008 and April 2009).

The rescue of AIG was initially led by FRBNY, acting on behalf of FRB and in close consultation with Treasury. While FRB had no role in supervising or regulating AIG and was

[399] These problems did not arrive out of the blue in mid-September. AIGFP had recognized $11.1 billion in unrealized losses on CDS contracts as early as the fourth quarter of 2007. This was followed by an effort to raise capital on May 21, 2008, and an announcement on June 15, 2008 that CEO Martin Sullivan was being replaced. A further $13.5 billion in unrealized losses on RMBS and other structured securities investments was recognized in late June, and on July 29, the new CEO, Robert Willumstad, spoke with then-FRBNY President Timothy Geithner about the possibility of getting access to the Federal Reserve's discount window, an idea which was dismissed by Mr. Geithner on the premise that this would only induce further panic among AIG's creditors. Various efforts to raise capital in other ways ensued. In late August, AIG contracted with JPMorgan Chase to help develop alternatives as the market and the company's condition worsened rapidly. A detailed timeline of the events leading up to the collapse of AIG is available in Annex II of COP's June 2010 AIG report. 2010 June Oversight Report, *supra* note 395, at 58, 238-250.

[400] Revolving Credit Facility (RCF) is a credit facility that allows the company to draw and repay loans to meet its funding requirements. As a part of a broader restructuring of the Government's assistance to AIG, on November 10, 2008, the RCF ceiling was lowered to $60.0 billion and the TARP made its initial investment of $40.0 billion in preferred stock. Fed Regulatory Reform: AIG, Maiden Lane II and III, *supra* note 40.

[401] The announced assistance to AIG exceeded the cost of the EU's sovereign bailouts of Greece (€110 billion) and Ireland (€85 billion). International Monetary Fund, *Europe and IMF Agree €110 Billion Financing Plan With Greece* (May 2, 2010) (online at www.imf.org/external/pubs/ft/survey/so/2010/car050210a.htm); International Monetary Fund, *IMF Reaches Staff-level Agreement with Ireland on €22.5 Billion Extended Fund Facility Arrangement* (Nov. 28, 2010) (online at www.imf.org/external/np/sec/pr/2010/pr10462.htm). *See also* 2010 August Oversight Report, *supra* note 213.

also not lending to the company, it was the only governmental entity at the time with the legal authority to provide liquidity to the financial system in emergency and exigent circumstances.[402] Treasury had little if any authority to provide funds to AIG at the time given that EESA was not enacted until October 3, 2008.[403] Similarly, other AIG regulatory bodies, such as state insurance regulators and the OTS, possessed oversight authority but lacked any legal authority to step in and provide funds to the parent company.[404]

Through internal discussions and a dialogue with AIG and its state insurance regulators, FRB and FRBNY, with input from Treasury, ultimately chose to provide AIG with assistance after identifying the systemic risks associated with the company and contemplating the consequences of an AIG bankruptcy or partial rescue.[405] FRB determined that, in the then-existing environment, "a disorderly failure of AIG could add to already significant levels of financial market fragility and lead to substantially higher borrowing costs, reduced household wealth, and materially weaker economic performance."[406]

Secretary Geithner has stated that "[t]he decision to rescue AIG was exceptionally difficult and enormously consequential."[407] Chairman Bernanke noted that the Federal Reserve's

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[402] The Federal Reserve's ability to act was dependent upon the Board's authorization to invoke Section 13(3) of the Federal Reserve Act, which was provided on September 16, 2008. For further discussion of the legal options available to AIG in September 2008, *see* 2010 June Oversight Report, *supra* note 395, at 79-83.

[403] At the time FRBNY provided AIG with the $85 billion RCF, Treasury only provided a very short statement, with then-Secretary Paulson noting that "[t]hese are challenging times for our financial markets. We are working closely with the Federal Reserve, the SEC and other regulators to enhance the stability and orderliness of our financial markets and minimize the disruption to our economy. I support the steps taken by the Federal Reserve tonight to assist AIG in continuing to meet its obligations, mitigate broader disruptions and at the same time protect the taxpayers." U.S. Department of the Treasury, *Statement by Secretary Henry M. Paulson, Jr., on Federal Reserve Actions Surrounding AIG* (Sept. 16, 2008) (online at www.treasury.gov/press-center/press-releases/Pages/hp1143.aspx). In a subsequent letter to Timothy F. Geithner, then-president and CEO of FRBNY, Secretary Paulson stressed that "the situation at AIG presented a substantial and systemic threat" to our financial markets, and that the government's decision to assist AIG "was necessary to prevent the substantial disruption to financial markets and the economy that could well have occurred from a disorderly wind-down of AIG." Letter from Henry M. Paulson, Jr., secretary, U.S. Department of the Treasury, to Timothy F. Geithner, president and chief executive officer, Federal Reserve Bank of New York (Oct. 8, 2008) (online at www.federalreserve.gov/monetarypolicy/files/letter_aig.pdf).

[404] It is similarly worth noting that OTS, although it was AIG's primary regulatory, approached AIG from a bottom-up perspective, focused primarily on ensuring that no harm would be done to AIG's relatively small thrift institution, as opposed to taking a top-down approach that reviewed the overall safety and soundness of the holding company. Given that AIG's thrift represented well under 1 percent of the holding company's assets, this approach seems misguided at best and raises questions about whether this is the most effective way to regulate complex companies and monitor their systemic risks. 2010 June Oversight Report, *supra* note 395, at 23.

[405] FRBNY and Treasury briefing with Panel and Panel staff (Apr. 12, 2010).

[406] Board of Governors of the Federal Reserve System, *Press Release* (Sept. 16, 2008) (online at www.federalreserve.gov/newsevents/press/other/20080916a.htm) (hereinafter "Fed Press Release on AIG Assistance").

[407] House Committee on Oversight and Government Reform, Written Testimony of Timothy F. Geithner, secretary, U.S. Department of the Treasury, *The Federal Bailout of AIG*, at 3 (Jan. 27, 2010) (online at

decision-making was driven by the "prevailing market conditions and the size and composition of AIG's obligations,"[408] as well as "AIG's central role in a number of markets other firms use to manage risks, and the size and composition of AIG's balance sheet."[409] The Federal Reserve's actions, with the support of Treasury, were also informed by its judgment that an AIG collapse would have been much more severe than that of Lehman Brothers because of its global operations, substantial and varied retail and institutional customer base, and the various types of financial services it provided.[410]

a. Initial Government Assistance (Non-TARP Initiatives)

As noted, on September 16, 2008, the FRB, with the full support of Treasury, announced that, using its authority under Section 13(3) of the Federal Reserve Act,[411] it had authorized FRBNY to establish an $85.0 billion RCF for AIG.[412] This facility would be secured by AIG's assets and "assist AIG in meeting its obligations as they come due and facilitate a process under which AIG will sell certain of its businesses in an orderly manner, with the least possible disruption to the overall economy."[413] In exchange for the provision of the credit facility by the

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oversight.house.gov/images/stories/Hearings/Committee_on_Oversight/TESTIMONY-Geithner.pdf) (hereinafter "Geithner Written Testimony before House Committee on Oversight").

[408] Senate Committee on Banking, Housing, and Urban Affairs, Written Testimony of Ben S. Bernanke, chairman, Board of Governors of the Federal Reserve System, *Turmoil in U.S. Credit Markets: Recent Actions Regarding Government Sponsored Entities, Investment Banks and Other Financial Institutions*, at 2 (Sept. 23, 2008) (online at banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=bbba8289-b8fa-46a2-a542-b65065b623a1).

[409] Ben S. Bernanke, chairman, Board of Governors of the Federal Reserve System, Remarks at the National Association for Business Economics, 50th Annual Meeting, Washington, DC, *Current Economic and Financial Conditions* (Oct. 7, 2008) (online at www.federalreserve.gov/newsevents/speech/bernanke20081007a.htm).

[410] Ben S. Bernanke, chairman, Board of Governors of the Federal Reserve System, Speech at the Morehouse College, Atlanta, GA, *Four Questions About the Financial Crisis* (Apr. 14, 2009) (online at www.federalreserve.gov/newsevents/speech/bernanke20090414a.htm).

[411] The Federal Reserve Act, enacted December 23, 1919, created the Federal Reserve System. Section 13(3) of the Act gives the Board of Governors of the Federal Reserve the power to authorize any regional Federal Reserve bank to provide funding in unusual or exigent circumstances, provided that evidence is obtained that a participant is unable to secure adequate credit accommodations from other banking institutions. Board of Governors of the Federal Reserve System, *Federal Reserve Act: Section 13. Powers of Federal Reserve Banks* (online at www.federalreserve.gov/aboutthefed/section13.htm (accessed Mar. 11, 2011).

[412] Fed Press Release on AIG Assistance, *supra* note 406. *See also* Henry M. Paulson, Jr., *On the Brink* (2010).

[413] Board of Governors of the Federal Reserve System, *Report Pursuant to Section 129 of the Emergency Economic Stabilization Act of 2008: Securities Borrowing Facility for American International Group*, at 2 (Oct. 14, 2008) (online at www.federalreserve.gov/monetarypolicy/files/129aigsecborrowfacility.pdf) (hereinafter "Fed Report Pursuant to Section 129 of the EESA").

federal government, AIG provided Treasury with preferred shares and warrants that, if exercised, would give the government a 79.9 percent ownership stake in AIG.[414]

By September 30, 2008, just 14 days after FRB approved the $85.0 billion RCF, AIG had already drawn down approximately $61.3 billion of that money.[415] It became apparent that the facility would be inadequate to meet all of AIG's obligations.[416] FRB and FRBNY worried about further ratings downgrades, which would – among other adverse effects – trigger more collateral calls on AIGFP.

On October 6, 2008, FRB approved an additional Securities Borrowing Facility to allow FRBNY to lend up to $37.8 billion to AIG.[417] The lending would occur on an overnight basis, with FRBNY borrowing investment-grade fixed income securities from AIG's life insurance subsidiaries in return for cash collateral.[418] The facility allowed AIG to replenish liquidity to its securities lending program – by extending its then-outstanding lending obligations where those obligations were not rolled over or replaced by transactions with other private market participants – while giving FRBNY possession and control of the securities.

b. Additional Government Assistance (Treasury Action)

As discussed above, Treasury's participation in the initial rescue of AIG was limited to an advisory role. It is clear, however, that all actions taken by FRBNY were in close consultation with Treasury. After passage of EESA in October 2008, Treasury took on a greater role in the AIG rescue as the government expanded and restructured its aid to the company. Additional assistance was necessitated by an ongoing decline in asset values and AIG's mounting debt burden, both of which raised concern with credit rating agencies.

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[414] *Id.* at 2.

[415] AIG used these funds for the following: $35.3 billion to cover loans to AIGFP for collateral postings, Guaranteed Investment Agreements, and other maturities; $13.3 billion in capital contributions for insurance subsidiaries; $3.1 billion to repay securities lending obligations; $2.7 billion for AIG funding commercial paper maturities; $1.5 billion for intercompany loan repayment; $1.0 billion each in contributions for AIG Consumer Finance Group's subsidiaries and debt repayments; and $2.7 billion in additional borrowing. Including paid in kind interest and fees on the amount borrowed, AIG's total balance outstanding on the facility was $62.96 billion at the end of September 2008. American International Group, Inc., *Form 10-Q for the Quarterly Period Ended September 30, 2008*, at 52 (Nov. 10, 2008) (online at www.sec.gov/Archives/edgar/data/5272/000095012308014821/y72212e10vq.htm).

[416] Fed Report Pursuant to Section 129 of the EESA, *supra* note 413, at 2.

[417] Fed Report Pursuant to Section 129 of the EESA, *supra* note 413, at 2. The Federal Reserve Board publicly announced the Securities Borrowing Facility on October 8, 2008, the day that FRBNY established it. *See* Board of Governors of the Federal Reserve System, *Press Release* (Oct. 8, 2008) (online at www.federalreserve.gov/newsevents/press/other/20081008a.htm).

[418] These securities were previously lent by AIG's insurance subsidiaries to third parties. The maximum amount of credit that FRBNY could extend at any one time was $37.8 billion. The Board made this authorization under Section 13(3) of the Federal Reserve Act. Fed Regulatory Reform: AIG, Maiden Lane II and III, *supra* note 40.

The credit rating agencies advised AIG that the company's upcoming November 10 report of third quarter earnings results – which would reveal a loss of $24.5 billion[419] – would likely trigger a ratings downgrade in the absence of a "parallel announcement of solutions to its liquidity problems."[420] AIG was having difficulty selling assets to pay down debt from the RCF and meet anticipated liquidity needs, particularly in light of continuing collateral calls under its credit default swap contracts.[421] Consequently, in the days leading up to AIG's earnings announcement, the Federal Reserve and Treasury hurried to put together additional financial assistance from the federal government that would address AIG's growing debt burden.

This resulted in the November 10, 2008 announcement by FRBNY and Treasury of a comprehensive multi-pronged plan to address AIG's liquidity issues, create a "more durable capital structure," and provide AIG with more time and increased flexibility to sell assets and repay the government.[422] Significantly, Treasury's TARP equity facilities allowed AIG to access capital without drawing on credit lines, avoiding an increase in the company's outstanding debt (and thus further pressure on its credit ratings).[423] As Secretary Geithner later stated, "[a]voiding any downgrade of AIG's credit rating was absolutely essential to sustaining the firm's viability and protecting the taxpayers' investment."[424]

As part of the announcement, Treasury said it planned to use $40 billion of TARP money to purchase newly issued AIG perpetual preferred shares and warrants to purchase AIG common stock;[425] this initiative was known as the Systemically Significant Failing Institutions program

[419] Of which $19 billion was due to the securities lending program and AIGFP's CDS exposure. Board of Governors of the Federal Reserve System, *Report Pursuant to Section 129 of the Emergency Economic Stabilization Act of 2008: Restructuring of the Government's Financial Support to the American International Group, Inc. on November 10, 2008*, at 4 (Nov. 10, 2008) (online at federalreserve.gov/monetarypolicy/files/129aigrestructure.pdf).

[420] House Committee on Oversight and Government Reform, Written Testimony of Thomas C. Baxter, executive vice president and general counsel, Federal Reserve Bank of New York, *The Federal Bailout of AIG*, at 8-9 (Jan. 27, 2010) (online at oversight.house.gov/images/stories/Hearings/pdfs/20100127baxter.pdf); FRBNY and Treasury briefing with Panel and Panel staff (Apr. 12, 2010).

[421] Congressional Oversight Panel, Joint Written Testimony of Thomas C. Baxter, Jr., general counsel and executive vice president of the legal group, and Sarah Dahlgren, executive vice president of special investments management and AIG monitoring, Federal Reserve Bank of New York, *COP Hearing on TARP and Other Assistance to AIG*, at 9 (May 26, 2010) (online at cop.senate.gov/documents/testimony-052610-baxter.pdf).

[422] Board of Governors of the Federal Reserve System, *Federal Reserve Board and Treasury Department Announce Restructuring of Financial Support to AIG* (Nov. 10, 2008) (online at www.federalreserve.gov/newsevents/press/other/20081110a.htm).

[423] FRBNY and Treasury briefing with Panel and Panel staff (Apr. 12, 2010).

[424] Geithner Written Testimony before House Committee on Oversight, *supra* note 407, at 8.

[425] The perpetual preferred shares were also known as the Series D Preferred Stock Purchase Agreement. American International Group, Inc., *U.S. Treasury, Federal Reserve and AIG Establish Comprehensive Solution for AIG*, at 1 (Nov. 10, 2008) (online at media.corporate-ir.net/media_files/irol/76/76115/reports/Restructuring10Nov08LTR.PDF) (hereinafter "U.S. Treasury & Federal Reserve Craft Solution for AIG").

(SSFI), and AIG was its only beneficiary. At the same time, FRBNY reduced AIG's line of credit under the RCF to $60 billion from $85 billion. FRBNY also announced that it was restructuring the facility by extending the loan from two to five years and lowering the interest rate and fees charged.[426]

Also on that day, Treasury and FRB announced a major initiative to increase and restructure federal assistance to AIG; FRBNY would be authorized to create two SPVs – Maiden Lane II and Maiden Lane III – to purchase troubled assets from AIG and its subsidiaries. Maiden Lane II was designed to address AIG's liquidity problems by purchasing RMBS assets from its securities lending collateral portfolio.[427] Maiden Lane III was authorized to provide up to $30.0 billion ($24.3 billion from FRBNY and $5.0 billion from AIG) to purchase the collateralized debt obligations (held by the firm's counterparties) underlying AIG's credit swap contracts.[428]

Although Maiden Lane II, Maiden Lane III, and Treasury's initial TARP capital infusion helped relieve AIG's financial pressures, asset valuations continued to decline, and AIG's losses increased through the end of 2008.[429] These losses raised the prospect of another round of rating agency downgrades and collateral calls that would require further cash postings from AIG. In response, the Federal Reserve and Treasury announced on March 2, 2009, that they would again restructure their existing aid to AIG and provide additional assistance in order to stabilize AIG and protect financial markets and the existing investment.[430]

Under the March 2009 restructuring, Treasury substantially increased its involvement in AIG, with the goal of reducing AIG's leverage, or debt load.[431] Treasury announced a new five-

[426] *See* Fed Regulatory Reform: AIG, Maiden Lane II and III, *supra* note 40.

[427] Initially $22.5 billion was authorized, of which $19.5 billion was lent in order to purchase $39.3 billion (at par value) of RMBS at the then-current market price of $20.8 billion. *See* 2010 June Oversight Report, *supra* note 395, at 87-88; Board of Governors of the Federal Reserve System, *Monthly Report on Credit and Liquidity Programs and the Balance Sheet*, at 22 (Jan. 2011) (online at www.federalreserve.gov/monetarypolicy/files/monthlyclbsreport201101.pdf) (hereinafter "Fed Monthly Report on Credit, Liquidity Programs, and Balance Sheet").

[428] *See* 2010 June Oversight Report, *supra* note 395, at 91; Fed Monthly Report on Credit, Liquidity Programs, and Balance Sheet, *supra* note 427, at 23.

[429] The company reported a net loss of $61.7 billion for the fourth quarter of 2008 on March 2, 2009, capping off a year in which AIG incurred approximately $99 billion in total net losses. 2010 June Oversight Report, *supra* note 395, at 94.

[430] *See* U.S. Department of the Treasury, *U.S. Treasury and Federal Reserve Board Announce Participation in AIG Restructuring Plan* (Mar. 2, 2009) (online at www.treasury.gov/press-center/press-releases/Pages/tg44.aspx). *See also* House Committee on Financial Services, Written Testimony of William C. Dudley, president and chief executive officer, Federal Reserve Bank of New York, *Oversight of the Federal Government's Intervention at American International Group*, at 5 (Mar. 24, 2009) (online at www.house.gov/apps/list/hearing/financialsvcs_dem/hr03240923.shtml).

[431] FRBNY also took several actions at this time with respect to the terms and structure of the RCF. First, it announced the creation of SPVs for American International Assurance Company, Limited (AIA) and American Life

year standby $29.8 billion TARP preferred stock facility, which would allow AIG to make draw-downs as needed.[432] Treasury also exchanged its November 2008 cumulative preferred stock interest for noncumulative preferred stock, which more closely resembles common stock and is, therefore, viewed more favorably as a source of funding by the credit rating agencies.[433]

These March 2009 announcements represented the final round of government support prior to the publication of the Panel's June 2010 report on AIG.

B. Summary of COP Report and Findings[434]

1. AIG Changed a Fundamental Market Relationship

By providing a complete bailout that called for no shared sacrifice among AIG and its creditors, FRBNY and Treasury fundamentally changed the rules of America's financial marketplace.

U.S. policy has long drawn a distinction between two different types of investments. The first type is "safe" products, such as checking accounts, which are highly regulated and are intended to be accessible and relatively risk free to even unsophisticated investors. Banks that offer checking accounts must accept a substantial degree of regulatory scrutiny, offer standardized features, and pay for FDIC insurance on their deposits. In return, the bank and its customers benefit from an explicit government guarantee: within certain limitations, no checking account in the United States will be allowed to lose even a penny of value.

By contrast, "risky" products, which are more loosely regulated, are aimed at more sophisticated players. These products often offer much higher profit margins for banks and much higher potential returns to investors, but they have never benefited from any government guarantee.

Insurance Company (ALICO), two of AIG's foreign insurance company subsidiaries, through which AIG would contribute the equity of AIA and ALICO in exchange for preferred and common interests in the SPVs. FRBNY received preferred interests of $16 billion in the AIA SPV and $9 billion in the ALICO SPV. AIG would then transfer the preferred interests in the SPVs to FRBNY in exchange for a $25 billion reduction in the outstanding balance of the RCF, to $35 billion. 2010 June Oversight Report, *supra* note 395, at 95, 97.

[432] The total amount of credit made available under the second TARP intervention was $30.0 billion, which included $165 million dedicated for retention bonuses of AIGFP employees. *See* 2010 June Oversight Report, *supra* note 395, at 95; Treasury Transactions Report, *supra* note 36.

[433] Non-cumulative preferred stock is more like common stock largely because its dividends are non-cumulative, which means missed dividend payments do not accumulate for later payment. At the time, the $1.6 billion in dividends AIG did not pay were capitalized and added as an obligation to be repaid prior to the company redeeming the newly issued Series E preferred stock. U.S. Treasury & Federal Reserve Craft Solution for AIG, *supra* note 425, at 1; Treasury Transactions Report, *supra* note 36.

[434] For a more complete discussion of the Panel's findings, see Section K and the conclusions of the Panel's June 2010 oversight report. 2010 June Oversight Report, *supra* note 395, at 230-235.

Before the AIG bailout, the derivatives market appeared to fall cleanly in the second category. Yet by bailing out AIG and its counterparties, the federal government signaled that the entire derivatives market – which had been explicitly and completely deregulated by Congress through the Commodities Futures Modernization Act[435] – would now benefit from the same government safety net provided to fully regulated financial products. In essence, the government distorted the marketplace by transforming highly risky derivative bets into fully guaranteed transactions, with the American taxpayer standing as guarantor.

The Panel believes that the moral hazard problem unleashed by making whole AIG's counterparties in unregulated, unguaranteed transactions undermined the credibility of specific efforts at addressing the financial crisis that followed, including the entirety of the TARP, as well as America's system of financial regulation.

2. The Powerful Role of Credit Rating Agencies

Considerations about credit rating agencies were central to FRBNY's, and later Treasury's, decision to assist AIG, and shaped many of the decisions that had to be made during the course of the rescue.[436] Indeed, it is no exaggeration to say that concerns about rating downgrades drove government policy in regard to AIG.

As the market's most widely followed judges of financial soundness, credit rating agencies wield immense power, whether they consciously use it or not. In this case, government decision makers felt compelled to follow a particular course of action out of a fear of what credit rating agencies might do if they acted otherwise. The fact that this small group of private firms was able to command such deference from the federal government raises questions about their role within the marketplace and how effectively and accountably they have wielded their power.[437]

3. The Options Available to the Government[438]

FRBNY and Treasury justify AIG's extraordinary bailout by saying that they faced a "binary choice" between allowing AIG to fail, which would have resulted in chaos, or rescuing

[435] The Commodities Futures Modernization Act was passed by Congress and signed into law by President Bill Clinton in December 2000. For a further discussion of AIG's regulatory scheme, *see* 2010 June Oversight Report, *supra* note 395, at 19-24.

[436] *See* 2010 June Oversight Report, *supra* note 395, at 52-53, 150, and 230-231.

[437] Credit rating agencies are private companies subject to the appropriate registration and approval of the SEC as nationally recognized statistical rating organizations (NRSROs). A complete list of NRSROs – including Moody's Investor Services, Standard & Poor's Ratings Services, and Fitch – can be found on the SEC's website. *See* U.S. Securities and Exchange Commission, *Commission Orders Granting NRSRO Registration* (online at www.sec.gov/divisions/marketreg/ratingagency.htm#nrsroorders) (accessed March 4, 2011).

[438] For a more complete discussion of the Panel's findings, see Section F.1.b of the Panel's June 2010 oversight report. 2010 June Oversight Report, *supra* note 395, at 139-164.

the entire institution, including all of its business partners.[439] The Panel was skeptical of this reasoning. The evidence suggested that government had more than two options at its disposal, and that some of the alternatives would not have involved payment in full of the counterparties and other AIG creditors.

In interviews and meetings with participants on all sides in these events, the Panel identified a key decision point: the period between Sunday afternoon, September 14, 2008, and Tuesday morning, September 16, 2008. This was the period during which FRBNY sought to encourage a private effort to lend sufficient funds to AIG to address its liquidity crisis, while at the same time trying to determine what the consequences would be of the bankruptcy of AIG's holding company.

The Panel is concerned that the government put the effort to organize a private AIG rescue in the hands of only two banks – banks with severe conflicts of interest given that they would have been among the largest beneficiaries of a taxpayer bailout.[440] By failing to bring in other players, the government neglected to use all of its negotiating leverage. There is no doubt that a private rescue would have been difficult, perhaps impossible, to arrange, but the Panel concluded that if the effort had succeeded, the impact on market confidence would have been extraordinary, particularly for a solution that avoided putting taxpayer dollars at risk.

Further, even after the Federal Reserve and Treasury had decided that a public rescue was the only choice, they still could have pursued options other than paying every creditor and every counterparty at 100 cents on the dollar. Arrangements in which different creditors accept varying degrees of loss are common in bankruptcy proceedings or other negotiations when a distressed company is involved, and in this case the government failed to use its significant negotiating leverage to extract such compromises. As Martin Bienenstock of Dewey & LeBoeuf testified to the Panel, "FRBNY was saving AIG with taxpayer funds due to the losses sustained by the business divisions transacting business with these creditor groups, and a fundamental principle of workouts is shared sacrifice, especially when creditors are being made better off than they would be if AIG were left to file bankruptcy." As such, "it was very plausible to have obtained material creditor discounts from some creditor groups as part of that process without undermining its overarching goal of preventing systemic impairment of the financial system and without compromising the Federal Reserve Board's principles."[441]

[439] According to Thomas Baxter Jr., FRBNY's general counsel, the government officials faced "a binary choice to either let AIG file for bankruptcy or to provide it with liquidity." 2010 June Oversight Report, *supra* note 395, at 69.

[440] 2010 June Oversight Report, *supra* note 395, at 74-75.

[441] *See* Congressional Oversight Panel, Written Testimony of Martin J. Bienenstock, partner and chair of business solutions and government department, Dewey & LeBoeuf, *COP Hearing on TARP and Other Assistance to AIG*, at 1, 3 (May 26, 2010) (online at cop.senate.gov/documents/testimony-052610-bienenstock.pdf).

Ultimately, it is impossible to stand in the shoes of those who had to make decisions during those hours, to weigh the risks of accelerated systemic collapse against the profound need for AIG and its counterparties to share in the costs and the risks of that rescue, and to weigh those considerations not today in an atmosphere of relative calm, but in the middle of the night in the midst of a financial collapse. All the Panel can do is observe the costs to the public's confidence in our public institutions from the failure to require that AIG's counterparties in the financial sector share the burden of the AIG rescue.

4. The Government's Authorities in a Financial Crisis

The Federal Reserve and Treasury have explained the haphazard nature of the AIG rescue by noting that they lacked specific tools to handle the collapse of such a complex, multisector, multinational financial corporation.[442] To some extent this argument is a red herring: the relevant authorities should have monitored AIG more closely, discovered its vulnerability earlier, and sought any needed new authorities from Congress in advance of the crisis. Even after AIG began to unravel, the Federal Reserve and Treasury could have used their existing authority more aggressively.

5. Conflicts

The AIG rescue illustrated the tangled nature of relationships on Wall Street. People from the same small group of law firms, investment banks, and regulators appear in the AIG saga (and many other aspects of the financial crisis) in many roles, and sometimes representing different and conflicting interests.[443] The lawyers who represented banks trying to put together a rescue package for AIG became the lawyers to FRBNY, shifting sides in a matter of minutes. Those same banks appear first as advisors, then potential rescuers, then as counterparties to several different kinds of agreements with AIG, and thereby as the direct and indirect beneficiaries of the government rescue. Many of the regulators and government officials (in both administrations) are former employees of the entities they oversee or that benefited from the rescue.

The government justified its decision to draw from a limited pool of lawyers and advisors by citing the need for expertise from Wall Street insiders familiar with AIG. Even so, the government entities should have recognized that at a time when the American taxpayer was being asked to bear extraordinary burdens, they had a special responsibility to ensure that their actions did not undermine public trust by failing to address all potential conflicts and the appearance of conflicts that could arise. The need to address conflicts and the appearance of conflicts by government actors, counterparties, lawyers, and all other agents involved in this

[442] See Section B.2 of the Panel's June 2010 oversight report for an overview of the company's operations and regulatory framework. *See* 2010 June Oversight Report, *supra* note 395, at 19-24.

[443] *See* 2010 June Oversight Report, *supra* note 395, at 72-76.

drama was wrongly treated largely as a detail that could be subjugated to the primary goal of keeping the financial system up and running.

Even setting aside concerns about actual or apparent conflicts of interest, the limited pool of people involved in AIG's rescue raises a broader concern. Everyone involved in AIG's rescue had the mindset of either a banker or a banking regulator. The discussions did not include other voices that might have brought different ideas and a broader view of the national interest. It is unsurprising, then, that the American public remains convinced that the rescue was designed by Wall Street to help fellow Wall Streeters, with less emphasis given to protecting the public trust.

The Panel recognized that government officials were confronting an immediate crisis and had to act in haste. Yet it is at moments of crisis that the government has its most acute obligation to protect the public interest by avoiding even the appearance of impropriety. As Mr. Baxter of FRBNY told the Panel, "[i]f we should go through this again, we [would] need to be more mindful of how our actions can be perceived. The lesson learned for me personally here is that we need to be mindful of that and perhaps change our behavior as a result of the perception, not the actuality."[444]

C. Panel Recommendations

1. Government Exit Strategy/Equity Market Risk Mitigation

In its June 2010 report, the Panel recommended that Treasury should explore options aimed at accelerated sales of smaller portions of its stake in AIG sooner rather than later, to help mitigate longer term equity market risks, and transfer some of the risk from the taxpayer to the public markets.[445] While the Panel recognized the danger in a prolonged investment strategy, political expediency should not trump the opportunity for taxpayers to realize as much value as possible from their investment. Thus, the Panel cautioned against a rapid exit in the absence of clearly defined parameters for achieving the maximum risk-adjusted return to the taxpayer. Nonetheless, given the significant equity market and company execution risks involved in a long-term, back-end-loaded exit strategy, the Panel noted that the government's exposure to AIG should be minimized (and shifted to private shareholders) where possible via accelerated sales of a small minority of the government's holdings, provided this could be done with limited harm to the share price. In this sense, the interests of AIG's government and private shareholders would be aligned, as the taxpayer would be best served by enhancing value before a broader exit strategy via the public markets could be executed.

[444] Congressional Oversight Panel, Testimony of Thomas C. Baxter, Jr., general counsel and executive vice president of the legal group, Federal Reserve Bank of New York, *COP Hearing on TARP and Other Assistance to AIG*, at 102 (May 26, 2010) (online at cop.senate.gov/documents/transcript-052610-aig.pdf).

[445] 2010 June Oversight Report, *supra* note 395, at 202.

2. Status of COP Recommendations

The Panel's recommendation that Treasury should explore options aimed at reducing its equity market exposure to AIG remains something of a work in progress.[446] In September 2010, AIG and Treasury reached an agreement to restructure AIG's obligations under the TARP, in which Treasury exchanged its preferred stock for 1.1 billion shares of AIG common stock on January 14, 2011 (discussed in more detail below). While AIG's improving outlook facilitated this announcement, these actions have not mitigated long-term equity market risk from Treasury's holdings. Although this recapitalization temporarily increases Treasury's equity market exposure to AIG (given the conversion of its preferred equity stake to common equity), the transaction does provide a path for the government to pursue share sales in the public markets that would reduce its exposure, potentially as soon as the second quarter of 2011. The assumption of FRBNY's preferred interest in AIG SPVs serves to increase Treasury's overall exposure to AIG, but via a mechanism that fully collateralizes this exposure, without assuming additional equity market risks.

D. Updates

1. Recent Developments

On September 30, 2010, AIG, Treasury, FRBNY, and the AIG Credit Facility Trust (Trust) announced their intent to enter into a series of transactions that would ultimately allow the government to exit AIG.[447] The timing and substance of this announcement clarifying the government's exit strategy was generally consistent with the expectations outlined in the Panel's June report.[448] The aggregate effect of this agreement, which was subsequently executed, was to repay all outstanding obligations to FRBNY, consolidate AIG's government ownership with Treasury, and provide the government with a pathway to monetize its holdings. The integrated steps involved in the execution of AIG's recapitalization plan on January 14, 2011 – the most

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[446] 2010 June Oversight Report, *supra* note 395, at 170.

[447] 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). This agreement was supplemented by a master transaction agreement on December 8, 2010. American International Group, Inc., *AIG Files Master Agreement on Recapitalization Plan* (Dec. 8, 2010) (online at ir.aigcorporate.com/External.File?t=2&item=g7rqBLVLuv81UAmrh20Mp3rr7lYtG5aXEd/NUIhOaDRM1TgAKUfcNQqWGNGO+veYq18TQTV4xM1BjE/CQAuJPw==). While largely similar to the recapitalization plan released on September 30, it contains two new pieces of material information. First, the terms of Treasury's role as a selling shareholder have been somewhat clarified. Treasury has the right to participate in any registered stock offering and can demand twice in a year that AIG effect a registered market offering of shares after the earlier of August 15, 2011 or AIG's completion of a primary equity offering. Treasury can also dictate the terms and frequency of any sales of new AIG shares until the government's ownership falls to under 33 percent. Finally, the agreement provides additional clarity on future AIG capital raises. AIG may raise up to $3 billion of common equity by August 15, 2011 (and can raise an additional $4 billion with Treasury's consent, for a total of $7 billion in additional equity).

[448] 2010 June Oversight Report, *supra* note 395, at 222.

significant being the repayment of FRBNY in full and Treasury exchanging its preferred equity interests for common stock – are outlined below.[449]

- Repayment and Termination of the FRBNY Credit Facility: FRBNY, which has repayment priority over Treasury, received approximately $21 billion in cash to redeem its outstanding balance and accrued interest and fees. AIG used funds from asset sales – the IPO of American International Assurance Company (AIA) and sale of American Life Insurance Company (ALICO) – to facilitate the repayment of amounts owed under the FRBNY Credit Facility.[450]

- Repurchase and Exchange of SPV Preferred Interests: AIG drew down an additional $20.3 billion in TARP funds (Series F) towards the repurchase of SPV interests from FRBNY. In consideration for this new funding, AIG transferred $20.3 billion of FRBNY's former SPV Preferred interests to Treasury.[451]

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[449] American International Group, Inc., *AIG Executes Plan to Repay U.S. Government* (Jan. 14, 2011) (online at ir.aigcorporate.com/External.File?t=2&item=g7rqBLVLuv81UAmrh20Mp31WhknkljlRVwaPlA8x40UnwpUYeTWqNeJMSo+ju5ThNwA5rr5tEDobelzmAXWiow==); U.S. Department of the Treasury, *Treasury Announces Completion of the American International Group Recapitalization Transaction* (Jan. 14, 2011) (online at www.treasury.gov/press-center/press-releases/Pages/tg1024.aspx); Federal Reserve Board of New York, *New York Fed Ends AIG Assistance with Full Repayment* (Jan. 14, 2011) (online at www.newyorkfed.org/newsevents/news/aboutthefed/2011/oa110114.html).

[450] As described in a regulatory filing AIG made with the SEC on January 14, 2011: "[a]t the Closing, AIG repaid FRBNY approximately $21 billion in cash, representing complete repayment of all amounts owing under the Credit Agreement (as amended, the "FRBNY Credit Facility"), dated as of September 22, 2008, and the FRBNY Credit Facility was terminated. The funds for the repayment came from the net cash proceeds from AIG's sale of 67 percent of the ordinary shares of AIA Group Limited ("AIA") in its initial public offering and from AIG's sale of American Life Insurance Company ("ALICO"). These funds were loaned to AIG, in the form of secured limited recourse debt (the "SPV Intercompany Loans"), from the SPVs that hold the proceeds of the AIA IPO and the ALICO sale. The SPV Intercompany Loans are secured by pledges by AIG and certain of its subsidiaries of, among other collateral, certain of their equity interests in Nan Shan Life Insurance Company, Ltd. ("Nan Shan"), AIG Star Life Insurance Co. Ltd. ("AIG Star"), AIG Edison Life Insurance Company ("AIG Edison") and International Lease Finance Corporation (collectively with Nan Shan, AIG Star and AIG Edison, the "Designated Entities"), as well as the remaining AIA ordinary shares held by the AIA SPV and certain of the MetLife, Inc. securities received from the sale of ALICO held by the ALICO SPV. The proceeds from any sale or disposition of the equity of such Designated Entities and such other assets will be used to repay the SPV Intercompany Loans and the recourse on the SPV Intercompany Loans is generally limited to foreclosing on the pledged collateral, except to the extent of the fair market value of equity interests of the Designated Entities that cannot be pledged because of regulatory or tax considerations." American International Group, Inc., *Form 8-K for the Period Ended January 14, 2011* (Jan. 14, 2011) (online at www.sec.gov/Archives/edgar/data/5272/000095012311003061/y88987e8vk.htm) (hereinafter "AIG: Form 8-K Period Ended January 14, 2011").

[451] As outlined in a company filing on January 14, 2011: "[a]t the Closing, AIG drew down approximately $20 billion (the "Series F Closing Drawdown Amount") under the Treasury Department's commitment (the "Treasury Department Commitment") pursuant to the Securities Purchase Agreement, dated as of April 17, 2009 (the "Series F SPA"), between AIG and the Treasury Department relating to AIG's Series F Fixed Rate Non-Cumulative Perpetual Preferred Stock, par value $5.00 per share (the "Series F Preferred Stock"). The Series F Closing Drawdown Amount was the full amount remaining under the Treasury Department Commitment, less $2 billion that AIG designated to be available after the Closing for general corporate purposes under a commitment

- Exchange of AIG Preferred for Common Stock: In the aggregate, Treasury converted $47.5 billion in TARP preferred stock at $45 per share for an equivalent amount of equity (representing approximately 1.1 billion shares).[452] Additionally, the Trust's Series C preferred shares were converted into approximately 563 million shares of

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relating to AIG's Series G Cumulative Mandatory Convertible Preferred Stock, par value $5.00 per share (the "Series G Preferred Stock"), described below (the "Series G Drawdown Right"). The right of AIG to draw on the Treasury Department Commitment (other than the Series G Drawdown Right) was terminated.

AIG applied certain proceeds from asset sales to retire a portion of FRBNY's preferred interests in the ALICO SPV and used the Series F Closing Drawdown Amount to repurchase the remainder of FRBNY's preferred interests in the ALICO SPV and all of FRBNY's preferred interests in the AIA SPV ("SPV Preferred Interests"). AIG transferred the SPV Preferred Interests to the Treasury Department as part of the consideration for the exchange of the Series F Preferred Stock, described below.

Under the Master Transaction Agreement, the Treasury Department, so long as it holds SPV Preferred Interests, will have the right, subject to existing contractual restrictions, to require AIG to dispose of the remaining AIA ordinary shares held by the AIA SPV and certain of the MetLife, Inc. securities received from the sale of ALICO held by the ALICO SPV. The consent of the Treasury Department, so long as it holds SPV Preferred Interests, will also be required for AIG to take specified significant actions with respect to the Designated Entities, including initial public offerings, sales, significant acquisitions or dispositions and incurrence of significant levels of indebtedness. If any SPV Preferred Interests are outstanding on May 1, 2013, the Treasury Department will have the right to compel the sale of all or a portion of one or more of the Designated Entities on terms that it will determine.

As a result of these transactions, the SPV Preferred Interests will no longer be considered permanent equity on AIG's balance sheet, and will be classified as redeemable noncontrolling interests in partially owned consolidated subsidiaries." AIG: Form 8-K Period Ended January 14, 2011, *supra* note 450.

[452] This figure includes $40.0 billion of Series E preferred stock converted to equity and $7.5 billion of Series F preferred stock converted to equity. Treasury Transactions Report, *supra* note 36.

As outlined in a company filing on January 14, 2011: "[a]t the Closing, AIG and the Treasury Department amended and restated the Series F SPA to provide for the issuance of 20,000 shares of Series G Preferred Stock by AIG to the Treasury Department. The Series G Preferred Stock initially has a liquidation preference of zero, which will increase by the amount of any funds drawn down by AIG under the Series G Drawdown Right from the Closing until March 31, 2012 (or the earlier termination of the Series G Drawdown Right).

At the Closing (i) the shares of AIG's Series C Perpetual, Convertible, Participating Preferred Stock, par value $5.00 per share (the "Series C Preferred Stock"), held by the Trust were exchanged for 562,868,096 shares of AIG common stock, par value $2.50 per share ("AIG Common Stock"), which were subsequently transferred by the Trust to the Treasury Department; (ii) the shares of AIG's Series E Fixed Rate Non-Cumulative Perpetual Preferred Stock, par value $5.00 per share (the "Series E Preferred Stock"), held by the Treasury Department were exchanged for 924,546,133 shares of AIG Common Stock; and (iii) the shares of the Series F Preferred Stock held by the Treasury Department were exchanged for (a) the SPV Preferred Interests, (b) 20,000 shares of the Series G Preferred Stock, and (c) 167,623,733 shares of AIG Common Stock. As a result of the Recapitalization, the Treasury Department holds 1,655,037,962 shares of newly issued AIG Common Stock, representing ownership of approximately 92 percent of the outstanding AIG Common Stock, and 20,000 shares of Series G Preferred Stock. After this share exchange and distribution were completed, the Trust terminated pursuant to the terms and conditions of the Trust Agreement.

The issuance of AIG Common Stock in connection with the exchange for the Series C Preferred Stock, the Series E Preferred Stock and the Series F Preferred Stock will significantly affect the determination of net income attributable to common shareholders and the weighted average shares outstanding, both of which are used to compute earnings per share." AIG: Form 8-K Period Ended January 14, 2011, *supra* note 450.

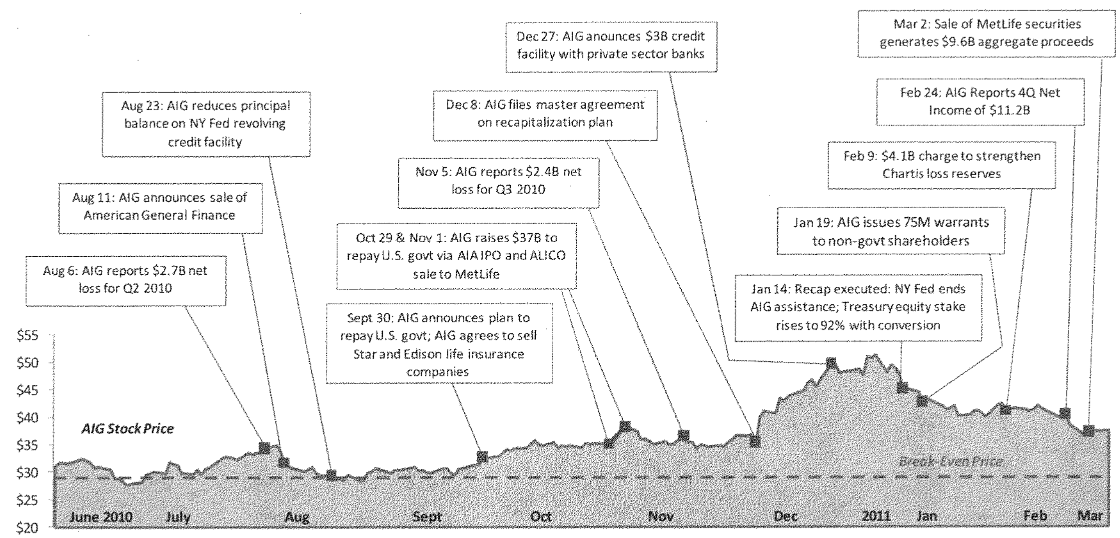
AIG common equity. These conversions resulted in Treasury holding a 92.1 percent equity stake in AIG.

- Warrants to Purchase Common Stock: AIG distributed 10-year warrants on 75 million shares of AIG common stock with an exercise price of $45.00 per share to the existing public shareholders. These warrants, aimed at softening the significant dilution from the government's common share conversion, were not provided to Treasury or other government shareholders.[453]

Figure 27 below provides a timeline of recent AIG-related announcements following the publication of our June 2010 report.

[453] As described in a company filing on January 14, 2011: "[a]s part of the Recapitalization, on January 19, 2011, AIG will distribute to the holders of record of AIG Common Stock on January 13, 2010, by means of a dividend, 10-year warrants to purchase a total of up to 75 million shares of AIG Common Stock at an exercise price of $45.00 per share. None of the Trust, the Treasury Department or the FRBNY will receive these warrants. For more information on these warrants, see AIG's Current Reports on Form 8-K dated January 7, 2011 and January 12, 2011." AIG: Form 8-K Period Ended January 14, 2011, *supra* note 450.

Figure 27: AIG Timeline



The composition of the government's assistance to AIG has evolved from debt to equity as the company's financial condition has changed. Initially, the Federal Reserve was the only government entity to provide assistance to AIG, which was limited to large lines of credit. Following the enactment of EESA, Treasury authorized $70 billion of preferred equity facilities for AIG. Since TARP assistance was in the form of preferred equity, it did not count against the company's outstanding debt, thereby providing a more attractive form of capital which helped improve AIG's leverage, or risk levels, in the eyes of the rating agencies. Currently, the only debt instruments outstanding as part of the government rescue of AIG are the loans to the Maiden Lane II and Maiden Lane III SPVs, which are not AIG liabilities. At present, Treasury holds exclusively common or preferred equity interests in AIG.

Figure 28: Government Assistance to AIG Outstanding *(millions of dollars)*

	November 5, 2008	June 24, 2010[454]	March 8, 2011[455]
FRBNY			
Revolving Credit Facility[456]	$80,257	$25,756	$0
Maiden Lane II[457]	N/A	14,668	12,832
Maiden Lane III[458]	N/A	16,290	13,008
Preferred interest in AIA Aurora LLC	N/A	16,453	0
Preferred interest in ALICO SPV	N/A	9,255	0
Total FRBNY	**80,257**	**82,422**	**25,840**
TARP			
Series E Non-Cumulative Preferred Stock (converted to common equity)[459]	N/A	40,000	40,000

[454] *See* Board of Governors of the Federal Reserve System, *Federal Reserve Statistical Release H.4.1: Factors Affecting Reserve Balances* (June 24, 2010) (online at www.federalreserve.gov/releases/h41/20100624/) (hereinafter "June 2010 Fed Statistical Release H.4.1").

[455] Treasury Transactions Report, *supra* note 36.

[456] Board of Governors of the Federal Reserve System, *Data Download Program* (Instrument Used: Factors Affecting Reserve Balances, Credit extended to American International Group, Inc., Net: week average) (online at www.federalreserve.gov/datadownload/).

[457] Outstanding principal amount of loan extended by FRBNY (including accrued and payable interest to FRBNY). Board of Governors of the Federal Reserve System, *Federal Reserve Statistical Release H.4.1: Factors Affecting Reserve Balances* (June 24, 2010 and Mar. 10, 2011) (online at www.federalreserve.gov/releases/h41/). On March 11, 2011, FRBNY announced that AIG had formally offered to purchase the assets in Maiden Lane II. There was no further news regarding the offer at the time this report was published. *See* Federal Reserve Bank of New York, *Statement Related to Offer by AIG to Purchase Maiden Lane II LLC* (Mar. 11, 2011) (online at www.newyorkfed.org/newsevents/news/markets/2011/an110311.html).

[458] Outstanding principal amount of loan extended by FRBNY (including accrued and payable interest to FRBNY). June 2010 Fed Statistical Release H.4.1, *supra* note 454; Board of Governors of the Federal Reserve System, *Federal Reserve Statistical Release H.4.1: Factors Affecting Reserve Balances* (Mar. 10, 2011) (online at www.federalreserve.gov/releases/h41/20110310/) (hereinafter "March 2011 Fed Statistical Release H.4.1").

[459] The initial direct TARP assistance was the $40 billion purchase of Series D (cumulative) preferred stock. AIG missed $1.6 billion of dividend payments on this investment. Consequently, when the Series D preferred stock was converted to Series E non-cumulative preferred stock in April 2009, the missed dividends were

Series F Non-Cumulative Preferred Stock[460]	N/A	[461]7,543	[462]18,763
Total TARP	**N/A**	**47,543**	**58,763**
Total Assistance	**$80,257**	**$129,965**	**$84,609**

As summarized above, with the execution of AIG's recapitalization plan, FRBNY retired its claims on the company, centralizing the remaining government holdings in AIG with Treasury in the form of AIG common stock and preferred interests in certain AIG assets through SPVs. While Treasury increased its assistance to AIG, the incremental commitment to each SPV is fully secured, putting the government ahead of other creditors in the (unlikely) event of a default on these obligations. More broadly, a key hurdle to the ultimate government exit has been removed as a result of the conversion of its claims to more liquid, but higher risk common stock, paving the way for an eventual exit via share sales in the public equity market. The government's exit is expected to parallel the emergence of AIG as a standalone A-rated credit, no longer reliant on government support to sustain its credit rating at a level sufficient for independent access to private capital market funding.

Treasury now owns 1.655 billion shares of AIG's common stock, representing 92 percent of the company's outstanding shares.[463]

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capitalized as part of the newly issued Series E preferred shares. Prior to the conversion to equity, the Series E shares could not be redeemed by AIG until the $1.6 billion in capitalized dividends were repaid. Following the conversion of the preferred interests to equity, however, the claims to the capitalized interest were also exchanged, thereby eliminating the potential for a payment from the missed dividends. Treasury Transactions Report, *supra* note 36.

[460] The funds available under the Series F stock facility were reduced by $165 million in March 2009 in order to pay retention bonuses to AIGFP employees, thus leaving $29.8 billion available. Immediately following the recapitalization, the components of the $29.8 billion of TARP Series F preferred stock were: the newly created $2.0 billion of Series G preferred credit facility (available but currently undrawn by AIG to date), a $16.9 billion investment in AIA preferred units, a $3.8 billion investment in ALICO junior preferred units, and the $7.5 billion from the Series F preferred stock facility that were subsequently converted into 167,623,733 common equity shares. As of March 8, 2011, $9.1 billion of Treasury's holdings in the AIA and ALICO SPVs had been redeemed. Treasury Transactions Report, *supra* note 36.

[461] American International Group, Inc., *Form 10-Q for the Quarterly Period Ended June 30, 2010*, at 107 (Aug. 6, 2010) (online at www.sec.gov/Archives/edgar/data/5272/000104746910007097/a2199624z10-q.htm).

[462] This figure is comprised of the $7.5 billion in Series F preferred stock that was converted to common stock and the $11.2 billion invested in the AIA SPV holdings. This figure does not reflect the $2.0 billion Series G preferred stock credit facility, which is available to AIG, but has yet to be drawn. Treasury Transactions Report, *supra* note 36.

[463] The total number of shares owned is comprised of 924,546,133 shares exchanged from the Series E preferred stock and the associated unpaid dividends, 167,623,733 shares of common stock exchanged from the Series F preferred stock, and 562,868,096 common shares that are connected to FRBNY's original assistance. Although the common shares derived from the FRBNY credit facility are not directly connected to the TARP assistance, they are included here as part of the total Treasury holdings in AIG. In total, Treasury holds 1,655,037,962 shares of AIG common stock. Treasury Transactions Report, *supra* note 36.

Figure 29: Ownership Profile of American International Group[464]

	Outstanding Shares of AIG Common Stock *(in millions)*	Percentage of Outstanding Shares
Series C Preferred Stock	562.9	31.3%
Series E Preferred Stock	924.5	51.4%
Series F Preferred Stock	167.6	9.3%
Subtotal	1,655.0	92.0%
Non-Government AIG Common Stock Holders[465]	143.3	8.0%
Total	**1,798.4**	**100.0%**

In addition to this equity – valued at $61.9 billion based on the stock's current price of $37.39 – Treasury has also invested approximately $11.2 billion in AIG-related preferred interests.[466] While the price of AIG common equity shares has fluctuated significantly since the recapitalization plan was announced on September 30, 2010, taxpayers are poised to recognize a gain on the government's assistance to AIG at current market prices.[467] The total value of Treasury's equity and preferred interests in AIG is currently $73.2 billion.[468] This equates to a

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464 Figures affected by rounding. Treasury Transactions Report, *supra* note 36; U.S. Department of the Treasury, *AIG Recapitalization: Summary of Terms September 30, 2010*, at 2 (Sept. 30, 2010) (online at www.treasury.gov/initiatives/financial-stability/investment-programs/AIG/Documents/Recapitalization.Summary.Terms.Executed.pdf) (hereinafter "AIG Recapitalization Summary"); Treasury conversations with Panel staff (Mar. 7, 2011).

465 This figure assumes that 2,854,069 additional shares will be converted and held by non-Treasury participants stemming from a conversion of equity units to common shares. American International Group, Inc., *Financial Supplement: Fourth Quarter 2010*, at 15 (Feb. 25, 2011) (online at www.aigcorporate.com/investors/2011_February/Financial_Supplement_4Q10_Revised_2-24-11.pdf) (hereinafter "AIG Financial Supplement: 4Q 2010"); AIG Recapitalization Summary, *supra* note 464, at 2.

466 Treasury's investment in the AIA SPV is $11.2 billion, although the current value of this holding is $11.3 billion due to the payment of accrued interest. As outlined in Section IV.D.1, AIG opted to exercise its right to classify $2.0 billion of funds into the newly created Series G preferred stock. This facility is not accounted for here because although the funds are available to AIG, the company has not drawn on the facility to date. On March 8, 2011, Treasury announced that its interests in the ALICO SPV, which were $3.4 billion following the recapitalization, had been fully redeemed by AIG. Treasury Transactions Report, *supra* note 36; U.S. Department of the Treasury, *Treasury: With $6.9 Billion Repayment Today from AIG, 70 Percent of TARP Disbursements Now Recovered* (Mar. 8, 2011) (online at www.treasury.gov/press-center/press-releases/Pages/tg1096.aspx) (hereinafter "Treasury: $6.9 Billion Repayment from AIG").

467 Between September 30, 2010 and January 19, 2011, AIG shares traded within a dividend-adjusted range of $34.22 and $51.25. Bloomberg Data Service (Mar. 8, 2011); AIG: Form 8-K Period Ended January 14, 2011, *supra* note 450.

468 Based on a March 4, 2011 closing stock price of $37.39 per share. Bloomberg Data Service (Mar. 8, 2011). This includes the current market price of the common equity as well as the value of Treasury's holdings in the AIA SPV. Treasury's investment in the AIA SPV is $11.2 billion; this figure references the current value of $11.3 billion, which includes accrued interest. Bloomberg Data Service (Mar. 8, 2011); Treasury Transactions Report, *supra* note 36; Treasury: $6.9 Billion Repayment from AIG, *supra* note 466.

$14.3 billion net gain based on Treasury's $58.8 billion cost-basis, or the amount of TARP funds spent to secure the government's current outstanding common and preferred equity interests. Of note, the Series C shares – representing a current market value of $21.0 billion – were obtained at no cost to the taxpayer (or Treasury), and reflect consideration provided by AIG for FRBNY's initial lending facility in September 2008. Thus, based on current valuations, this stake, which is now held for the benefit of Treasury, is offsetting a current loss on the direct TARP assistance provided by Treasury. The break-even threshold for the value of the government's stake, including the common stock derived from the Series C shares, is approximately $28.73 per share, which means that should the share price drop below this level, representing a 23 percent decline versus its current share price, Treasury's holdings in AIG would imply a net loss to the government.[469]

Figure 30: Valuation of Treasury's Common Stock Holdings in AIG *(in billions)*[470]

	TARP	Series C	Total Treasury Position (TARP + Series C)
Funds Provided	$47.5	N/A	$47.5
Common Equity:			
No. of Shares	1.1	0.6	1.7
Implied Value	$40.8	$21.0	$61.9
Implied Net Gain on Common Stock	$(6.7)	$21.0	$14.3

2. Outlook

a. Key Swing Factor: AIG's Execution of Strategy

Based on a share price of $37.39, the equity market currently values AIG at $67.2 billion.[471] While down considerably from the firm's peak split-adjusted share price of $1,456, the stock is trading significantly above the lows witnessed in late 2008 and early 2009, and has

[469] The breakeven price assumes the following cost basis for the 1,655,037,962 common shares Treasury holds: $40.0 billion investment in Series E preferred shares and $7.5 billion in Series F preferred stock draws. Treasury Transactions Report, *supra* note 36.

[470] This figure reflects Treasury's common stock position only, and does not account for Treasury's other holdings in AIG: $11.2 billion interest in the AIA SPV, the $2 billion Series G preferred stock credit facility (available but undrawn). Similarly, it does not account for the $9.1 billion in repayments Treasury has received on its preferred holdings. Bloomberg Data Service (Mar. 9, 2011). Based on a March 4, 2011 closing stock price of $37.39 per share. Treasury Transactions Report, *supra* note 36.

[471] AIG's market capitalization is based on a March 4, 2011 closing price of $37.39 and a total of 1,798,357,785 common shares outstanding. Bloomberg Data Service (Mar. 9, 2011); This figure assumes that 2,854,069 additional shares will be converted and held by non-Treasury participants stemming from a conversion of equity units to common shares. AIG Financial Supplement: 4Q 2010, *supra* note 465, at 15.

gained 52 percent in value since the beginning of 2010.[472] Not surprisingly, this rebound has coincided with increased optimism concerning the potential for the government to recoup a significant portion of its investment. (The recent spike and subsequent decline in AIG shares corresponded with the September 30, 2010 recapitalization announcement and January 19, 2011 issuance of 10-year warrants to non-government shareholders. Market analysts estimated that these warrants equated to a value of approximately $8-10/share.)[473]

In this context, both AIG and Treasury continue to express varying degrees of optimism on repayment prospects. AIG expects to repay fully its obligations to the government, while Treasury is increasingly confident on the outlook for a return of the taxpayer's investment. Secretary Geithner noted in a December 2010 appearance before the Panel that AIG's recapitalization plan "will accelerate the government's exit on terms that are likely to lead to an overall profit on the government's support for AIG, including the value of Treasury's interests in AIG held outside of the TARP."[474] Acting Assistant Secretary of the Treasury for the Office of Financial Stability Timothy Massad noted in a March 2011 appearance before the Panel that the government is "potentially in position to recover every dollar we invested."[475]

The outlook for the taxpayer is dependent on the successful execution of AIG's strategy, which will inform the public market's assessment of AIG's valuation over the next 12-18 months. This relationship was evidenced by the recent announcement by AIG of a $4.1 billion charge to cover increased loss reserves in its insurance operations.[476] This charge could have weakened the company's capital position. In response, Treasury agreed to waive the right to $2.0 billion or proceeds from the sale of Star Life and Edison Life insurance subsidiaries for use

[472] This calculation uses dividend-adjusted stock prices for AIG on January 5, 2010 and March 4, 2011. Bloomberg Data Service (Mar. 9, 2011).

[473] Analysis of Bloomberg adjusted vs. unadjusted share price data. Bloomberg Data Service (Mar. 9, 2011). *See also* Andrew Kligerman, UBS Investment Research, *American International Group: Staying Neutral, but with Short-term Buy* (Oct. 18, 2010).

[474] Geithner Testimony to the Panel, *supra* note 119.

[475] COP Hearing on the TARP's Impact on Financial Stability, *supra* note 311, at 7.

[476] AIG "announced today that, following completion of its annual comprehensive loss reserve review, it expects to record a $4.1 billion charge, net of $446 million in discount and loss sensitive business premium adjustments, for the fourth quarter of 2010 to strengthen loss reserves in its Chartis property and casualty insurance subsidiaries." American International Group, Inc., *AIG Expects to Record $4.1 Billion Net Charge in Fourth Quarter 2010 to Strengthen Loss Reserves Associated with Long-Tail Lines in P&C Business* (Feb. 9, 2011) (online at ir.aigcorporate.com/External.File?t=2&item=g7rqBLVLuv81UAmrh20Mpz0DS1SXuRN3WmkCRzUb5ppzF78O70yvCeQf98uqlxnez2NAoHFPnDPDhNydglxz0w==). The actual charge reported on February 24, 2011 was $4.2 billion. American International Group, *AIG Reports Fourth Quarter Net Income of $11.2 billion* (Feb. 24, 2011) (online at www.aigcorporate.com/investors/2011_February/4Q2010PR02242010LTR.pdf).

in AIG's reserve strengthening, thereby delaying the payment of proceeds from asset sales Treasury was entitled to as collateral for its SPV Preferred Interests.[477]

This allowed AIG to stabilize its capital ratios in a cost-effective manner (e.g., without relying on market funding). Importantly, this agreement does not represent a direct loss to Treasury. The only "concession" by the government was the nominal forfeiture of interest income that it would have otherwise earned on the sale proceeds. However, this is more than offset by the 5 percent dividend on the government's preferred interest in the SPVs. Further, since Treasury's preferred equity investment is over-collateralized (the value of Treasury's claims on AIG's assets is in excess to the value of the funds provided by Treasury), the government remains well-positioned to be paid in full as AIG transfers payments received from subsequent asset sales to Treasury. In fact, this process continues, with the recent sale of AIG equity in MetLife conducted ahead of schedule, netting Treasury $6.9 billion in proceeds, reducing the outstanding amount of Treasury's preferred interests in AIG assets to $11.2 billion from $20.3 billion immediately following the recapitalization.[478]

Thus, AIG's financial health remains dependent on the government, the company's dominant shareholder, while the outlook for the government's investment is to a large degree dependent on AIG's successful execution of its business strategy. AIG is seeking to balance asset sales and risk reduction with a credible and focused ongoing business strategy. This strategy has been some time in the making, as difficult market conditions and management turnover may have frustrated earlier efforts at charting a course for repaying the taxpayer prior to CEO Robert Benmosche's arrival at the firm in August of 2009.[479] Thus, a greatly improved market backdrop and a longer-term investment mentality on the part of AIG's principal shareholder have facilitated a strategy aimed at repaying the government *and* cultivating a sustainable independent business strategy.

[477] Treasury's investment in the AIA SPV is $11.2 billion; however, its current holdings in this SPV are $11.3 billion due to the payment of accrued interest. American International Group, Inc., *Form 8-K for the Period Ended February 8, 2011* (Feb. 9, 2011) (online at www.sec.gov/Archives/edgar/data/5272/000095012311010653/y89586e8vk.htm); Treasury Transactions Report, *supra* note 36.

[478] Treasury Transactions Report, *supra* note 36; Treasury: $6.9 Billion Repayment from AIG, *supra* note 466.

[479] In the wake of the government's rescue in the fall of 2008, the math simply did not provide a way forward for the company (and, as became evident in subsequent months, for the government). Market conditions and the terms of the government's rescue provided little hope of a full recovery, beyond seeking to mitigate the magnitude of expected losses on the government's assistance and to reduce the systemic risk posed by the company. Potential buyers in the insurance sector suffered through significant valuation declines, dampening their appetite for acquisitions of AIG's most marketable assets. Cash purchases were problematic during this period, owing to the dearth of available funding, even to highly rated borrowers. In this environment, core operating fundamentals of key insurance businesses suffered amidst the deteriorating market, further clouding the mergers and acquisitions outlook.

Specifically, in addition to asset sales, the firm is focused on strengthening its global property and casualty franchise and its domestic life insurance and retirement services operations, while continuing to reduce the firm's legacy exposure within AIGFP. After the company's restructuring and asset sales are complete, the vast majority of AIG's businesses will be housed within its global property and casualty and commercial insurance operation, which has been rebranded as Chartis, and its domestic life insurance and retirement services segment, rebranded as SunAmerica.[480]

b. Exit Strategy and Timing

The government is unlikely to wait for the successful execution of this strategy. According to press reports, Treasury intends to commence the sale of an initial stake in AIG via a secondary share offering after AIG's 1Q 2011 earnings are released in May 2011.[481] Media reports indicate the government could sell up to $20 billion worth of stock, representing approximately one-third of the government's holdings in AIG. The balance of the government's stake in AIG would then likely be sold through additional secondary offerings, automated sales through a prearranged written trading plan, or some combination of both.[482]

The government's disposition of its shares in Citigroup is likely to be the model for AIG.[483] However, the AIG disposition may prove more difficult for Treasury to execute, given the value of AIG's publicly traded float of $5.4 billion and a government equity stake that currently amounts to approximately $61.9 billion.[484] Institutional investor ownership in AIG is

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[480] These businesses include General Insurance (Chartis), Domestic Life Insurance & Retirement Services, and Foreign Life Insurance & Retirement Services.

Additionally, the company must continue to make progress on streamlining its operations and untangling the cross-linkages throughout its vast operations. In turn, greater transparency into individual business lines will help facilitate more beneficial terms from the capital markets for financing core operations as well as advancing the prospects for the sale of non-core businesses at more attractive valuations.

[481] *See, e.g.*, Serena Ng, *AIG to Start Marketing "Re-IPO" in May*, Wall Street Journal (Feb. 25, 2011) (online at online.wsj.com/article/SB10001424052748704150604576166360234955504.html) (by subscription only).

[482] Treasury employed both methods to dispose of its Citigroup holdings – large secondary offerings were supplemented by smaller and more frequent automated sales of stock in the marketplace.

[483] The differences between the AIG rescue and the government's investment in Citigroup and the subsequent exit strategy is discussed in Section F.8 of the Panel's June 2010 oversight report. *See* 2010 June Oversight Report, *supra* note 395, at 181. 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. As of February 8, 2011, Treasury had sold the entirety of its Citigroup common shares and warrants for $31.91 billion in gross proceeds. The Panel's January 2010 oversight report contains a discussion of the government's since-executed Citigroup exit strategy, including the monetization of the preferred shares under the CPP. *See* 2010 January Oversight Report, *supra* note 153, at 34-64.

[484] The value of AIG's public float is based on the closing price of the common shares on March 4, 2011 of $37.39 and 143,319,823 shares held by non-government investors. This assumes 2,854,069 shares will be converted from equity units to common shares. AIG Financial Supplement: 4Q 2010, *supra* note 465, at 15; AIG Recapitalization Summary, *supra* note 464, at 2.

relatively limited, whereas Citigroup enjoyed broad institutional ownership prior to the government's share sales.[485] Thus, absent a capital raise by AIG to repay Treasury directly, a protracted wind-down of Treasury's stake seems inevitable.

In a briefing for TARP oversight bodies, Jim Millstein, Treasury's chief restructuring officer, noted that the government's exit from AIG could take anywhere from six months to two years, following the execution of the recapitalization plan.[486] In any case, as the Panel has noted previously in the case of other asset dispositions, Treasury is likely to do what it can to accelerate the timetable for its exit. While six months may be overly aggressive, a two-year time horizon is probably overly cautious, assuming a normalized market backdrop. For his part, Mr. Benmosche believes the government may not fully exit AIG until mid-year 2012.[487]

This exit timeline, of course, involves substantial equity market risk and will rely heavily on AIG building a sustainable franchise value over the medium term in order to support the placement of a significant supply of additional shares (at relatively attractive valuations) on the market. As noted, based on the stock's current valuation, taxpayers would see a positive return on their investment in AIG. However, near-term paper gains do not always equate to longer-term realized gains. Accordingly, the long-term horizon for a full government exit, with attendant equity market and company operating risks, still presents potential downside risks to the taxpayer.

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[485] Few actively managed investment funds own sizable long positions in AIG shares. The top five shareholders, outside of the U.S. government are: Fairholme Capital Management, which owns approximately 2.5 percent of AIG shares; Starr International, Hank Greenberg's company, which owns 0.8 percent; two index funds, Vanguard Group Inc. and State Street Corp., which own 0.7 percent in the aggregate; and Blackrock Institutional Trust, which owns 0.2 percent. These five shareholders account for over half the 8 percent of AIG's shares not owned by the U.S. government. Fairholme Capital Management, LLC, *Schedule 13D Statement of Acquisition of Beneficial Ownership by Individuals* (Jan. 14, 2011) (online at www.sec.gov/Archives/edgar/data/5272/000091957411000237/d1164162_13d-a.htm); American International Group, Inc., *Form 4 Statement of Changes in Beneficial Ownership of Securities* (Jan. 20, 2011) (online at www.sec.gov/Archives/edgar/data/5272/000114036111003441/xslF345X03/doc1.xml); Vanguard Group Inc., *Form 13F for Quarterly Period Ending December 31, 2010* (Dec 31, 2010) (online at www.sec.gov/Archives/edgar/data/102909/000093247111000241/dec2010vgi13f1.txt); State Street Corp., *Form 13F for Quarterly Period Ending December 31, 2010* (Dec. 31, 2010) (online at www.sec.gov/Archives/edgar/data/93751/000119312511032288/d13fhr.txt); Blackrock Institutional Trust, *Form 13F for Quarterly Period Ending December 31, 2010* (Dec. 31, 2010) (online at www.sec.gov/Archives/edgar/data/913414/000108636411004275/blkinsttrustco.txt); Data accessed through Bloomberg Data Service.

[486] Oversight briefing on AIG recapitalization (Oct. 6, 2010).

[487] *See* Andrew Frye and Hugh Son, *AIG Repays Fed, Swaps Treasury Investment for Common as U.S. Unwinds Stake*, Bloomberg News (Jan. 14, 2011) (online at www.bloomberg.com/news/2011-01-14/aig-repays-fed-swaps-treasury-investment-for-common-stock.html) ("Treasury may need 18 months to divest its stake, Benmosche told CNBC today.").

E. Lessons Learned

The Panel noted that the government has no well-defined legal process to wind down a company like AIG in the same way that it winds down banks through the FDIC resolution process or nonfinancial companies through bankruptcy. As a result, the Federal Reserve and Treasury had to repurpose powers that were originally intended for other circumstances, leading to a bailout that was improvised, imperfect, and in many ways deeply unfair.

While issues surrounding AIG's failure provide an exhaustive list of lessons for regulators, Congress and the financial industry ("too-big-to-fail," moral hazard, systemic risk oversight, over-the-counter transparency/centralized clearing, risk management, etc.), the government's (both Treasury and FRBNY) management of its AIG engagement offers a host of specific lessons. These include:

- Transparency: Decisions made by government officials behind closed doors that put taxpayer dollars at risk must be subject to elevated transparency to assure fair dealing on behalf of the taxpayer. FRBNY's failure to be more sensitive with respect to potential conflicts of interest and the way in which the public and members of Congress would view its actions has colored all the dealings between the government and AIG in the eyes of the public.[488]

- Reluctant Shareholder versus Maximizing Taxpayer Value: As the Panel has previously noted, particularly in conjunction with accelerated exits of the government's other assets (e.g., GM and Chrysler Financial), Treasury should be careful not to sacrifice its mandate to maximize the value of its investment in favor of an expedited exit strategy consistent with its "reluctant shareholder" philosophy. AIG represents a notable example of Treasury successfully taking a longer-term view on its investment horizon to provide the greatest opportunity to realize a meaningful return.

- Moral Hazard: Given the absence of a resolution authority to assist with a controlled liquidation of the firm, AIG's vast interconnectedness across the financial landscape served as a mechanism to broaden the risk of moral hazard to the firm's creditors and counterparties. The absence of shared sacrifice by private parties undermined the government's ability to respond to the financial crisis, while also seeding longer-term risks for the effective functioning of the financial markets.

[488] 2010 June Oversight Report, *supra* note 395, at 105.

VII. Administration of the TARP

A. Treasury's Use of Its Contracting Authority

1. Background

The TARP was an unprecedented intervention into the markets and as a result, Treasury did not always have the in-house capabilities needed to implement the programs it wished to establish. To meet these needs, Treasury employed outside contractors and agents.

Treasury is authorized by EESA and pre-existing law to employ private parties to provide goods and services using two separate mechanisms. First, the Secretary may enter into contracts, which are used to acquire goods and services from the market. This process is governed by the Federal Acquisition Regulation, and though EESA authorizes the Secretary to waive specific provisions of the regulation if needed, Treasury has not done so.[489] Second, the Secretary may designate "financial institutions" as financial agents to perform "all such reasonable duties related to this Act ... as may be required."[490] Financial agents "serve as an extension of Treasury to act on behalf of the Government."[491] Historically, financial agents could be employed to perform only "inherently governmental" functions, although it may be the case that EESA eliminated this limitation. Treasury is not bound by the Federal Acquisition Regulation when it hires a financial agent. As a result, there are essentially no restrictions on the process Treasury may use for selecting financial agents. Once selected, however, a financial agent must abide by the principles of agency law.[492]

a. Treasury Action

At the time of the Panel's October 2010 report, *Examining Treasury's Use of Financial Crisis Contracting Authority*, Treasury had awarded 81 TARP-related procurement contracts and 15 financial agency agreements. Under these arrangements, there were a total of 98 subcontracts, 40 from procurement contracts and 58 from financial agency agreements.[493]

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[489] Congressional Oversight Panel, *October Oversight Report: Examining Treasury's Use of Financial Crisis Contracting Authority*, at 10 (Oct. 14, 2010) (online at cop.senate.gov/documents/cop-101410-report.pdf) (hereinafter "2010 October Oversight Report").

[490] 12 U.S.C. § 5211(c)(3). For a definition of "financial institutions," *see* 2010 October Oversight Report, *supra* note 489, at 39 n.143.

[491] 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 2-3 (Sept. 22, 2010) (online at cop.senate.gov/documents/testimony-092210-treasury.pdf). For a discussion comparing contracting to financial agency agreements, *see* 2010 October Oversight Report, *supra* note 489, at 42.

[492] 2010 October Oversight Report, *supra* note 489, at 11.

[493] 2010 October Oversight Report, *supra* note 489, at 24.

The obligated value of these contracts and agreements was $436.7 million, with $109.3 million attributable to procurement contracts and $327.4 million attributable to financial agency agreements. The expended value under these contracts and agreements totaled $363.0 million, with procurement contracts accounting for $87.0 million and financial agency agreements accounting for the remaining $276.0 million.[494]

In terms of obligated value, Fannie Mae was the largest financial agent, with $126.7 million, while PricewaterhouseCoopers LLP was the largest contractor, with $25.8 million. Seven categories of work were performed under the TARP procurement contracts, the largest of which was legal advisory. Legal advisory work accounted for 35 contracts as well as for the largest obligated and potential contract values of $55.6 million and $203.4 million, respectively.[495]

In addition, to govern potential conflicts of interest arising from these contracts and agreements, Treasury issued an Interim Final Rule on TARP Conflicts of Interest (IFR-COI) on January 21, 2009. The rule establishes two separate schemes to govern two different types of conflicts: organizational conflicts of interest,[496] and personal conflicts of interest.[497] The IFR-COI also regulates many traditional ethical issues, such as acceptance of gifts and other sorts of "bribes" during the contract solicitation process and the handling of nonpublic information.[498]

2. Summary of COP Report and Findings

The Panel's October 2010 report, *Examining Treasury's Use of Financial Crisis Contracting Authority*, applauded Treasury's significant efforts to ensure that it used contractors and agents appropriately, noting that in testimony to the Panel, some outside experts had praised

[494] 2010 October Oversight Report, *supra* note 489, at 24-25.

[495] 2010 October Oversight Report, *supra* note 489, at 25, 31.

[496] The IFR defines an organizational conflict of interest 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 the Treasury." 31 CFR § 31.201. Organizational conflicts of interest are prohibited unless they are disclosed to Treasury and either mitigated under a Treasury-approved plan or waived by Treasury.

[497] The rule defines a personal conflict of interest 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." 31 CFR § 31.201. A retained entity must ensure that "all management officials" working on the contract or agreement not have personal conflicts of interest unless the conflict has been either neutralized by mitigation measures or waived by Treasury. 2010 October Oversight Report, *supra* note 489, at 13-14, 62-63.

[498] 2010 October Oversight Report, *supra* note 489, at 15.

Treasury for going above and beyond the usual standards for government contracting.[499] However, the report cautioned that there still remained important areas of concern.[500]

For example, the Panel was concerned that while Treasury had disclosed some information, such as the texts of the contracts and agreements, the date each contract was awarded, and the value of the arrangements, material information still had not been released. Specifically, the report noted that Treasury does not release task orders to the public, despite the fact that for many arrangements critical specifics typically appear in task orders, rather than in the contracts themselves. Similarly, Treasury does not publicly disclose detailed information with respect to the names and duties of subcontractors, nor does it publish the subcontracts themselves. In addition, Treasury publishes almost no information on the performance of contractors and financial agents during the life of the arrangement.[501]

The report expressed further concern with regard to Treasury's post-award management of its contracts and agreements. The Panel acknowledged that the procedures for post-award management of contracts followed well-established government contracting norms. By contrast, however, the Panel observed that the procedures for financial agent management had failed to detect at least one serious failing by an agent.[502]

More troublingly, the report noted that although Treasury's consent was required before any contractor or financial agent could engage a subcontractor, Treasury had limited oversight ability after the subcontract was awarded and instead relied upon the prime contractor or the financial agent to ensure their subcontractors' compliance. As a result, Treasury lacked critical basic information about subcontractors, such as the text of the subcontracts themselves and the dates on which they were awarded. Furthermore, the Panel found that Treasury would have difficulty both ensuring they received the best value from subcontractors and detecting violations of contract terms not related to work product, such as whether or not a subcontractor has maintained the confidentiality of information or that there are no conflicts of interest.[503]

The Panel was also concerned about the scope of Treasury's conflict of interest rules. Though the IFR-COI took a robust approach to organizational conflicts of interest, personal conflicts of interest, and the traditional ethical issues, the Panel noted that the regulations did not

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[499] 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); 2010 October Oversight Report, *supra* note 489, at 5.

[500] 2010 October Oversight Report, *supra* note 489, at 5.

[501] 2010 October Oversight Report, *supra* note 489, at 55-59.

[502] 2010 October Oversight Report, *supra* note 489, at 47, 49.

[503] 2010 October Oversight Report, *supra* note 489, at 49-50.

address all situations in which conflicts of interest could arise. In particular, the report noted with concern the potential that a conflict of interest could 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.[504]

The Panel was especially concerned with the potential conflicts of interest arising from Treasury's financial agency agreements with Fannie Mae and Freddie Mac to administer and to enforce compliance with HAMP, respectively. The report noted that because the majority of modifications involved mortgages that the GSEs held or guaranteed, the GSEs were in the position of both overseeing the program and using it to modify mortgages at the same time.[505] In addition, Freddie Mac had indicated that it may not attempt to enforce its contractual rights against servicers who violated their contracts by using "robo-signers" because doing so would jeopardize their relationships with these servicers. The Panel noted that if Freddie Mac was hesitant to jeopardize their relationships with servicers to enforce its rights in its own book of business, it was reasonable to worry that it may be similarly unwilling to risk these relationships on Treasury's behalf by aggressively overseeing HAMP servicers.[506] It is worth noting that the GSEs and Treasury took a number of measures to mitigate these conflicts, such as establishing a fiduciary relationship, placing a firewall around material non-public information, and creating separate entities in the GSEs to handle all HAMP work.[507] Despite these efforts, the Panel remained deeply concerned about the significant potential conflicts of interest that spring from using Fannie Mae and Freddie Mac as financial agents.[508]

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[504] For further discussion of these potential conflicts of interest, *see* 2010 October Oversight Report, *supra* note 489, at 63-70.

[505] 2010 October Oversight Report, *supra* note 489, at 82-86.

[506] 2010 December Oversight Report, *supra* note 283, at 82.

[507] For a more complete discussion of the mitigating factors, *see* 2010 October Oversight Report, *supra* note 489, at 82-86.

[508] 2010 October Oversight Report, *supra* note 489, at 82-86.

3. Panel Recommendations and Updates

The Panel recommended that Treasury publish more information, including its rationale in selecting contractors and agents, contract and agreement task orders, the results of monitoring efforts, and descriptions of its plans to hold contractors and agents accountable. The Panel further recommended that Treasury require all contractors to disclose the names and duties of all subcontractors, the values of the subcontracts, and the subcontracts themselves. The Panel released some of this information, such as the names of all subcontractors and the values of the subcontracts, in the October report. Finally, the Panel recommended that Treasury adopt a final rule on conflicts of interest, disclose ongoing conflicts-of-interest findings and compliance costs, and consider alternatives that would make it less reliant on the retained entities for factual information, such as conducting intensive spot checks on individual entities.

Since the Panel made these recommendations, Treasury has begun on-site reviews of financial agents' conflict-of-interest regimes, making it less reliant on self-reporting by retained entities. To date, Treasury has done one such review and plans to complete three to five more in 2011. The examinations focus on agents' conflict-of-interest controls, such as their policies and procedures, the information firewalls around confidential information, and the non-disclosure agreements. In addition, Treasury has been working to finalize the IFR-COI, including doing a high-level review of a possible final rule, though there is no timeline for publishing the final rule.[509] Outside of these two areas, Treasury has not acted on the Panel's other recommendations.

Since it last provided data to the Panel for its October report, Treasury has awarded 13 more contracts worth $1.8 million in obligated value and $265,637 in expended value. Eight of these contracts have been to Management Concepts for administrative support. The other five contracts are with the Association of Government Accountants, Reed Elselvier, Inc., Addx Corporation, MITRE Corporation, and the Hispanic Association of Colleges & Universities.[510]

Treasury has also awarded two additional financial agency agreements to Greenhill & Co., LLC and Perella Weinberg Partners & Co. on November 18, 2010 and January 18, 2011, respectively. The agreements were for structuring and disposition services and have a combined obligated value of $13,050,000 and expended value of $1,400,000.[511] In addition, two agreements, with Morgan Stanley and with KBW Asset Management, have been successfully completed.[512]

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[509] Treasury conversations with Panel staff (Feb. 24, 2011).

[510] Data provided by Treasury (Mar. 1, 2011). Data on procurement contracts is current through January 31, 2011.

[511] Data provided by Treasury (Mar. 1, 2011). Data on financial agency agreements is current through January 31, 2011.

[512] Treasury conversations with Panel staff (Feb. 17, 2011).

In total, Treasury has now awarded 94 TARP-related procurement contracts and 17 financial agency agreements.[513] The total obligated value of these arrangements, including both new arrangements and new expenses under existing arrangements, is $697.5 million, with procurement contracts accounting for $134.2 million and financial agency agreements accounting for the remaining $563.3 million. The total expended value of these arrangements is $454.5 million, with $96.7 million attributable to procurement contracts and $357.8 million attributable to financial agency agreements.[514]

In addition, since the Panel's October report, Treasury's conflict-of-interest monitoring regime has been changed. Previously, the Office of Financial Stability-Compliance was primarily responsible for such monitoring. Since October, the Contract and Agreement Review Board and the contracting officer technical representatives have also been tasked with reviewing conflict-of-interest issues.

Finally, Treasury is in the process of consolidating Procurement Services with the corresponding body in the Internal Revenue Service (IRS). All Procurement Services employees are scheduled to become employees of the IRS on March 13, 2011. Procurement Services employees working in the Office of Financial Stability are scheduled to move physically to the IRS facility on Oxon Hill on June 30, 2011. As a result of this consolidation, Procurement Services is in the process of reviewing their policies and procedures and will update them as needed once this review is completed.[515]

4. Lessons Learned

In general, Treasury has taken significant steps to ensure that it has used private contractors appropriately, and indeed some experts have praised Treasury for going above and beyond the usual standards for government contracting. This praise must be viewed in context, however. The government contracting process is notoriously nontransparent, and although

[513] 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.

[514] Data provided by Treasury (Mar. 1, 2011). The majority of the total growth in both obligated value and expended value is due to increases in the financial agency agreements with Fannie Mae and Freddie Mac. The obligated and expended values of the agreements with the GSEs have grown by $192.7 million and $61.5 million, respectively, since the Panel's October report. Data provided by Treasury (Mar. 1, 2011).

[515] Treasury conversations with Panel staff (Feb. 17, 2011).

Treasury appears to have performed well on a comparative basis, significant improvements can still be made.

In particular, the Panel noted the need for increased transparency. For example, 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. As work moves farther and farther from Treasury's direct control, it becomes less and less transparent and thus impedes accountability.

B. Executive Compensation Restrictions in the TARP

1. Background

a. Overview

Since well before the financial crisis, executive compensation has been a contentious issue. From the early 1950s through the mid-1970s, executive pay remained at a fairly steady level in terms of real dollars. From the 1980s onward, however, executive compensation has generally increased, often swiftly. For instance, during the 1970s, the average pay for a CEO was approximately 30 times the average annual pay of a production worker. Just before the economic crisis in 2007, the average compensation for a CEO was approximately $21 million, nearly 300 times that of a production worker.[516]

Though a good deal of research has been done on why executive pay has risen over the past three decades, there is still no real consensus. Executive mobility, managerial bargaining power, executive control over boards of directors, the low values assigned to stock options along with the perception that stock options are a low-cost method to pay employees, the effects of the bull market and government regulation, and deregulation have all been cited as contributing to this phenomenon. Commentators across the spectrum do agree that changing the structure of pay to include stock-based compensation during a thriving stock market contributed to the increase in compensation.[517]

Since the onset of the financial crisis, much attention has focused on how executive compensation practices contributed to corporate risk-taking. Some have argued that compensation packages created incentives for executives to focus on short-term results, even at the cost of taking excessively large risks of later catastrophe. Many commentators have a particular interest in the effect of mismatches between executive compensation and the time

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[516] Congressional Oversight Panel, *February Oversight Report: Executive Compensation Restrictions in the Troubled Asset Relief Program*, at 10 (Feb. 10, 2011) (online at cop.senate.gov/documents/cop-021011-report.pdf) (hereinafter "2011 February Oversight Report").

[517] *Id.* at 13.

horizon for assessments of risk.[518] Chairman Bernanke stated that compensation practices "led to misaligned incentives and excessive risk taking, contributing to bank losses and financial instability."[519] On the other hand, this link between compensation and risk taking has been contested by some scholars who note that the value of executives' stock holdings fell precipitously during the crisis. Given this potential for loss, they argue, there is no reason compensation structures would lead to excessive risk taking. Some commentators note, however, that stock options in particular do not necessarily create an exposure to losses for executives symmetric with that of ordinary shareholders.[520] As one of these commentators puts it, "stock options – where executives only participate in the gains, but not the losses – and even more so, analogous bonus schemes prevalent in financial markets, provide strong incentives for excessive risk taking."[521] Although there is no academic consensus on the relationship between compensation practices and risk, or whether compensation practices contributed to the financial crisis,[522] Treasury's view is that compensation practices did in fact contribute to the crisis. Secretary Geithner has stated that executive compensation played a "material role" in causing the crisis because it encouraged excessive risk taking.[523]

In addition, commentators have also examined how the government's implicit "too big to fail" guarantee may further distort executive compensation practices. As a result of providing a "too-big-to-fail" backstop, the government may have eliminated certain disincentives for pay arrangements that encourage excessive risk taking. Too-big-to-fail status permits shareholders

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[518] *Id.* at 17-18. The Panel discussed the role of misaligned incentives on risk-taking in its Special Report on Regulatory Reform. The Panel noted "the unnecessary risk that many compensation schemes introduce into the financial sector," and stated that "[a]ltering the incentives that encourage this risk ... will help mitigate systemic risk in future crises. ... Executive pay should ... incentivize financial executives to prioritize long-term objectives, and to avoid both undertaking excessive, unnecessary risk and socializing losses with the help of the federal taxpayer." Congressional Oversight Panel, *Special Report on Regulatory Reform: Modernizing the American Financial Regulatory System: Recommendations for Improving Oversight, Protecting Consumers, and Ensuring Stability*, at 37-40 (Jan. 29, 2009) (online at cop.senate.gov/documents/cop-012909-report-regulatoryreform.pdf) (hereinafter "COP: Special Report on Regulatory Reform").

[519] Board of Governors of the Federal Reserve System, *Press Release* (Oct. 22, 2009) (online at www.federalreserve.gov/newsevents/press/bcreg/20091022a.htm).

[520] 2011 February Oversight Report, *supra* note 516, at 17-18.

[521] Joseph E. Stiglitz, *The Financial Crisis of 2007/2008 and its Macroeconomic Consequences*, at 1 (online at unpan1.un.org/intradoc/groups/public/documents/apcity/unpan033508.pdf) (accessed Feb. 8, 2011). *See also* Financial Crisis Inquiry Commission, *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States*, at 63 (Jan. 2011) (online at www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf) ("Stock options had potentially unlimited upside, while the downside was simply to receive nothing if the stock didn't rise to the predetermined price. The same applied to plans that tied pay to return on equity: they meant that executives could win more than they could lose. These pay structures had the unintended consequence of creating incentives to increase both risk and leverage, which could lead to larger jumps in a company's stock price.").

[522] 2011 February Oversight Report, *supra* note 516, at 17-18.

[523] Geithner Testimony to the Panel, *supra* note 119.

and executives to accept substantial amounts of risk, since they can reap the benefits but will not suffer the consequences if the gambles are unsuccessful.[524]

b. Treasury's Legal Framework

Congress entered the executive compensation debate with the passage of EESA. After a series of revelations about bonuses at several major TARP recipients, ARRA subsequently amended EESA (EESA as amended) and put additional restrictions on pay practices at TARP recipients. These included, among others, a prohibition on golden parachutes, the requirement that TARP recipients establish compensation committees composed entirely of independent directors, the adoption of "clawback" provisions, and annual "say on pay" votes, and a requirement that bonuses not exceed one-third of total compensation.[525] EESA as amended required the Secretary of the Treasury to issue implementing regulations, which resulted in the Interim Final Rule on TARP Standards for Compensation and Corporate Governance (IFR-Comp) in June 2009. For all TARP recipients, the IFR-Comp includes a number of specific limitations, such as prohibiting paying tax gross-ups to the top 25 most highly compensated employees, and then requiring them annually to certify their compliance with the IFR-Comp. Treasury's Office of Internal Review monitors these certifications for completeness. Some of the smaller TARP institutions have failed to meet their reporting deadlines or to provide complete information. The Office of Internal Review works with these recipients to ensure that these reports are eventually filed and that all information is accurate.[526]

In addition to the provisions applicable to all TARP recipients, the IFR-Comp created the Office of the Special Master and placed seven exceptional assistance recipients under its jurisdiction. These exceptional assistance recipients were AIG, Bank of America, Citigroup, Chrysler, Chrysler Financial, General Motors, and GMAC/Ally Financial. The Special Master determined the compensation packages for the 25 most highly paid employees at these companies and the structure of compensation for the 26th-100th most highly compensated employees.[527]

c. Special Master's Determinations

To date, the Special Master has released compensation determinations for 2009 and 2010, as well as a number of supplemental determinations.

In general, the Special Master awarded compensation to executives in the form of cash, stock salary, and incentive payments, and generally targeted total compensation amounts at the

[524] 2011 February Oversight Report, *supra* note 516, at 19-20, 89-91.

[525] 2011 February Oversight Report, *supra* note 516, at 23.

[526] 2011 February Oversight Report, *supra* note 516, at 26.

[527] 2011 February Oversight Report, *supra* note 516, at 22.

50th percentile of compensation for comparable employees at comparable companies. Cash compensation was typically limited to $500,000. The amount of stock salary was not restricted but it was not immediately redeemable. Incentive payments were also not immediately redeemable. In addition, the Special Master limited incentive payments to no more than one-third of total compensation and required that they be paid only if specific observable performance metrics were met. All other types of compensation, such as severance plans or perquisites, were limited to a maximum of $25,000.[528]

In making these determinations, the Special Master is required by the IFR-Comp to use six guiding principles: (1) minimize excessive risk; (2) maximize the capacity to repay TARP obligations; (3) appropriately allocate compensation between types of compensation; (4) use performance-based compensation; (5) award pay that is consistent with compensation for similar employees at similar entities; and (6) base compensation on an employee's contributions. The IFR-Comp also created a "safe harbor" for employees who will receive less than $500,000 in annual compensation. Institutions are not required to obtain approval of compensation structures from the Special Master for employees who fall within this safe harbor.[529]

For a detailed description of the specific determinations made for each of the seven exceptional assistance recipients, see the Panel's February 2011 report.[530]

In addition to approving specified compensation payments and structures, the Special Master is authorized to interpret and issue non-binding advisory opinions on Section 111 of EESA as amended and the IFR-Comp. Furthermore, the IFR-Comp authorized the Special Master to review compensation paid by each TARP recipient from the day it first received TARP funding to February 17, 2009, the date of ARRA's passage, to determine whether such payments were contrary to the public interest. If any payments met this standard, the Special Master was required to seek to negotiate with the offending company for reimbursement.[531] The Special Master found that TARP recipients had paid $1.7 billion in "disfavored" compensation that was "inappropriate,"[532] but not contrary to the public interest.[533]

[528] 2011 February Oversight Report, *supra* note 516, at 34.

[529] 2011 February Oversight Report, *supra* note 516, at 28.

[530] 2011 February Oversight Report, *supra* note 516, at 36-48.

[531] 2011 February Oversight Report, *supra* note 516, at 36-48.

[532] Congressional Oversight Panel, Testimony of Kenneth R. Feinberg, former special master for TARP executive compensation, *Transcript: COP Hearing on the TARP and Executive Compensation Restrictions* (Oct. 21, 2010) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-102110-compensation.cfm).

[533] 2011 February Oversight Report, *supra* note 516, at 6.

d. Non-TARP Initiatives

Although Treasury has not regulated executive compensation outside of the TARP, a number of other agencies have begun developing guidance on executive compensation. For example, on June 21, 2010, the Office of the Comptroller of the Currency, the Federal Reserve, the FDIC, and the Office of Thrift Supervision adopted final guidance that establishes three core principles for executive compensation designed to maintain the safety and soundness of banking organizations. In addition, the FDIC is developing enhanced examination procedures to use in evaluating incentive compensation at institutions under its supervision. Furthermore, the SEC recently adopted regulations that require shareholder approval of executive compensation and "golden parachute" compensation arrangements, and is in the process of formulating regulations that require institutional investment managers to disclose how they vote on these compensation arrangements.[534]

Moreover, Congress took further action on executive compensation. Signed into law on July 21, 2010, the Dodd-Frank Act includes several provisions that will govern executive compensation at financial institutions in the future. For example, it includes provisions that permit clawbacks in certain situations, require increased disclosures, and impose more stringent requirements with respect to independent compensation committees.[535]

2. Summary of COP Report and Findings

The Panel first considered executive compensation in its January 2009 report when it noted that executive pay should "incentivize financial executives to prioritize long-term objectives, and to avoid both undertaking excessive, unnecessary risk and socializing losses with the help of the federal taxpayer."[536] The Panel again examined compensation practices in March 2010, when it stated that the levels of compensation set for GMAC/Ally Financial's CEO "raise significant questions, which the Panel will continue to study."[537] In its June 2010 report, the Panel reiterated its concern that compensation levels "raise significant unanswered questions."[538] In addition, on October 21, 2010, the Panel held a hearing on executive compensation, which

[534] 2011 February Oversight Report, *supra* note 516, at 31.

[535] 2011 February Oversight Report, *supra* note 516, at 29.

[536] COP: Special Report on Regulatory Reform, *supra* note 518, at 38.

[537] 2010 March Oversight Report, *supra* note 377, at 57 ("These [significant questions] include whether particular levels of compensation are either necessary or appropriate, the nature of the incentives the compensation creates, and the manner in which Treasury is exercising its authority under the EESA compensation restrictions as amended by the American Recovery and Reinvestment Act of 2009 (ARRA).").

[538] 2010 June Oversight Report, *supra* note 395, at 229.

included testimony from former Special Master for TARP Executive Compensation Kenneth Feinberg, among others.[539]

The Panel's primary study of executive compensation, though, was in its February 2011 report, *Executive Compensation Restrictions in the Troubled Asset Relief Program*, which primarily examined the Office of Internal Review and the Office of the Special Master. The report expressed concern that the Office of Internal Review had not released a single document to the public, despite having far-reaching jurisdiction to monitor compliance with executive compensation restrictions at all TARP recipients. In addition, the Panel was troubled that the Office did not review compliance with all relevant compensation restrictions.[540]

With regard to the Special Master, the Panel praised the changes the Special Master had made to compensation practices at the seven exceptional assistance companies. In particular, the Panel noted that in 2009 the Special Master reduced total direct compensation by 55 percent overall and had altered the form of compensation executives received. Nevertheless, the Panel concluded that the Special Master's impact was likely to be limited, noting rebounding pay on Wall Street, including at some of the institutions that had previously been under the Special Master's jurisdiction. However, the report acknowledged that it is difficult to develop a precise assessment of the Special Master's impact because there are so many different factors that contribute to setting executive pay.[541]

The Panel also expressed concern with the Special Master's level of transparency. The report described the Special Master's process for making determinations as a "black box" that was not capable of replication by any interested outsider. In particular, the report noted that the Special Master had not explained how he resolved conflicts between the six principles of the public interest standard, how he crafted the general rules he used, and how he applied these rules to specific circumstances. This lack of transparency, the Panel stated, helped prevent the Special Master's work from becoming a model for compensation in the future.[542]

The Panel was also troubled by the general uniformity of the Special Master's determinations. The report questioned whether one size truly fits all and, for example, whether

[539] Other witnesses at the Panel's hearing included Kevin Murphy, Kenneth L. Trefftzs Chair in Finance and professor of corporate finance, University of Southern California Marshall School of Business; Fred Tung, Howard Zhang Faculty Research Scholar and professor of law, Boston University School of Law; Rose Marie Orens, senior partner, Compensation Advisory Partners LLC; and Ted White, strategic advisor, Knight Vinke Asset Management. Congressional Oversight Panel, *COP Hearing on the TARP and Executive Compensation Restrictions* (Oct. 21, 2010) (online at cop.senate.gov/hearings/library/hearing-102110-compensation.cfm).

[540] 2011 February Oversight Report, *supra* note 516, at 5.

[541] 2011 February Oversight Report, *supra* note 516, at 79.

[542] 2011 February Oversight Report, *supra* note 516, at 6.

the same redemption schedule for salary stock should apply to both employees of an automotive company and employees of a large bank.[543]

A separate concern in the February 2011 report was the Special Master's aforementioned "Look Back Review" of payments to executives at TARP recipients prior to February 17, 2009. Because the Special Master concluded that payments totaling $1.7 billion were "inappropriate" but not "contrary to the public interest," he did not attempt to claw back the payments. The Panel found the Special Master's conclusion troublesome for several reasons: it may have appeared to the public to be excessively legalistic, it may have represented an end-run around Congress' determination that the Special Master should make every effort to claw back wrongful payments, and it may have given the impression that the government condoned inappropriate compensation to executives whose actions contributed to the financial crisis.[544]

3. Panel Recommendations and Updates

In its February 2011 report, the Panel recommended that both the Office of Internal Review and the Office of the Special Master provide more information to the public. In particular, the report called for the Office of the Special Master to publish the specific rationales that led to individual determinations. In addition, the report suggested publishing executive turnover data, the companies' compensation proposals, and specific information on the performance goals set for incentive compensation. For the Office of Internal Review, the Panel recommended that it issue a report on compensation at non-exceptional assistance companies and also publish information on its monitoring activities. The Office of Internal Review was also called upon to expand its monitoring activities to encompass all of the compensation restrictions set by EESA as amended, the IFR-Comp, and the Special Master. Finally, the Panel recommended that Treasury release a guide outlining best practices for executive compensation.[545]

Since the Panel's February 2011 report, several companies have released their 2010 compensation data, which showed that executive compensation increased.[546] In total, the New York State Comptroller calculated that overall compensation increased by 6 percent in 2010. The structure of this compensation has changed, however. Base salaries and deferred compensation increased while cash bonuses declined by 8 percent.[547] Also, in a step away from

[543] 2011 February Oversight Report, *supra* note 516, at 59 & n. 241.

[544] 2011 February Oversight Report, *supra* note 516, at 6.

[545] 2011 February Oversight Report, *supra* note 516, at 81.

[546] For example, J.P. Morgan CEO James Dimon received a 22 percent increase in restricted stock payout. J.P. Morgan Chase & Co., *Form 4: Statement of Change in Beneficial Ownership* (Feb. 17, 2011) (online at sec.gov/Archives/edgar/data/19617/000122520811006335/xslF345X03/doc4.xml).

[547] Office of the New York State Comptroller Thomas P. DiNapoli, *DiNapoli: Wall Street Bonuses Declined in 2010* (Feb. 23, 2011) (online at www.osc.state.ny.us/press/releases/feb11/022311a.htm). Though

the structures established by the Special Master, Citigroup stated that "it does not intend to award salary stock in 2011 or future years, as it is no longer a TARP company."[548]

In addition, on March 2, 2011, the SEC proposed a new rule requiring certain financial institutions to disclose the structure of their incentive compensation and prohibiting pay arrangements that encourage excessive risk-taking. The rule is now open for public comment and therefore may change before becoming final.[549]

4. Lessons Learned

The Panel's recommendations from its February 2011 report focused on a common theme: transparency. In the more than two years since EESA was passed, exceptional assistance institutions have altered their cash compensation and their compensation structures. The Office of the Special Master has been at the center of these two reforms. But despite these achievements, the public knows very little about how the government has implemented the compensation rules or about the impact of these measures. The Office of Internal Review has not published a single document to the public and aspects of the Special Master's work are "black boxes."

This lack of transparency limits the impact of the executive compensation restrictions. It makes it very difficult, if not impossible, for any board of directors, shareholder, or government agency to use the Special Master's public determination letters as the basis for mimicking those decisions. So long as compensation experts on Wall Street and elsewhere lack the information needed to use the Special Master's deliberations as a model, what seemed an opportunity for sweeping reform will be destined to leave a far more modest legacy.

VIII. General TARP Assessment

The preceding sections have provided an issue-specific look at the various pieces of the TARP. But this program, an unprecedented $700 billion response to a panic in the financial markets, is more than just the sum of its parts. In four of its previous reports, the Panel evaluated the TARP as a whole. This section includes a review of the findings in those reports, as well as an update on the current status of the TARP.

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applauding the changes to compensation that have occurred to date, a Moody's report expressed pessimism that such changes would last. *See* Moody's Investor Service, *Bank Compensation Reform: Short-Term Improvements, Long-Term Questions* (Mar. 9, 2011).

[548] Citigroup, Inc., *Schedule 14(a)*, at 56 (Feb. 28, 2011) (online at sec.gov/Archives/edgar/data/831001/000119312511050132/dpre14a.htm).

[549] U.S. Securities and Exchange Commission, *SEC Proposes Rules on Disclosure of Incentive-Based Compensation Arrangements at Financial Institutions* (Mar. 2, 2011) (online at www.sec.gov/news/press/2011/2011-57.htm).

A. Summary of COP Reports and Findings

The Panel's April 2009 report, *Assessing Treasury's Strategy: Six Months of TARP*, provided a framework for evaluating the TARP's success.[550] The report gave an overview of past banking crises in the United States and in other countries, as well as the responses of other countries to the current crisis. It concluded that each successful resolution of a financial crisis involved: (1) swift action to ensure the integrity of bank accounting; (2) a willingness to take aggressive action to address failing institutions; (3) a willingness to hold management accountable either by firing them or, where appropriate, prosecuting them; and (4) transparency in the reporting of the use of public sector funds. The report also stated that if a future course change proved necessary, Treasury might consider liquidation or conservatorship of distressed banks as an alternative to subsidizing them through the TARP.[551]

The Panel's December 2009 report, *Taking Stock: What Has the Troubled Asset Relief Program Achieved?*, evaluated the TARP a little more than one year after its enactment. The report noted that the TARP should be judged as part of a larger series of extraordinary actions taken by the federal government to stem the panic in the financial markets in the fall of 2008, and stated that there is a consensus that these programs stabilized the U.S. financial system by renewing the flow of credit and averting a more acute crisis. The report also found, though, that credit availability remained low, questions remained about the capitalization of many banks, the foreclosure crisis continued to grow, CRE remained a looming problem, and the government's actions resulted in implicit guarantees of financial institutions, which posed the most difficult long-term problem to emerge from the crisis. As Columbia University economist Charles Calomiris stated in testimony before the Panel, "If financial institutions know that the government is there to share losses, risk-taking becomes a one-sided bet, and so more risk is preferred to less."[552]

In its January 2010 report, *Exiting TARP and Unwinding Its Impact on the Financial Markets,* the Panel focused on Treasury's strategy for exiting the TARP.[553] The report was released following Secretary Geithner's December 9, 2009, exercise of his authority to extend the TARP until October 3, 2010.[554] Secretary Geithner had recently explained this decision in

[550] 2009 April Oversight Report, *supra* note 88.

[551] The Panel also explored these questions in an associated hearing. *See generally* Congressional Oversight Panel, *Transcript: Learning from the Past: Lessons from the Banking Crises of the 20th Century* (Mar. 19, 2009) (online at cop.senate.gov/documents/transcript-031909-bankingcrises.pdf).

[552] Congressional Oversight Panel, Written Testimony Charles Calomiris, Henry Kaufman Professor of Financial Institutions, Columbia Business School, *Taking Stock: Independent Views on TARP's Effectiveness*, at 4 (Nov. 19, 2009) (online at cop.senate.gov/documents/testimony-111909-calomiris.pdf).

[553] 2010 January Oversight Report, *supra* note 153.

[554] TARP funds had to be legally obligated to a program by October 3, 2010, but they could continue to be disbursed after that date.

testimony before the Panel, stating: "We need to continue to find ways to help mitigate foreclosures for responsible homeowners and to get credit to small business. We also must maintain the capacity to address potential threats to our financial system, which could undermine the recovery we have seen to date."[555] The Panel noted that while Treasury's formal cutoff from further TARP commitments was October 3, 2010, its final exit from the TARP and divestiture of all TARP-related holdings, potentially worth billions of dollars, would be an ongoing process that would extend well into the future.[556] Treasury's exit strategy sought to balance an emphasis on maintaining the stability of the financial system, preserving the stability of individual financial institutions, and maximizing the return on the taxpayers' investment. The Panel concluded that Treasury's three goals were potentially conflicting and sufficiently broad to justify any strategy. The report also focused on the continuing market effects created by the TARP, specifically the implicit guarantee that has created the perception that certain institutions will be protected by the government. The Panel noted two means of counteracting the effects of implicit guarantees: regulation of implicitly guaranteed institutions and the creation of a financial system in which those institutions could be liquidated or reorganized to allow for failure.

The Panel's September 2010 report, *Assessing the TARP on the Eve of Its Expiration*, provided a summation of Treasury's use of TARP funds and how its TARP programs have performed. The Panel noted that while Secretary Geithner's extension of the TARP in December 2009 was meant to allow for continued use of TARP funds and preserve Treasury's authority to intervene swiftly should financial markets exhibit signs of another meltdown, Treasury provided no further funding to address the areas it highlighted at the time the extension occurred. Thus, the report noted, the extension of the TARP functioned as a means to extend the government's implicit guarantee of the financial system. The report also noted that over time a public stigma has attached to the TARP, which is seen as a bailout of Wall Street banks and domestic auto manufacturers that had little impact on the unemployed and homeowners at risk of foreclosure. Alan Blinder, a Princeton economist, told the Panel that "in the near term, the extreme unpopularity of TARP will make it hard to do anything even remotely like it again, should the need arise."[557] The Panel's report noted that Treasury did little to remove this stigma, as it struggled with transparency and communications and failed to collect key data that would have allowed for greater understanding of the use and impact of TARP funds. The Panel consulted with outside economic experts who, while disagreeing on various points, generally agreed that

[555] Congressional Oversight Panel, Written Testimony of Timothy F. Geithner, secretary, U.S. Department of the Treasury, *COP Hearing with Treasury Secretary Timothy Geithner* (Dec. 10, 2009) (online at cop.senate.gov/documents/testimony-121009-geithner.pdf).

[556] EESA provided the Treasury Secretary with the authority to "hold the assets to maturity or for resale for and until such time as the Secretary determines that the market is optimal for selling such assets, in order to maximize the value for taxpayers" and "sell such assets at a price that the Secretary determines, based on available financial analysis, will maximize return on investment for the Federal Government." 12 U.S.C. § 5223(a)(2).

[557] Alan Blinder, Written Answers to Questions Posed by the Congressional Oversight Panel (Aug. 2010). *See* 2010 September Oversight Report, *supra* note 53, at 96, 112-114.

the TARP was necessary to stabilize the financial system, but that it created significant moral hazard. The report noted that any evaluation of the TARP ultimately must take into account the goals stated in EESA: protecting home values, college funds, retirement accounts, and life savings; preserving homeownership and promoting jobs and economic growth; and maximizing overall returns to U.S. taxpayers.[558]

B. Panel Recommendations

In its reports evaluating the TARP as a whole, several of the Panel's recommendations have focused on transparency. Specifically, the Panel has encouraged Treasury to provide more detailed, useful information in its TARP accounting statements, in order to show how it has managed TARP resources. The Panel has encouraged Treasury to produce quarterly TARP financial statements with an improved Management's Discussion and Analysis section. The Panel also recommended that Treasury disclose to the public more information about its plans for disposing of TARP assets. And in January 2010 the Panel urged Treasury to require any future TARP recipients to be more transparent about their use of taxpayer funds.[559]

Treasury has made some progress in this area, but the Panel believes that Treasury can and should be more transparent. Treasury has produced annual financial statements and a TARP Two Year Retrospective that more clearly articulated the metrics by which Treasury was evaluating the TARP's effectiveness;[560] these have been useful for oversight of the program. Treasury now provides daily updates on its financial positions and releases some of its data in a spreadsheet format, making it more easily analyzed and evaluated.[561] Treasury released a semi-annual TARP financial statement in early 2010 and has been providing more frequent accounting for the status of TARP resources, but it has not adopted the Panel's recommendation of producing quarterly financial reports. Treasury did not take meaningful steps to require more transparency by new TARP recipients.

In light of the government's dual roles as investor in and overseer of the financial industry, the Panel recommended that Treasury consider holding its TARP assets in a trust that is insulated from political pressure and government interference, as long as care is taken to ensure that the trust assets are managed in the best interests of taxpayers. Treasury has maintained that the drawbacks of such a trust outweigh the benefits. One drawback that Treasury has cited is

[558] 2010 September Oversight Report, *supra* note 53, at 106.

[559] 2010 January Oversight Report, *supra* note 153.

[560] TARP: Two Year Retrospective, *supra* note 246.

[561] For instance as of December 7, 2009, Treasury began releasing the Transaction reports in excel format. *See, e.g.*, U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 3, 2009* (Dec. 7, 2009) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/Pages/default.aspx?page=8).

that the trust structure would make it difficult to balance Treasury's goal of maximizing the benefit to taxpayers with the goal of maintaining financial stability.[562]

Finally, the Panel, both in its January 2009 Special Report on Regulatory Reform and in subsequent reports, recommended that Treasury take steps to resolve the problem of an implicit government guarantee of too-big-to-fail financial institutions.[563] The Dodd-Frank Act takes a variety of approaches to address this problem. The law empowers the FDIC to resolve financial institutions whose failure poses a risk to the nation's financial stability. The law also requires systemically significant institutions with more than $50 billion in assets to submit so-called "living wills," or plans for their resolution in times of severe financial distress. And the law creates a Financial Stability Oversight Council charged with identifying and responding to systemic risks in the U.S. economy. In recent months, federal regulatory agencies have begun the process of implementing these provisions. Nonetheless, the implicit guarantee of the TARP is proving difficult to unwind.[564]

C. Financial Status of the TARP

EESA authorized the expenditure of up to $700 billion under the TARP, and by the end of 2008 Treasury had used roughly $250 billion of that sum, mostly in assistance to banks. In February 2009, the Obama administration proposed a budget that raised the possibility that as much as $750 billion more would be needed.[565] Those additional funds were never requested.

[562] 2010 January Oversight Report, *supra* note 153, at 32, 142.

[563] COP: Special Report on Regulatory Reform, *supra* note 518, at 76 ("We should all know by now that whenever government subsidizes risk, either by immunizing parties from the consequences of their behavior or allowing them to shift risk to others at no cost, we produce a clear moral hazard that furthers risky behavior, usually with disastrous consequences."); 2010 January Oversight Report, *supra* note 153, at 142 ("There are multiple options available and there is broad agreement that a new approach to systemic risk regulation is necessary so that businesses are not insulated from the effects of their own bad decisions."). *See also* Congressional Oversight Panel, Written Testimony of Sarah Bloom Raskin, commissioner, Maryland Office of Financial Regulation, *Modernizing America's Financial Regulatory Structure*, at 6 (Jan. 14, 2009) (online at cop.senate.gov/documents/testimony-011409-raskin.pdf) ("While this crisis has demanded a dramatic response from the federal government, the short-term result of many of these programs, including the TARP, has been to create even larger and more complex institutions and greater systemic risk. These responses have created extreme disparity in the treatment of financial institutions, with the government protecting those deemed to be too big or too complex to fail at the expense of smaller institutions, and perhaps of the diversity of our financial system.").

[564] 2010 September Oversight Report, *supra* note 53, at 11-12. The four economists who testified at the Panel's March 4th hearing – Prof. Joseph E. Stiglitz, Prof. Simon Johnson, Prof. Allan H. Meltzer, and Prof. Luigi Zingales – were all skeptical as to whether the Dodd-Frank Act will prove effective in limiting the too-big-to-fail guarantee that TARP has served to strengthen. *See generally* Congressional Oversight Panel, *COP Hearing on Assessing the TARP* (Mar. 4, 2011) (online at cop.senate.gov/hearings/library/hearing-030411-cre.cfm).

[565] Office of Management and Budget, *A New Era of Responsibility: Renewing America's Promise*, at 37 (Feb. 26, 2009) (online at www.whitehouse.gov/sites/default/files/omb/assets/fy2010_new_era/A_New_Era_of_Responsibility2.pdf) ("Although the Administration is not requesting additional funds from the Congress at this point and although it is not yet possible to provide a precise estimate of how much additional Federal action may be involved should the Administration need to request such funds, the President's Budget nonetheless includes a $250 billion contingent

As 2009 continued, it became clear that unless Treasury expanded TARP programs or introduced new ones, it would not spend the entire $700 billion that Congress had authorized in October 2008. The stress tests, which raised the possibility of substantial additional TARP funds going to the banking sector, ultimately resulted in a TARP expenditure of only $3.8 billion.[566] Treasury initially announced that it would spend $100 billion in TARP funds on the PPIP, but later lowered the program's ceiling to $22.4 billion. Likewise, the ceiling for TARP spending on the TALF was dropped from $55 billion to $4.3 billion.[567] On the eve of the TARP's potential expiration in December 2009, nearly $300 billion of the original $700 billion in TARP funds was still available. Then on December 9, 2009, Secretary Geithner exercised his statutory authority to extend the TARP for roughly nine more months. Secretary Geithner explained at the time that barring an immediate and substantial threat to the economy stemming from financial instability, Treasury would limit new TARP commitments to mitigating home foreclosures, providing capital to small and community banks, along with other efforts aimed at facilitating small business lending, and potentially increasing Treasury's commitment to the TALF.[568] In the end Treasury did not allocate any additional TARP funds beyond those it had allocated in December 2009. In the summer of 2010, Congress reduced the TARP's ceiling – or the amount that Treasury could spend before accounting for repayments – to $475 billion. Treasury's spending authority under the TARP expired on October 3, 2010.

Over the life of the TARP, final loss estimates have sharply decreased. In March 2009, CBO estimated that the TARP would end up costing $356 billion. By January 2011, that latest loss estimate for the TARP is $25 billion, while OMB's latest estimate is $48 billion.[569] OMB's cost estimates reflect the Administration's policy on HAMP and other programs, have similarly declined sharply since 2009. Figure 31 illustrates three trends: the total TARP funds outstanding, which rose over the early months of the program before falling in 2010; CBO's loss estimates, which rose sharply in early 2009 before declining; and OMB's loss estimates, which also rose precipitously before falling off.

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reserve for further efforts to stabilize the financial system. … The $250 billion reserve would support $750 billion in asset purchases.").

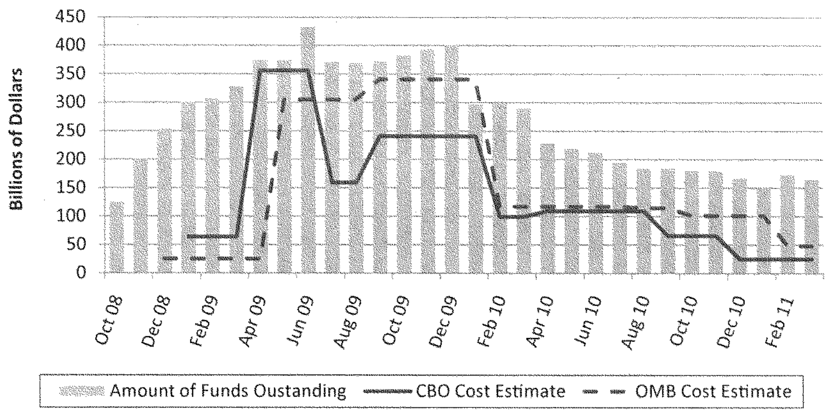
[566] See the discussion of GMAC's participation in the SCAP in Section V.A.1, *supra*.

[567] 2009 May Oversight Report, *supra* note 227, at 72-73; 2011 February Oversight Report, *supra* note 516, at 107.

[568] U.S. Department of the Treasury, *Treasury Department Releases Text of Letter from Secretary Geithner to Hill Leadership on Administration's Exit Strategy for TARP* (Dec. 9, 2009) (online at www.treasury.gov/press-center/press-releases/Pages/tg433.aspx).

[569] The main reason for the difference between CBO's estimate and the Administration's estimate is that CBO projects a total of $12 billion in expenditures on HAMP, the Hardest Hit Fund, and the FHA Short Refinance Program, while the Administration projects $45.6 billion in spending on those programs. The Panel believes that CBO's assumption is more realistic. CBO Report on TARP – November 2010, *supra* note 341, at 5; Office of Management and Budget, *FY 2012 Budget, Economic and Budget Analyses*, at 47 (Feb. 14, 2011) (online at www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/econ_analyses.pdf).

Figure 31: TARP Funds Outstanding vs. CBO and OMB Subsidy Cost Estimates[570]



[570] For current and past CBO cost estimates of TARP, *see* Congressional Budget Office, *Report on the Troubled Asset Relief Program*, at 2 (Jan. 16, 2009) (online at cbo.gov/ftpdocs/99xx/doc9961/01-16-TARP.pdf); Congressional Budget Office, *Report on the Troubled Asset Relief Program*, at 7 (June 2009) (online at www.cbo.gov/ftpdocs/100xx/doc10056/06-29-TARP.pdf); Douglas Elmendorf, *Troubled Asset Relief Program*, Congressional Budget Office Director's Blog (Apr. 17, 2009) (online at cboblog.cbo.gov/?p=231); Congressional Budget Office, *Report on the Troubled Asset Relief Program*, at 2 (June 2009) (online at www.cbo.gov/ftpdocs/100xx/doc10056/06-29-TARP.pdf); Congressional Budget Office, *The Budget and Economic Outlook: An Update*, at 18 (Aug. 2009) (online at www.cbo.gov/ftpdocs/105xx/doc10521/08-25-BudgetUpdate.pdf); Congressional Budget Office, *The Budget and Economic Outlook: Fiscal Years 2010 to 2020*, at 104 (Jan. 2010) (online at www.cbo.gov/ftpdocs/108xx/doc10871/01-26-Outlook.pdf); Congressional Budget Office, *Report on the Troubled Asset Relief Program*, at 3 (Mar. 2010) (online at cbo.gov/ftpdocs/112xx/doc11227/03-17-TARP.pdf); Douglas Elmendorf, *CBO's Latest Projections for the TARP*, Congressional Budget Office Director's Blog (Aug. 20, 2010) (online at cboblog.cbo.gov/?p=1322); Congressional Budget Office, *Report on the Troubled Asset Relief Program*, at 5 (Nov. 2010) (online at cbo.gov/ftpdocs/119xx/doc11980/11-29-TARP.pdf); Congressional Budget Office, *The Budget and Economic Outlook: Fiscal Years 2011 to 2021*, at 67 (Jan. 2011) (online at cbo.gov/ftpdocs/120xx/doc12039/01-26_FY2011Outlook.pdf).

For current and past OMB cost estimates of TARP, *see* Office of Management and Budget, *OMB Report Under the Emergency Economic Stabilization Act, Section 202*, at 4 (Dec. 5, 2008) (online at www.whitehouse.gov/sites/default/files/omb/assets/omb/legislative/eesa_120508.pdf); Office of Management and Budget, *Analytical Perspectives: Budget of the U.S. Government – Fiscal Year 2010*, at 66 (Feb. 26, 2009) (online at www.gpoaccess.gov/usbudget/fy10/pdf/spec.pdf); Office of Management and Budget, *Analytical Perspectives: Budget of the U.S. Government – Fiscal Year 2011*, at 40 (Feb. 1, 2010) (online at www.gpoaccess.gov/usbudget/fy11/pdf/spec.pdf); Office of Management and Budget, *OMB Report Under the Emergency Economic Stabilization Act, Section 202*, at 3 (Oct. 15, 2010) (online at www.whitehouse.gov/sites/default/files/OMB212Sharp_omb_eop_gov_20101015_175127.pdf); Office of Management and Budget, *Analytical Perspectives: Budget of the U.S. Government – Fiscal Year 2012*, at 45 (Feb. 14, 2011) (online at www.gpoaccess.gov/usbudget/fy12/pdf/BUDGET-2012-PER.pdf).

Figure 32 shows the current status of the government's investments for the 13 programs that have used TARP funds. This table only shows the status of principal invested by Treasury. Any dividends, interest payments, and other proceeds that may allow Treasury to earn a return on its TARP investments are accounted for separately in Figure 33.

The first five programs listed in Figure 32 – CPP, TIP, AGP, AIGIP, and CDCI – collectively represent the TARP's direct assistance to financial institutions. Out of $320 billion provided to these firms, about $92.3 billion remains outstanding, including $30.9 billion in the CPP and $60.9 billion to AIG. The Panel believes that the eventual losses in the CPP are likely to be relatively small. Consequently, most of Treasury's exposure to losses on its investments in financial institutions involves AIG. The outcome of the AIG investment will depend on the price that Treasury can eventually obtain for its common stock, including its Series C shares, which were not actually received as part of any TARP initiative.[571]

The next two programs listed in the table – AIFP and ASSP – represent the TARP's assistance to automotive companies.[572] About 60 percent of the $81.3 billion that Treasury provided to automotive companies remains outstanding, including large investments in GM, Chrysler, and GMAC/Ally Financial. There is still uncertainty about the outcome of each of those investments. The next three TARP programs listed in the table – TALF, PPIP, and the SBA 7(a) Securities Purchase Program – represent targeted efforts to revive lending. Though very little of this money has been repaid, the Panel expects losses on these programs to be minimal.

Finally, the last three programs listed in the table – HAMP, HHF, and the FHA Short Refinance Program – represent the TARP's foreclosure-prevention efforts. By design, all three of these programs will result in net losses to the TARP, since the funds are being used to provide financial incentives to prevent foreclosures, and are not meant to be repaid. So the size of the eventual losses will be negatively correlated with the success of the programs. In other words, the more foreclosures that the program prevents, the greater the losses to the TARP. The Panel expects the eventual losses to be far smaller than the $45.6 billion allocated for the programs, because usage of the programs to date is far below initial projections.

Overall, Treasury has spent $419.9 billion of the $475 billion that it is currently authorized to spend. Of the total amount spent, $255.9 billion has been repaid. Roughly $6 billion in losses have been recorded. For particular TARP programs, those losses on principal may be partially or fully offset by dividends, interest payments, and other proceeds collected by

[571] The Series C shares – discussed in Section VI.F.1, *supra* – were provided by AIG to the U.S. Treasury in consideration for FRBNY's $85 billion lending facility. This happened in September 2008, prior to the TARP investments in AIG.

[572] This category includes assistance to GMAC/Ally Financial, which Treasury chose to fund as part of AIFP due to the companies' interconnectedness to the future viability of the automotive manufacturers.

Treasury. Since the TARP expired in October 2010, Treasury has no longer been able to make new funding commitments, but it can continue to provide funding for TARP programs for which it has existing contracts and previous legal commitments. As Figure 32 shows, $55.1 billion in TARP funding is still available to Treasury, reserved mostly for the three TARP foreclosure-prevention programs.

Figure 32: TARP Accounting (as of March 10, 2011) *(billions of dollars)*[ix]

Program	Maximum Amount Allotted[x]	Actual Funding	Total Repayments/ Reduced Exposure	Total Losses	Funding Currently Outstanding	Funding Available[xi]
Capital Purchase Program (CPP)	$204.9	$204.9	[xii]$(171.5)	[xiii]$(2.6)	$30.8	$0
Targeted Investment Program (TIP)	40.0	40.0	(40.0)	0	0	0
Asset Guarantee Program (AGP)	5.0	[xiv]5.0	[xv](5.0)	0	0	0
AIG Investment Program (AIGIP)	[xvi]70.0	70.0	[xvii](9.1)	0	60.9	0
Community Development Capital Initiative (CDCI)	0.6	[xviii]0.6	0	0	0.6	0
Auto Industry Financing Program (AIFP)	81.3	81.3	[xix](29.0)	[xx](3.4)	48.9	0
Auto Supplier Support Program (ASSP)[xxi]	0.4	0.4	(0.4)	0	0	0
Term Asset-Backed Securities Loan Facility (TALF)	[xxii]4.3	[xxiii]0.1	0	0	0.1	4.2
Public-Private Investment Program (PPIP)[xxiv]	22.4	[xxv]15.9	[xxvi](0.7)	0	15.2	6.5
SBA 7(a) Securities Purchase Program	0.4	[xxvii]0.4	[xxviii]0	0	0.4	0
Home Affordable Modification Program (HAMP)	29.9	[xxix]1.0	0	0	1.0	28.9
Hardest Hit Fund (HHF)	[xxx]7.6	[xxxi]0.1	0	0	0.1	7.5
FHA Short Refinance Program	8.1	[xxxii]0.1	0	0	0.1	8.1
Total	**$475.0**	**$419.9**	**$(255.8)**	**$(6.0)**	**$158.1**	**$55.1**

See endnote references in Annex III: Endnotes

A quantitative assessment of the TARP must also include any profit earned or loss incurred on actual fund outlays. The terms of TARP transactions created the possibility for Treasury to profit from its investments after repayment, but Treasury has also suffered losses related to both investments that are unrecoverable and those never intended for repayment.

Most of the TARP programs hold at least the potential for the taxpayers to make a profit. So far, those programs have earned a profit, net of losses, of $30.3 billion.[573] The losses to date include $2.6 billion from CPP investments and $3.4 billion from the AIFP. The CPP losses relate to the bankruptcies of CIT Group and Pacific Coast National Bank and the sales of the preferred stock (and any related warrants) of South Financial Group, TIB Financial Corporation, the Bank of Currituck, Treaty Oak Bancorp, and Cadence Financial Corporation. The AIFP losses were derived from a $1.9 billion settlement payment for Treasury's $3.5 billion loan to Chrysler Holding[574] and the net loss from the $1.9 billion debtor-in-possession loan provided to Old Chrysler.[575] Figure 33 shows the profits and losses for each TARP program. It is important to note that this table represents a snapshot in time, and shows only recorded profits and losses; the TARP's net profit or loss changes with the finalization of each transaction. Additional profits and losses are inevitable. As noted earlier, CBO currently estimates a final net loss of $25 billion, although this represents a discounted present value estimate rather than a simple accounting summation of net profits and losses as discussed here.[576]

[573] These figures do not include the amount currently outstanding of $157.9 billion. Treasury Transactions Report, *supra* note 36.

[574] 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. *See* 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.treasury.gov/press-center/press-releases/Pages/tg700.aspx); Treasury Transactions Report, *supra* note 36.

[575] Following the bankruptcy proceedings for Old Chrysler, which extinguished the $1.9 billion debtor-in-possession loan provided to Old Chrysler, Treasury retained the right to recover the proceeds from the liquidation of specified collateral. Although Treasury does not expect a significant recovery from the liquidation proceeds, Treasury is not yet reporting this loan as a loss in the TARP Transactions Report. As of March 8, 2011, Treasury had collected $48.1 million in proceeds from the sale of collateral. Treasury included these proceeds as part of the funds repaid under the AIFP. U.S. Department of the Treasury, *Troubled Assets Relief Program Monthly 105(a) Report – September 2010* (Oct. 12, 2010) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/105/Documents105/September%20105(a)%20report_FINAL.pdf); Treasury conversations with Panel staff (Aug. 19, 2010 and Nov. 29, 2010); Treasury Transactions Report, *supra* note 36.

[576] CBO Report on TARP – November 2010, *supra* note 341, at 5.

Figure 33: TARP Profit and Loss *(millions of dollars)*

TARP Initiative[xxxiii]	Dividends[xxxiv] (as of 2/28/2011)	Interest[xxxv] (as of 2/28/2011)	Warrant Disposition Proceeds[xxxvi] (as of 3/8/2011)	Other Proceeds (as of 2/28/2011)	Losses[xxxvii] (as of 3/8/2011)	Total
Total	**$16,482**	**$1,256**	**$8,681**	**$10,014**	**($6,018)**	**$30,415**
CPP	10,570	68	7,069	[xxxviii]6,852	(2,578)	21,981
TIP	3,004	–	1,446	–	–	4,450
AIGIP	–	–	–	[xxxix]18	–	18
AIFP	2,461	1,061	[xl]99	[xli]43	[xlii] (3,440)	224
ASSP	–	15	–	[xliii]101	–	116
AGP	443	–	67	[xliv]2,246	–	2,756
PPIP	–	107	–	[xlv]477	–	583
SBA 7(a)	–	5	–	[xlvi]0	–	5
Bank of America Guarantee	–	–	–	[xlvii]276	–	276
CDCI	3	2	–	–	–	5

See endnote references in Annex III: Endnotes

Beyond the basic profit and loss calculation, an additional determination of the profitability of investments is the investment's return. As mentioned above, some TARP programs were not designed to create a return, and thus it would not make sense to calculate one for those expenditures. But for the other TARP programs, the return offers one way to assess their effectiveness. The Panel has consistently employed the IRR as a measure of profitability, as it incorporates cash outflows and inflows while taking into consideration the time value of money. Treasury, in contrast, has utilized several measures to assess the government's return on particular TARP programs as well as the TARP as a whole.[577]

For the warrants associated with the CPP investment, Treasury utilizes a non-annualized absolute return, which is calculated simply as money in divided by money out, without any consideration for the timing of cash flows.[578] The Panel's calculation includes a consideration

[577] One criticism of the IRR approach is that it assumes reinvestment of the earnings and repaid principal at the same rate as that calculated for the overall IRR for the program. *See e.g.*, John S. Walker, Henry F. Check, and Karen L. Randall, *Does the Internal Rate of Return Calculation Require a Reinvestment Rate Assumption? – There Is Still No Consensus* (online at www.abe.sju.edu/check.pdf) (accessed Mar. 11, 2011). In the case of Treasury, the more appropriate assumption may be that Treasury's return covers only its cost of issuing new debt for the comparable period.

[578] Treasury notes that this method was chosen because at the time they first issued a CPP return, most of the investments and disposed warrants had only been held for a year or less, which would have inflated an annualized return. They have continued with this calculation for consistency. Treasury conversations with Panel staff (Mar. 7, 2011).

for the time value of money. Further, Treasury includes only CPP and TIP investments that have been fully repaid, and excludes investments lost due to bankruptcy or partial repayment. The Panel, however, includes all CPP and TIP investments that have been repaid or in which Treasury has concluded it will take a loss, ensuring that the total return is not inflated by exclusion of known losses. As of December 31, 2010, Treasury measured the return on CPP investments fully repaid to be 9.8 percent, including both dividends and warrants.[579] The Panel, by comparison, calculates a return of 8.4 percent on CPP investments as of January 3, 2011.[580]

Neither Treasury nor the Panel have calculated an overall rate of return for TARP as a whole, given the disparate nature of the separate programs involved – including housing programs for which no return was expected – and the fact that most have not been completely closed out. The only other TARP program for which Treasury calculates a rate of return is the PPIP, for which Treasury calculates a return on equity alone, excluding the debt portion.[581] While calculating a return on equity is standard industry practice in the private sector, for the purpose of a return on taxpayer dollars, this practice does not reflect the government's true financial exposure. While Treasury makes clear that its PPIP return is for equity only, and is useful for private investors in the program, the total return on debt and equity would be lower than the return on equity alone. Based on its method of calculating a return for PPIP, Treasury currently shows a return of 27.0 percent.[582] When calculated as a blended return on both equity and debt, the total return is only 9.7 percent.[583]

IX. Conclusions and Lessons Learned

In order to evaluate the TARP's impact, one must first recall the extreme fear and uncertainty that infected the financial system in late 2008. The stock market had endured triple-digit swings. Major financial institutions, including Bear Stearns, Fannie Mae, Freddie Mac, and Lehman Brothers, had collapsed, sowing panic throughout the financial markets. The economy was hemorrhaging jobs, and foreclosures were escalating with no end in sight. Chairman

[579] December 2010 Warrant Disposition Report, *supra* note 152, at 1.

[580] The 8.4 percent return calculated by the Panel also includes the additional warrants received from Treasury's investment in Bank of America through the TIP. The Panel calculates a return of 10.0 percent on CPP investments as of March 9, 2011.

[581] According to Treasury, their rationale for using a return on only equity is because under the terms of the PPIP agreement, only the equity financing was truly at risk. Treasury conversations with Panel staff (Feb. 11, 2011). Also, the debt portion of the PPIP investment carries a financing rate of LIBOR plus one percent. U.S. Department of the Treasury, *Letter of Intent*, at Exhibit A (July 8, 2009) (online at www.treasury.gov/initiatives/financial-stability/investment-programs/ppip/s-ppip/Documents/S-PPIP_LOI_Term-Sheets.pdf).

[582] Treasury's Legacy Securities Public-Private Investment Program: Program Update, *supra* note 102, at 8.

[583] Ben Protess, *Bad Asset Purchase Program Turning a Profit*, The New York Times Dealbook Blog (Jan. 24, 2011) (online at dealbook.nytimes.com/2011/01/24/toxic-asset-purchase-program-turning-a-profit/).

Bernanke, looking back on the events of late 2008, has said that the nation was on course for "a cataclysm that could have rivaled or surpassed the Great Depression."

It is now clear that, although America has endured a wrenching recession, it has not experienced a second Great Depression. America's financial system has survived. Its economy is recovering.

The TARP does not deserve full credit for preventing a depression; indeed, the TARP in isolation may have been insufficient to make much of a difference to the broader economy. But the TARP provided critical support at a moment of profound uncertainty. At the peak of the 2008 financial crisis, when the markets questioned the stability of virtually every bank in the country, the TARP restored a measure of calm and stability. It achieved this effect in part by providing capital to banks but, more significantly, by demonstrating that the United States would take any action necessary to prevent the collapse of its financial system. Through a combined display of political resolve and financial force, the TARP quelled the immediate panic and helped to avert an even more severe crisis.

At the time that Congress established the TARP in October 2008, CBO declined to provide a cost estimate, saying that the program's extremely broad and vague mandates rendered its final cost unknowable. One number, however, caught the public imagination: $700 billion, the total amount of money that Treasury requested and Congress authorized to bail out the financial system. As the New York Times reported following Treasury's initial TARP proposal, "A $700 billion expenditure on distressed mortgage-related assets would roughly be what the country has spent so far in direct costs on the Iraq war and more than the Pentagon's total yearly budget appropriation. Divided across the population, it would amount to more than $2,000 for every man, woman and child in the United States." It is important to note, however, that even at the time the TARP was created, CBO considered it unlikely that the program would cost taxpayers $700 billion, as Treasury always stood to recover at least some portion of its investments. Nonetheless, $700 billion was the most precise figure available to the public as the TARP was enacted, and it remains the figure indelibly associated with the program.

Several months after the TARP's creation, in April 2009, CBO finally had enough information to estimate what the TARP would ultimately cost taxpayers: $356 billion, or roughly half of the oft-cited $700 billion figure. Since then, CBO's estimates have grown progressively less grim as the economy has recovered and TARP investments have been repaid. CBO today estimates that the TARP will cost $25 billion – an enormous sum, but vastly less than anyone expected in the dark days of late 2008 and early 2009.

Although CBO's falling cost estimates are in many ways encouraging, they do not necessarily validate Treasury's administration of the TARP. To be sure, Treasury deserves credit for lowering costs to taxpayers through its diligent management of TARP assets and, in particular, its careful restructuring of AIG, Chrysler, and GM. However, a separate reason for the TARP's falling costs is that Treasury's foreclosure prevention programs, which could have cost $50 billion, have largely failed to get off the ground. Viewed from this perspective, the TARP will cost less than expected in part because it will accomplish far less than envisioned for American homeowners. Another reason for the TARP's falling costs is that non-TARP government programs, such as the FDIC's efforts to allow banks to borrow at below-market rates and the Federal Reserve's efforts to support the RMBS market, have shifted some of the costs of the financial rescue off of the TARP's balance sheet and onto the balance sheets of other programs that are subject to significantly less oversight. Still another reason that costs have fallen is that the value of the government's stock holdings in the financial sector have sharply rebounded – a rebound that has, unfortunately, not been accompanied by increased lending to consumers and small businesses, nor by increased hiring in the broader economy, both of which were among the TARP's explicit goals.

Further, the Panel has always emphasized that the TARP's cost cannot be measured merely in dollars. The TARP's implicit guarantee of "too big to fail" financial firms has entrenched moral hazard in the financial system, and the TARP's unpopularity in the public eye has created a lingering stigma that may hinder future rescue efforts. Further, accounting for the TARP from today's vantage point – at a time when the financial system has made great strides toward recovery – obscures the risk that existed in the depths of the financial crisis. At one point, the federal government guaranteed or insured $4.4 trillion in face value of financial assets. If the financial system had suffered another shock on the road to recovery, taxpayers would have faced staggering losses.

Finally, the TARP's incomplete transparency creates a real cost as well: an enduring public suspicion that taxpayers' money was not managed as effectively and accountably as possible.

A. "Too Big to Fail" and Moral Hazard

The TARP did not create the idea of "too big to fail." Commentators had suggested for years that the U.S. government would intervene to prevent the collapse of any sufficiently large and interconnected financial institution. The government had even demonstrated a willingness in the past – for example, in the 1998 Federal Reserve-supervised bailout of Long Term Capital Management, a hedge fund whose failure the government believed would threaten financial stability – to play at least a limited role in preventing a panic. It is possible that these relatively small-scale interventions created a market expectation that the government would intervene in a more sweeping manner in the event of a crisis.

Yet although the notion of "too big to fail" had existed for years, the TARP and other extraordinary government interventions in 2008 transformed it into stark reality. At the height of the financial crisis, 18 very large financial institutions received $208.6 billion in TARP funding almost overnight, in many cases without having to apply for funding or to demonstrate any ability to repay taxpayers. Three particularly weak and systemically significant firms – Citigroup, Bank of America, and AIG – received even greater amounts of assistance under improvised programs that were not available to smaller, less significant institutions. The AIG rescue was particularly extraordinary in that it appears to have extended the "too big to fail" guarantee beyond AIG itself and into the broader derivatives market in which the company was entrenched. In essence, by bailing out AIG and its counterparties, the government transformed highly risky derivative bets into fully guaranteed transactions, with the American taxpayer standing as guarantor.

The parameters of "too big to fail" gained greater clarity in early 2009, when Treasury and the Federal Reserve announced that the nation's 19 largest banks would undergo stress tests and that, if any of these banks were found to be potentially insolvent, it would receive further TARP capital as needed. In essence, the federal government announced that taxpayers would bear any burden and pay any price to prevent the collapse of any very large or very interconnected U.S. bank. Indeed, it was this implicit guarantee, more than any explicit government action, that played the greatest role in calming markets and halting the financial panic.

Even as Treasury took drastic steps to rescue a handful of very large banks, smaller banks continued to collapse across the country. A total of 334 small and medium-sized banks have failed since the TARP's creation. Partly due to Treasury's decision to rescue very large banks while allowing smaller banks to collapse, America's largest banks today manage an even greater fraction of the nation's wealth than before the crisis. Banks that were "too big to fail" in 2008 are even bigger today.

In light of these events, it is not surprising that markets have incorporated the notion that "too big to fail" banks are safer than their "small enough to fail" counterparts. Credit rating agencies continue to adjust the credit ratings of very large banks to reflect their implicit government guarantee. Smaller banks receive no such adjustment, and as a result, they face higher costs of funds relative to very large banks.

By protecting very large banks from insolvency and collapse, the TARP also created classic moral hazard: that is, very large financial institutions may now rationally decide to take inflated risks because they expect that, if their gamble fails, taxpayers will bear the loss. Ironically, these inflated risks may create even greater systemic risk and increase the likelihood of future crises and bailouts. It is difficult to determine the degree to which moral hazard continues to infect the financial system. Treasury believes that the recent Dodd-Frank Act reined in the problem by establishing a plausible resolution authority for very large banks, but that authority has yet to be tested.

It is important to note that much of the moral hazard created by the TARP was inherent in any large-scale government intervention in the financial sector. That is, once Congress and the administration decided to rescue too-big-to-fail firms from the natural consequences of their own errors, a hefty dose of moral hazard was guaranteed. Yet Treasury likely exacerbated moral hazard in late 2008 and early 2009 by choosing not to impose tough consequences on TARP-recipient banks. For example, if banks had been forced as a condition of TARP assistance to use TARP funds to increase lending, fire their top management, or endure other severe penalties, they would be less willing to repeat the experience, reducing moral hazard.

Treasury's interventions in the automotive industry, in particular, raise moral hazard concerns. In some ways, Treasury actually mitigated moral hazard through its very strict approach to these companies: it forced GM and Chrysler to enter bankruptcy, a step not required of other major TARP-recipient institutions. However, the mere fact that Treasury intervened in the automotive industry, rescuing companies that were not banks and were not particularly interconnected within the financial system, extended the "too big to fail" guarantee and its associated moral hazard to non-financial firms. The implication may seem to be that any company in America can receive a government backstop, so long as its collapse would cost enough jobs or deal enough economic damage.

B. Stigma

As the TARP evolved, Treasury found its policy choices increasingly constrained by public anger about the program. The TARP is now widely perceived as having restored stability to the financial sector by bailing out Wall Street banks and domestic automotive manufacturers while doing little for the 13.9 million workers who are unemployed, the 2.4 million homeowners who are at immediate risk of foreclosure, or the countless families otherwise struggling to make ends meet. Treasury acknowledges that, as a result of this perception, the TARP and its programs are now burdened by a public "stigma."

Because the TARP was designed for an inherently unpopular purpose – rescuing Wall Street banks from the consequences of their own actions – stigmatization was likely inevitable. Treasury's implementation of the program has, however, made this stigma worse. For example, Treasury initially insisted that only healthy banks would be eligible for capital infusions under the CPP. When it later became clear that some TARP-recipient banks were in fact on the brink of failure, all participating banks, even those in comparatively strong condition, became tainted in the public eye. Further, many senior managers of TARP-recipient institutions maintained their jobs and their substantial salaries, and although shareholders often suffered meaningful dilution, they were not wiped out. To the public, this may appear to be evidence that Wall Street banks and bankers can retain their profits in boom years and shift their losses to taxpayers during a bust – an arrangement that is anathema to market discipline in a free economy.

Another factor contributing to stigmatization was the haphazard, constantly shifting, and in some ways misleading manner in which the TARP was sold to the public. Treasury initially proposed the TARP in a three-page bill that would have provided the Secretary of the Treasury with nearly unlimited, unilateral authority to buy troubled mortgage-backed assets off of bank balance sheets, absent any oversight or review. Although the legislation authorizing the TARP later grew in length and complexity (and added several layers of oversight, including the Panel), Treasury continued to assert that the TARP would function mainly by purchasing troubled assets. Mere days after the legislation authorizing the program was signed into law, however, Treasury changed course and decided to implement the TARP mainly as a bank capitalization program. The shift may have been made for sound policy reasons, but it helped to create a public distrust of the TARP: a sense that the government was treating honest and forthright communication to the public as secondary to Wall Street's needs. Further, the program's architects in many ways oversold its potential. Congress authorized the TARP to be used in a manner that "protects home values, college funds, retirement accounts, and life savings" and "preserves homeownership and promotes jobs and economic growth." Notwithstanding these stated goals, the TARP was always intended by Congress and Treasury primarily to recapitalize banks. By citing the other goals as part of the rationale for the TARP, Congress and the administration may have laid the groundwork for some of the public disillusionment and anger that followed.

Yet another source of stigma is that the TARP and other government rescue efforts were generally coordinated by the very regulators, bankers, and public officials who failed to anticipate or prevent the crisis, and that the boundaries between public and private actors were not always clear. To give a concrete example, in the rescue of AIG, people from the same small group of law firms, investment banks, and regulators appeared in many roles, sometimes representing conflicting interests. More broadly, the individuals who orchestrated the TARP and other rescue efforts almost all had the perspectives of either a banker or a banking regulator. This problem may be insurmountable – after all, who other than financial experts would coordinate a financial rescue? Nonetheless, the fact that the same people who contributed to the crisis were charged with ending it contributed to a perception that the government was quietly helping banking insiders at the expense of accountability and transparency.

Whatever the reasons for the TARP's stigmatization, the program eventually became so detested that some smaller banks refused to participate in the CPP, while the legislation proposing the SBLF, a TARP-like bank capitalization program, attempted to escape the program's unpopularity by providing explicit assurances that the fund was not affiliated with the TARP.

Stigma is difficult to quantify, but opinion polling is suggestive. A Bloomberg poll conducted in October 2010 found that 60 percent of respondents believe that most of the TARP funds provided to the banks would be lost; only 33 percent believed that most of the funds would be recovered. This overwhelming public belief stands at odds with projections released by the administration and CBO, which indicate that these programs may in fact turn a profit. In other words, the public's broad fury about the TARP may leave many Americans ready to believe only the worst about the program – a sentiment that creates real obstacles to any future government effort to intervene in a financial crisis.

C. Transparency, Data Collection, and Accountability

Transparency. Beginning with its very first report, the Panel has repeatedly expressed concerns about the lack of transparency in the TARP. In too many cases, especially in late 2008 and early 2009, Treasury either declined to release information that it possessed about the program or declined to require TARP-recipient institutions to reveal information about their use of taxpayer funds. In perhaps the most profound violation of the principle of transparency, Treasury decided in the TARP's earliest days to push tens of billions of dollars out the door to very large financial institutions without requiring banks to use the funds in any particular way or even reveal how the money was used. As a result, the public will never know to what purpose its money was put. Other transparency problems include Treasury's refusal to explain how it valued the stock warrants it received in exchange for its TARP investments and the joint failure of Treasury and the Federal Reserve to disclose enough details of the 2009 stress tests to permit the results to be duplicated or challenged by outside parties.

To Treasury's credit, its transparency and disclosure practices have improved over the lifetime of the TARP. For example, Treasury has recently begun to release loan-level information on its foreclosure mitigation programs – a far greater level of detail than was available in the program's early days. Further, Treasury has made an admirable commitment to posting TARP contracts online, and it has even disclosed the identity of TARP subcontractors – an unusual degree of transparency within the government contracting arena.

Data Collection and Analysis. In some cases, public understanding of the TARP has suffered not because Treasury refused to reveal useful data but because these data were never collected in the first place. For example, despite repeated urgings from the Panel, Treasury still does not collect sufficient information about why loans are moving to foreclosure, nor does it monitor closely enough any loan modifications performed outside of HAMP. Additionally, Treasury stopped collecting lending data from CPP-recipient banks after larger banks repaid TARP funds, rendering it difficult for observers to measure that program's continuing impact.

Without adequate data collection, Treasury has flown blind; it has lacked the information needed to spot trends, determine which programs are succeeding and which programs are failing, and make changes necessary for better implementation. The collection and analysis of data were especially important because so many of the TARP's programs were unprecedented, creating the possibility that data could reveal surprising and unexpected results. For example, Treasury took for granted that recapitalizing banks through the CPP would spur lending, yet when the Panel analyzed bank-level lending data, it was unable to find any correlation between the receipt of CPP funds and new lending. Similarly, it may seem intuitively obvious that homeowners who are burdened by significant car loan and credit card payments would be more likely to default on their mortgages than similar homeowners unburdened by such payments – yet surprisingly, HAMP data revealed that this was not the case. To the extent that comprehensive, usable data were not collected for all TARP programs, or to the extent that data were collected but not analyzed or released for public review, other surprising and important correlations were likely never uncovered.

Goals and Accountability. A related concern is Treasury's failure to articulate clear, meaningful goals for many of its TARP programs or to update its goals as programs have evolved. For example, when the President announced HAMP in early 2009, he asserted that the program would prevent three to four million foreclosures. The program has fallen far short of that goal and now appears on track to help only 700,000 to 800,000 homeowners – yet Treasury has never formally announced a new target for the program.

Even in cases in which Treasury's decisions have been clearly disclosed, the justifications have often remained obscure. For example, Treasury has often stated numerous goals for a single TARP program, such as to maintain systemic stability, to protect the stability of a particular institution, and to ensure the best possible return on taxpayer money. These goals have, unfortunately, frequently come into conflict, and Treasury has never adequately explained how it balanced conflicting obligations or prioritized conflicting aims. Because virtually any course of action could be justified as meeting one or another of Treasury's goals, the public has had no meaningful way to hold Treasury accountable – and Treasury has had no clear target to strive toward in its own internal deliberations.

D. Other Obstacles Encountered by the TARP

In addition to the broad problems laid out above, Treasury has encountered other recurring difficulties in its administration of the TARP.

- **Treasury often found greater success in TARP programs that had only a few participants than in programs that required coordinating hundreds or thousands of participants.** In the case of the CPP, Treasury achieved the vast majority of the program's effect by quickly pumping tens of billions of dollars into a handful of very large banks. Treasury needed a much longer timeframe to recapitalize hundreds of local and regional banks, and Treasury's investments in these banks were simply too small and too late to have a meaningful effect on financial stability. Along similar lines, the TARP program that directly reached the most participants – HAMP – was also one of the least effective, in part because Treasury found the task of coordinating hundreds of banks and loan servicers and millions of homeowners to be nearly overwhelming.

  Although Treasury found it easier and often more effective to stabilize the financial system by supporting "too big to fail" institutions rather than smaller banks or individual homeowners, it is critically important that the government consider the effects of its actions on the overall financial system. Rescuing large banks may have averted the immediate crisis, but it also provided these banks a competitive advantage, exacerbating concentration and potentially destabilizing the financial system. Further, the fact that large banks received such quick and dramatic support even as foreclosures continued unabated has contributed to the TARP's stigmatization, which has undermined the program's effectiveness.

- **Treasury often encountered difficulty in attracting active, widespread participation in voluntary programs.** The TARP's most effective programs were those in which participants had little choice but to follow Treasury's guidance. In particular, the investments that most dramatically stabilized the financial system were the CPP's investments in very large banks (which, at the peak of the financial crisis, received intense political and market pressure to participate in the TARP) and AIG, GM, and Chrysler (which would have suffered catastrophic, uncontrolled bankruptcies had they refused government support). In cases in which Treasury relied on voluntary participation, as in the involvement of small banks in the CPP or of investors and loan servicers in HAMP, many would-be participants refused to join, and Treasury found that it had little leverage to enforce program terms on the participants that did enroll. These problems persisted even though the terms of HAMP and the CPP were quite generous.

  Of course, mandatory programs present their own problems, including the specter of unrestrained government intervention into private institutions. The fact that voluntary TARP programs worked relatively poorly does not necessarily mean that future programs should be made mandatory; rather, it means that future administrations should carefully weigh the trade-offs of a program that relies purely on voluntary participation.

- **Treasury often found that hastily designed programs could backfire.** For example, in the foreclosure arena, Treasury found that HAMP's initial design attracted only limited interest from loan servicers, prompting it to launch half a dozen increasingly generous foreclosure-related efforts in 2009 and early 2010. Unfortunately, the pattern of providing ever more generous incentives may have backfired, as lenders and servicers may have opted to delay modifications in hopes of eventually receiving a better deal. In addition, loan servicers expressed confusion about the constant flux of new programs, new standards, and new requirements that made implementation more complex. A similar problem arose in the CPP, in which Treasury and Congress imposed additional restrictions on CPP-recipient banks – particularly as related to executive compensation – long after those banks had accepted taxpayer money. Once financial institutions recognized that their CPP participation entailed a risk of being forced to accept additional, unilaterally imposed restrictions at a later date, they became less willing to participate in future TARP programs.

In a crisis, government agencies may feel forced to launch a response – any response – as quickly as possible with the expectation that, if their first effort should fail, they can always revise and improve the program later. The experience of the TARP, however, suggests that poorly designed first efforts may create enduring problems. Government actors should weigh this risk carefully when choosing whether to launch an immediate, haphazard response or to take more time to design an effective program.

- **Treasury's programs often focused on addressing the immediate crisis, potentially giving short shrift to longer-term risks.** For example, the Panel highlighted potential threats to the financial system in its oversight reports on the CRE market and on the potential hazards posed by mortgage irregularities. Treasury had not established specific programs to deal with these potential systemic threats, and its existing programs in some cases relied upon these threats not materializing (for example, HAMP's contracts with loan servicers take for granted that those servicers have a legal right to conduct loan modifications, notwithstanding widespread concern about mortgage documentation irregularities).

  It is understandable that, while dealing with threats that could impair the financial system tomorrow, Treasury may pay less attention to threats that could damage the system months or years in the future. Even so, failure to pay attention to threats at their earliest stages could allow risks to magnify and may force more costly interventions down the road.

E. On the Role of Oversight

In establishing the TARP, Congress assigned oversight roles to no fewer than three government bodies: the Congressional Oversight Panel, the Special Inspector General for TARP (SIGTARP), and the Government Accountability Office (GAO). Although this document is the Panel's final report, SIGTARP and GAO will continue to monitor the TARP and issue public reports on their findings, and further oversight work will be performed by committees of the U.S. House of Representatives and the U.S. Senate. Academics, journalists, and watchdog groups also have played and will continue to play an important role in evaluating the TARP.

Because so many organizations have examined Treasury's efforts, the TARP has become one of the most thoroughly scrutinized government programs in U.S. history. Such close scrutiny inevitably begets criticism, and in the case of the TARP – a program born out of ugly necessity – the criticism was always likely to be harsh. After all, in the midst of a crisis, perfect solutions do not exist; every possible action carries regrettable consequences, and even the best possible decisions will be subject to critiques and second-guessing. For these reasons the TARP was likely doomed to be unpopular, and because close scrutiny from oversight bodies drew attention to the program's faults – both the faults resulting from Treasury's decisions and the faults beyond anyone's control – the oversight process itself may have magnified the TARP's unpopularity.

This fact creates an unfortunate tension. In a democracy in which a government's legitimacy depends upon public approval for its actions, political logic may argue for conducting only loose oversight of unpopular programs in hopes of shielding such programs from public criticism. It is to the credit of Congress, Treasury, and the administration that the TARP has not been hidden: that despite the much-discussed gaps in the program's transparency, it has been thoroughly and systematically scrutinized and debated. There can be no question that this oversight has improved the TARP and increased taxpayer returns. For example, in July 2009, the Panel reported that Treasury's method for selling stock options gained through the CPP appeared to be recovering only 66 percent of the warrants' estimated worth. Due in part to pressure generated by the Panel's work, Treasury changed its approach, and subsequent sales recovered 103 cents on the dollar, contributing to $8.6 billion in returns to taxpayers. Other substantial improvements in the TARP – such as Treasury's heightened focus on the threat to HAMP posed by second liens and its greater disclosure of TARP-related data – are all partly the result of pressure exerted by the Panel and other oversight bodies.

Thus, an enduring lesson of the TARP is that extraordinary government programs can benefit from, and indeed may require, extraordinary oversight. This lesson remains relevant in the context of the government's extraordinary actions in the 2008 financial crisis: the public will continue to benefit from intensive, coordinated efforts by public and private organizations to oversee Treasury, the FDIC, the Federal Reserve, and other government actors. Careful, skeptical review of the government's actions and their consequences – even when this review is uncomfortable – is an indispensable step toward preserving the public trust and ensuring the effective use of taxpayer money.

Annex I: Federal Financial Stability Efforts

Beginning in its April 2009 report, the Panel broadly classified the resources that the federal government has devoted to stabilizing the economy in the aftermath of the financial crisis through myriad programs and initiatives such as outlays, loans, or guarantees. The Panel calculates the total current value of these Treasury, FDIC, and Federal Reserve resources to be approximately $1.9 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. The $1.9 trillion total current value does not include Treasury's exposure to Fannie Mae and Freddie Mac, which the Panel consistently has treated as a separate issue. It also excludes efforts by the Federal Reserve that are primarily monetary policy initiatives, rather than financial stability efforts. These efforts are discussed separately below.

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, or 1 percentage point, on TLGP debt guarantees.[584] In contrast, the Federal Reserve's liquidity programs, classified here as loans under "Other Federal Reserve Credit Expansion," 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 the Federal Reserve whole. In this way, the risk to the taxpayer on recourse loans only materializes if the borrower enters bankruptcy.

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[584] 2009 November Oversight Report, *supra* note 60, at 36.

Figure 34: Federal Government Financial Stability Efforts (as of March 8, 2011)

Program *(billions of dollars)*	Treasury (TARP)	Federal Reserve	FDIC	Total
Total	**$213.2**	**$1,156.9**	**558.3**	**1,928.3**
Outlays[xlviii]	186.4	1,092.2	64.1	1,342.7
Loans[xlix]	22.4	64.7	0	87.1
Guarantees[l]	4.3	0	494.2	498.5
AIG[li]	**60.9**	**24.8**	**0**	**85.7**
Outlays	[lii]**60.9**	[liii]0	0	60.9
Loans	0	[liv]24.8	0	24.8
Guarantees	0	0	0	0
Citigroup	**0**	**0**	**0**	**0**
Outlays	[lv]0	0	0	0
Loans	0	0	0	0
Guarantees	0	0	0	0
Bank of America	**0**	**0**	**0**	**0**
Outlays	[lvi]0	0	0	0
Loans	0	0	0	0
Guarantees	0	0	0	0
Capital Purchase Program (Other)	**30.8**	**0**	**0**	**30.8**
Outlays	[lvii]30.8	0	0	30.8
Loans	0	0	0	0
Guarantees	0	0	0	0
Capital Assistance Program	**N/A**	**0**	**0**	[lviii]**N/A**
TALF	**4.3**	**15.9**	**0**	**20.2**
Outlays	0	0	0	0
Loans	0	[lx]15.9	0	15.9
Guarantees	[lix]4.3	0	0	4.3
PPIP (Loans)[lxi]	**0**	**0**	**0**	**0**
Outlays	0	0	0	0
Loans	0	0	0	0
Guarantees	0	0	0	0
PPIP (Securities)	[lxii]**21.7**	**0**	**0**	**21.7**
Outlays	7.4	0	0	7.4
Loans	14.3	0	0	14.3
Guarantees	0	0	0	0
Making Home Affordable Program/ Foreclosure Mitigation	**45.6**	**0**	**0**	**45.6**
Outlays	[lxiii]45.6	0	0	45.6
Loans	0	0	0	0
Guarantees	0	0	0	0
Automotive Industry Financing Program	[lxiv]**48.9**	**0**	**0**	**48.9**
Outlays	40.8	0	0	40.8
Loans	8.1	0	0	8.1
Guarantees	0	0	0	0

Automotive Supplier Support Program	**0**	**0**	**0**	**0**
Outlays	0	0	0	0
Loans	[lxv]0	0	0	0
Guarantees	0	0	0	0
SBA 7(a) Securities Purchase	[lxvi]**0.37**	**0**	**0**	**0.37**
Outlays	0.37	0	0	0.37
Loans	0	0	0	0
Guarantees	0	0	0	0
Community Development Capital Initiative	[lxvii]**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**	**494.2**	**494.2**
Outlays	0	0	0	0
Loans	0	0	0	0
Guarantees	0	0	[lxviii]494.2	494.2
Deposit Insurance Fund	**0**	**0**	**64.1**	**64.1**
Outlays	0	0	[lxix]64.1	64.1
Loans	0	0	0	
Guarantees	0	0	0	0
				0
Other Federal Reserve Credit Expansion	**0**	**1,116.2**	**0**	**1,116.2**
Outlays	0	[lxx]1,092.2	0	1,092.2
Loans	0	[lxxi]24.0	0	24.0
Guarantees	0	0	0	0

See endnote references in Annex III: Endnotes

Treasury's Exposure to Fannie Mae and Freddie Mac

In July 2008, the Federal Reserve and Treasury began to provide increased credit support to Fannie Mae and Freddie Mac. On September 7, 2008, the FHFA, using authority it had been provided through the Housing and Economic Recovery Act of 2008, placed Fannie Mae and Freddie Mac in conservatorship, thereby explicitly guaranteeing the $5.2 trillion in debt and MBS guaranteed by the GSEs in 2008.[585] As part of this action, Treasury initiated agreements to recapitalize the GSEs, and additionally established two programs to aid them: the Government Sponsored Enterprises' Mortgage Backed Securities Purchase Program (GSE MBS Purchase Program) and the GSE Credit Facility.

[585] Fannie Mae had $3.0 trillion of guaranteed debt on its books in 2008, and had $3.1 trillion in 2010. Freddie Mac had $2.2 trillion of MBS on its books in 2008 and had $2.2 trillion in 2010. Federal National Mortgage Association, *Form 10-K for the Fiscal Year Ended December 31, 2010,* at 74 (Feb. 24, 2011) (online at www.sec.gov/Archives/edgar/data/310522/000095012311017972/w81665e10vk.htm); Federal Home Loan Mortgage Corporation, *Form 10-K for the Fiscal Year Ended December 31, 2010,* at 81 (Feb. 24, 2011) (online at www.sec.gov/Archives/edgar/data/1026214/000102621411000005/f71542e10vk.htm).

Under the GSE MBS Purchase Program, Treasury purchased approximately $225 billion in GSE MBS by the time its authority expired.[586] As of February 2011, there was approximately $136.3 billion in MBS still outstanding under this program.[587] No loans were needed or issued under the GSE Credit Facility.

On May 6, 2009, Treasury doubled its recapitalization (stock purchase) commitment to each enterprise. In December 2009, Treasury announced amendments to the Senior Preferred stock purchase agreements that removed any limits on such stock purchases of each GSE through the end of 2012. As of the end of fiscal year 2010, Treasury held $52.6 billion in preferred stock, a number that was predicted to fall to $47.5 billion in fiscal year 2011.[588]

Other Federal Reserve Actions

On November 3, 2010, the FOMC announced that it had directed FRBNY to begin purchasing $600 billion in longer-term Treasury securities. In addition, FRBNY will reinvest $250 billion to $300 billion in principal payments from agency debt and agency MBS in Treasury securities.[589] The additional purchases and reinvestments will be conducted through the end of the second quarter of 2011, meaning the pace of purchases will be approximately $110 billion per month. In order to facilitate these purchases, FRBNY will temporarily lift its System Open Market Account per-issue limit, which prohibits the Federal Reserve's holdings of an individual security from surpassing 35 percent of the outstanding amount.[590] As of March 9, 2011, the Federal Reserve held $1.27 trillion in Treasury securities.[591]

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[586] U.S. Department of the Treasury, *FY2011 Budget in Brief*, at 138 (Feb. 2010) (online at www.treasury.gov/about/budget-performance/budget-in-brief/Documents/FY%202011%20BIB%20(2).pdf).

[587] U.S. Department of the Treasury, *MBS Purchase Program: Portfolio by Month* (online at www.treasury.gov/resource-center/data-chart-center/Pages/mbs-purchase-program.aspx) (accessed Mar. 11, 2011). Treasury has received $80.7 billion in principal repayments and $16.2 billion in interest payments from these securities. *See* U.S. Department of the Treasury, *MBS Purchase Program Principal and Interest Received* (online at www.treasury.gov/resource-center/data-chart-center/Pages/mbs-purchase-program.aspx) (accessed Mar. 11, 2011).

[588] U.S. Department of the Treasury, *Housing Government Sponsored Enterprise Programs: Program Summary by Budget Activity* (Feb. 14, 2011) (online at www.treasury.gov/about/budget-performance/budget-in-brief/Documents/FY2012_GSE_508.pdf).

[589] On August 10, 2010, the Federal Reserve began reinvesting principal payments on agency debt and agency MBS holdings in longer-term Treasury securities in order to keep the amount of their securities holdings in their System Open Market Account portfolio at their then-current level. Board of Governors of the Federal Reserve System, *FOMC Statement* (Aug. 10, 2010) (online at www.federalreserve.gov/newsevents/press/monetary/20100810a.htm).

[590] Federal Reserve Bank of New York, *FAQs: Purchases of Longer-term Treasury Securities* (Nov. 3, 2010) (online at www.newyorkfed.org/markets/lttreas_faq.html).

[591] March 2011 Fed Statistical Release H.4.1, *supra* note 458.

Annex II: Additional CPP Data

The CPP is discussed at length in Section II.A above. This annex provides additional data about the current state of the CPP. Figure 35 shows the number of CPP recipients that have missed dividend payments to Treasury by bank size, type of dividend owed, and number of payments missed.

Figure 35: CPP Missed Dividend Payments (as of February 28, 2011)[592]

Number of Missed Payments	1	2	3	4	5	6	7	8	9	Total
Cumulative Dividends										
Number of Banks, by asset size	26	18	26	20	17	13	8	3	0	131
Under $1B	16	11	19	17	13	8	5	1	0	90
$1B-$10B	9	7	6	3	4	5	3	2	0	39
Over $10B	1	0	1	0	0	0	0	0	0	2
Non-Cumulative Dividends										
Number of Banks, by asset size	3	5	2	6	6	1	3	3	1	30
Under $1B	2	5	2	6	5	1	3	3	1	28
$1B-$10B	1	0	0	0	1	0	0	0	0	2
Over $10B	0	0	0	0	0	0	0	0	0	0
Total Banks Missing Payments										**161**
Total Missed Payments										**596**

Figure 36 identifies CPP recipients to whose board meetings Treasury currently sends an observer, as a result of multiple missed dividend payments.

[592] Additionally, two banks in the CDCI program have missed one payment and one has missed two payments, as of February 28, 2011. All three banks have less than $1 billion in assets. Treasury's Dividends & Interest Report, *supra* note 156. Data on total bank assets compiled using SNL Financial data service (accessed Mar. 11, 2011).

Figure 36: Institutions Where Treasury Observers Now Attend Board Meetings[593]

Institution	CPP Investment Amount	Non-Current Dividends/ Interest	No. of Missed Payments
Anchor BanCorp Wisconsin, Inc.	$110,000,000	$11,229,167	8
Blue Valley Ban Corp	21,750,000	2,175,000	8
Cascade Financial Corporation	38,970,000	2,922,750	6
Central Pacific Financial Corp.[594]	135,000,000	N/A	0
Centrue Financial Corporation	32,668,000	2,858,450	7
Citizens Bancorp	10,400,000	991,900	7
Citizens Commerce Bancshares, Inc.	6,300,000	515,025	6
Dickinson Financial Corporation II	146,053,000	13,929,860	7
FC Holdings, Inc.	21,042,000	1,720,170	6
First BanCorp (PR)[595]	400,000,000	12,077,176	3
First Banks, Inc.	295,400,000	28,173,775	7
Grand Mountain Bancshares, Inc.	3,076,000	286,885	7
Heritage Commerce Corp	40,000,000	3,000,000	6
Idaho Bancorp	6,900,000	658,088	7
Integra Bank Corporation	83,586,000	6,268,950	6
Northern States Financial Corporation	17,211,000	1,290,825	6
Pacific Capital Bancorp[596]	180,634,000	0	0
Pacific City Financial Corporation	16,200,000	1,545,075	7
Pathway Bancorp	3,727,000	304,635	6
Premierwest Bancorp	41,400,000	3,105,000	6
Ridgestone Financial Services, Inc.	10,900,000	891,075	6
Rogers Bancshares, Inc.	25,000,000	2,043,750	6
Royal Bancshares of Pennsylvania, Inc.	30,407,000	2,660,613	7
Seacoast Banking Corporation of Florida	50,000,000	5,000,000	8
Syringa Bancorp	8,000,000	654,000	6

[593] Treasury's Dividends & Interest Report, *supra* note 156.

[594] On February 18, 2011, Treasury completed the exchange of its $135,000,000 of Preferred Stock (including accrued and unpaid dividends thereon) in Central Pacific Financial Corp. for 5,620,117 shares of common stock, pursuant to an exchange agreement dated February 17, 2011. Treasury's Dividends & Interest Report, *supra* note 156.

[595] On July 20, 2010, Treasury completed the exchange of its $400,000,000 of Preferred Stock in First BanCorp for $424,174,000 of Mandatorily Convertible Preferred Stock (MCP), which is equivalent to the initial investment amount of $400,000,000, plus $24,174,000 of capitalized previously accrued and unpaid dividends. Subject to the fulfillment by First BanCorp of certain conditions, including those related to its capital plan, the MCP may be converted to common stock. Since that point, two additional dividend payments have been missed. Treasury's Dividends & Interest Report, *supra* note 156.

[596] On August 31, 2010, following the completion of the conditions related to Pacific Capital Bancorp's capital plan, Treasury exchanged its $180,634,000 of Preferred Stock in Pacific Capital for $195,045,000 of Mandatorily Convertible Preferred Stock, which is equivalent to the initial investment amount of $180,634,000, plus $14,411,000 of capitalized previously accrued and unpaid dividends. On September 27, 2010, following the completion of the conversion conditions set forth in the Certificate of Designations for the MCP, all of Treasury's MCP was converted into 360,833,250 shares of common stock of Pacific Capital. No dividends have been missed since this point. Treasury's Dividends & Interest Report, *supra* note 156.

Georgia Primary Bank	4,500,000	438,725	7
Lone Star Bank	3,072,000	339,107	8
One Georgia Bank	5,500,000	530,391	7
OneUnited Bank	12,063,000	1,206,300	8
Premier Service Bank	4,000,000	378,472	7
United American Bank	8,700,000	941,715	8
Total	**$1,772,459,000**	**$108,136,877**	**194**

Figure 37 details the losses to Treasury to date, both settled and unsettled, from the CPP.

Figure 37: CPP Settled and Unsettled Losses[597]

Institution	Investment Amount	Investment Disposition Amount	Warrant Disposition Amount	Dividends & Interest	Possible Losses/ Reduced Exposure	Action
Cadence Financial Corporation*	$44,000,000	$38,000,000	–	$2,970,000	$(6,000,000)	3/4/2011: Treasury completed the sale of the preferred stock and warrants issued by Cadence Financial to Community Bancorp LLC for $38 million plus accrued and unpaid dividends.
CIT Group Inc.*	2,330,000,000	–	–	43,687,500	(2,330,000,000)	12/10/2009: Bankruptcy reorganization plan for CIT Group Inc. became effective. CPP preferred shares and warrants were extinguished and replaced with contingent value rights. On Feb. 8, 2010, the contingent value rights expired without value.
Midwest Banc Holdings, Inc.	89,388,000	–	–	824,289	(89,388,000)	5/14/2010: Midwest Banc Holdings, Inc. subsidiary, Midwest Bank and Trust, Co., placed into receivership. Midwest Banc Holdings is currently in bankruptcy proceedings.
Pacific Coast National Bancorp*	4,120,000	–	–	18,088	(4,120,000)	2/11/2010: Pacific Coast National Bancorp dismissed its bankruptcy proceedings without recovery to creditors or investors. Investments, including Treasury's CPP investments, were extinguished.
Pierce County Bancorp	6,800,000	–	–	207,948	(6,800,000)	11/5/2010: Pierce County Bancorp subsidiary, Pierce Commercial Bank, placed into receivership.
Sonoma Valley Bancorp	8,653,000	–	–	347,164	(8,653,000)	8/20/2010: Sonoma Valley Bancorp subsidiary, Sonoma Valley Bank, placed into receivership.
South Financial	347,000,000	130,179,219	$400,000	16,386,111	(216,820,781)	9/30/2010: Preferred stock and warrants sold

[597] Treasury Transactions Report, *supra* note 36, at 14. The asterisk ("*") denotes recognized losses on Treasury's Transactions Report.

Group*						to Toronto-Dominion Bank.
The Bank of Currituck*	4,021,000	1,742,850	–	169,834	(2,278,150)	12/3/2010: The Bank of Currituck completed its repurchase of all preferred stock (including preferred stock received upon exercise of warrants) issued to Treasury.
TIB Financial Corp.*	37,000,000	12,119,637	40,000	1,284,722	(24,880,363)	9/30/2010: Preferred stock and warrants sold to North American Financial Holdings.
Tifton Banking Company	3,800,000	–	–	223,208	(3,800,000)	11/12/2010: Tifton Banking Company placed into receivership.
Treaty Oak Bancorp*	3,268,000	500,000		192,415	(2,768,000)	1/26/2011: Treaty Oak shareholders approve Carlile Bankshares' purchase plan.
UCBH Holdings, Inc.	298,737,000	–	–	7,509,920	(298,737,000)	11/6/2009: United Commercial Bank, a wholly owned subsidiary of UCBH Holdings, Inc., was placed into receivership. UCBH Holdings is currently in bankruptcy proceedings.
Total	**$3,176,787,000**	**$182,541,706**	**440,000**	**73,821,199**	**$(2,994,245,294)**	

Figure 38: Warrant Repurchases/Auctions for Financial Institutions that have fully Repaid CPP Funds (as of March 9, 2011)

Institution	Investment Date	Warrant Repurchase Date	Warrant Repurchase/ Sale Amount	Panel's Best Valuation Estimate at Disposition Date	Price/ Estimate Ratio	IRR
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%
CIT Group Inc.	12/31/2008	–	–	562,541	–	(97.2)%
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[598]	10/28/2008[599] 1/9/2009[600] 1/14/2009[601]	3/3/2010	1,566,210,714	1,006,416,684	1.533	6.5%
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%

[598] Calculation of the IRR for Bank of America does not include fees received by Treasury as part of an agreement to terminate that bank's participation under the AGP. TARP Monthly 105(a) Report – December 2010, *supra* note 241, at A-3.

[599] Investment date for Bank of America in the CPP.

[600] Investment date for Merrill Lynch in the CPP.

[601] Investment date for Bank of America in the TIP.

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	9/1/2010	400,000	468,164	0.854	5.9%
Columbia Banking System, Inc.	11/21/2008	9/1/2010	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	181,431,183	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)%
Central Jersey Bancorp	12/23/2008	12/1/2010	319,659	1,554,457	0.206	6.3%
Huntington Bancshares	11/14/2008	1/19/2011	49,100,000	45,180,929	1.087	6.4%

First PacTrust Bancorp, Inc.	11/21/2008	1/5/2011	1,033,227	1,750,518	0.590	7.3%
East West Bancorp	12/5/2008	1/26/2011	14,500,000	32,726,663	0.443	7.0%
Susquehanna Bancshares, Inc	12/12/2008	1/19/2011	5,269,179	14,708,811	0.358	6.2%
Citigroup[602]	10/25/2008[603] 12/31/2008[604]	1/25/2011	245,008,277	136,161,499	1.799	13.4%
Boston Private Financial Holdings, Inc.	11/21/2008	2/1/2011	6,352,500	10,150,607	0.626	7.4%
Sandy Spring Bancorp, Inc.	12/5/2008	2/23/2011	4,450,000	4,452,306	0.999	7.3%
Wintrust Financial Corporation	12/19/2008	2/8/2011	25,694,061	30,185,219	0.860	9.6%
Washington Banking Company	1/16/2009	3/2/2011	1,625,000	3,792,179	0.429	7.8%
Cadence Financial Corporation	1/9/2009	3/4/2011	–	881,230	–	(2.2)%
First Horizon National Corporation	11/14/2008	3/9/2011	79,700,000	43,387,200	1.837	8.9%
1st Source Corporation	1/13/2009	3/9/2011	3,750,000	4,494,175	0.834	6.5%
Total			**$8,585,404,069**	**$8,329,269,048**	**1.031**	**10.0%**

Figure 39 shows the Panel's estimates of the value of Treasury's current holdings of warrants in CPP recipients as well as in AIG.

602 Calculations for the IRR of Citigroup do not include dividends or warrant proceeds earned from the Asset Guarantee Program (AGP). This IRR also does not incorporate proceeds received from Treasury's sale of Citigroup's trust preferred securities, given as a premium for Treasury's guarantee under the AGP. It is important to note that subject to the AGP termination agreement with Citigroup, Treasury could receive $800 million in trust preferred securities held by the FDIC upon the company's exit from the FDIC's TLGP. As of March 11, 2011, the company and its subsidiaries had $58.2 billion in long-term debt outstanding, which is guaranteed under the TLGP. Treasury Transactions Report, *supra* note 36, at 20. Data on Citigroup debt guaranteed by the TLGP accessed through SNL Financial(Mar. 11, 2011).

603 Investment date for Citigroup in the CPP.

604 Investment date for Citigroup in the TIP.

Figure 39: Valuation of Current Holdings of Warrants (as of March 3, 2011)

Financial Institutions with Warrants Outstanding	Warrant Valuation *(millions of dollars)* Low Estimate	High Estimate	Best Estimate
SunTrust Banks, Inc.	$44.75	$305.37	$128.99
Regions Financial Corporation	13.62	203.30	111.40
Fifth Third Bancorp	134.47	427.64	189.77
KeyCorp	34.51	179.69	87.17
AIG	247.75	1,708.06	787.49
All Other Banks	554.97	1,371.69	964.56
Total	**$1,030.07**	**$4,195.74**	**$2,269.38**

Annex III: Endnotes

[i] U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for Period Ending March 8, 2011* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

[ii] Figures represent TLGP debt outstanding at the end of the month for which the amount of debt outstanding reached its peak. BB&T Financial, Capital One Financial, and Fifth Third Bancorp did not issue debt guaranteed under the TLGP. Data provided by FDIC staff (Feb. 25, 2011).

[iii] For further discussion on the FDIC's loss exposure to Bank of America and Citigroup under the AGP, *see* Section II.B.1.

[iv] Figures represent the outstanding loan amount at the end of the month for which the amount loaned to each company reached its peak, and include loans to companies that were acquired by a SCAP bank. Data provided by Federal Reserve staff (Mar. 4, 2011). For more information on the credit and liquidity programs, *see* Board of Governors of the Federal Reserve System, *Regulatory Reform – Usage of Federal Reserve Credit and Liquidity Facilities* (online at www.federalreserve.gov/newsevents/reform_transaction.htm) (accessed Mar. 14, 2011).

Does not include the Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility (AMLF). Under the AMLF, the Federal Reserve provided loans to banks, which served as conduits to purchase asset-backed commercial paper from money market mutual funds. At its height, the facility had $146 billion in outstanding loans to participating banks. Although the data released by the Federal Reserve in December 2010 indicate that some of the SCAP banks acted as sponsors for money market mutual funds, it is difficult to determine the extent to which these banks were the ultimate beneficiaries of this facility. As a result, loans extended under the AMLF are not included in this table.

[v] For discussion on the Federal Reserve's loss exposure to Bank of America and Citigroup under the AGP, *see* Section II.B.1.

[vi] Under the TSLF, the Federal Reserve loaned Treasury securities in exchange for eligible collateral rather than extending credit. Figures represent the par value of Treasury securities loaned to participating institutions. *See* Board of Governors of the Federal Reserve System, *Regulatory Reform –Term Securities Lending Facility (TSLF) and TSLF Options Program (TOP)* (online at www.federalreserve.gov/newsevents/reform_tslf.htm) (accessed Mar. 11, 2011).

[vii] JPMorgan Chase did not have any outstanding loans from the Primary Dealer Credit Facility at month end. However, the company's maximum amount drawn from the facility was $3 billion in September 2008. Data provided by Federal Reserve staff (Mar. 4, 2011).

[viii] MetLife was not a TARP recipient.

[ix] Figures affected by rounding. Unless otherwise noted, data in this table are from the following sources: U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for Period Ending March 8, 2011* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf); U.S. Department of the Treasury, *Daily TARP Update* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-daily-summary-report/TARP%20Cash%20Summary/Daily%20TARP%20Update%20-%2003.10.2011.pdf).

[x] Unless otherwise noted, figures reference the adjusted TARP commitments following the enactment of the Dodd-Frank Act. The automotive sector programs (AIFP and ASSP) as well as the housing programs (HAMP, HHF, FHA Short Refi) have been broken out in the above table in order to provide more detail. U.S. Department of the Treasury, *Troubled Assets Relief Program (TARP) Monthly 105(a) Report – July 2010*, at 5 (July 2010) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/105/Documents105/July%202010%20105(a)%20Report_Final.pdf).

[xi] Treasury will not make additional purchases pursuant to the expiration of its purchasing authority under EESA. Any funds still accounted for as available were committed to programs prior to the expiration of Treasury's purchasing authority. U.S. Department of the Treasury, *Troubled Asset Relief Program: Two-Year Retrospective*, at 43 (Oct. 2010) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/agency_reports/Documents/TARP%20Two%20Year%20Retrospective_10%2005%2010_transmittal%20letter.pdf).

[xii] The total CPP repayment figure includes the principal repayment from the sale of Citigroup common stock as well as amounts repaid by institutions that exchanged their CPP investments for investments under the CDCI. *See* U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for Period Ending March 8, 2011*, at 2, 7, 13-15 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf); U.S. Department of the Treasury, *Troubled Asset Relief Program: Two-Year Retrospective*, at 25 (Oct. 2010) (online at www.treasury.gov/press-center/news/Documents/TARP%20Two%20Year%20Retrospective_10%2005%2010_transmittal%20letter.pdf); U.S. Department of the Treasury, *Treasury Commences Plan to Sell Citigroup Common Stock* (Apr. 26, 2010) (online at www.treasury.gov/press-center/press-releases/Pages/tg660.aspx).

[xiii] In the TARP Transactions Report, Treasury has classified the entirety of 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., TIB Financial Corp., the Bank of Currituck, Treaty Oak Bancorp, and Cadence Financial Corp. to non-TARP participating institutions. These shares were sold at prices below the value of the initial CPP investment, and represent losses of $252.7 million. Therefore, Treasury's net current CPP investment is $30.8 billion due to the $2.6 billion in losses thus far. *See* U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 1-14 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

[xiv] The $5.0 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.treasury.gov/initiatives/financial-stability/briefing-room/reports/agency_reports/Documents/TARP%20Two%20Year%20Retrospective_10%2005%2010_transmittal%20letter.pdf).

[xv] Although this $5.0 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 32. *See* U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 20 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

[xvi] AIG completely utilized the $40 billion that was made available on November 25, 2008, in exchange for the company's preferred stock. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf). It has also drawn down the entirety of the $30 billion made available on April 17, 2009. Of this $30 billion investment, $165 million was a reduction of available funds used for retention payments and the remainder was exchanged or used in the execution of AIG's recapitalization plan. In total $29.8 billion was drawn by AIG. The $7.5 billion that was outstanding under the facility at the time AIG executed its recapitalization plan was converted to 167.6 million shares of AIG common stock. Upon the closing of the recapitalization plan, $16.9 billion of the funds drawn-down by AIG from the Series F TARP investment was exchanged for a corresponding liquidation preference of preferred stock in the AIA Aurora LLC, $3.4 billion was exchanged for junior preferred stock interest in the ALICO Holdings LLC, and $2 billion was designated as Series G preferred stock, which provides AIG with an equity capital facility they can draw on for general corporate purposes. This figure does not include $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. *Id.* at 21. For a full discussion of AIG's recapitalization plan, *see* American International Group, Inc., *Form 8-K for the Period Ending January 14, 2011* (Jan. 14, 2011) (online at www.sec.gov/Archives/edgar/data/5272/000095012311003061/y88987e8vk.htm).

[xvii] As of March 8, 2011, Treasury received $9.1 billion in proceeds from its preferred interests in AIG-related SPVs. The funds used by AIG to redeem these preferred shares came from AIG asset sales. On February 14, 2011, AIG paid Treasury $2.2 billion using funds from the sale of AIG Star Life Insurance Co., Ltd. and AIG Edison Life Insurance Company. On March 8, 2011, Treasury received a further $6.9 billion pursuant to AIG's sales of the MetLife equity units it acquired when it sold its subsidiary, ALICO, to MetLife. This fully closes Treasury's stake in the ALICO SPV. Treasury's remaining investment is comprised of $11.2 billion in AIA Preferred Units, 92 percent of AIG's common stock, and $2.0 billion preferred stock credit facility for AIG's benefit (available but undrawn). AIG is also still required to pay the remaining $110 million it owes stemming from the $165 million reduction to the Series F TARP investment. These funds were used to pay AIGFP retention bonuses and, as of March 8, 2011, $55 million had been repaid. American International Group, Inc., *Form 8-K for the Period Ending February 8, 2011* (Feb. 9, 2011) (online at www.sec.gov/Archives/edgar/data/5272/000095012311010653/y89586e8vk.htm); U.S. Department of the Treasury, *Treasury: With $6.9 Billion Repayment Today from AIG, 70 Percent of TARP Disbursements Now Recovered* (Mar. 8, 2011) (online at www.treasury.gov/press-center/press-releases/Pages/tg1096.aspx); U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf); Treasury conversations with Panel staff (Mar. 11, 2011).

[xviii] Treasury closed the program on September 30, 2010, after investing $570 million in 84 community development financial institutions. Including additional investments, $464 million of the CDCI program funds were provided to banks that previously received assistance under the TARP's Capital Purchase Program. 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 www.treasury.gov/press-center/press-releases/Pages/tg885.aspx); U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 18-19 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

[xix] This figure includes $2,540,000,000 of repayment Treasury received from the sale of GMAC\Ally Financial's TruPs. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 18-19 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

[xx] 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. *See* 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.treasury.gov/press-center/press-releases/Pages/tg700.aspx); U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 18-19 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

Also, following the bankruptcy proceedings for Old Chrysler, which extinguished the $1.9 billion DIP loan provided to Old Chrysler, Treasury retained the right to recover the proceeds from the liquidation of specified collateral. Although Treasury does not expect a significant recovery from the liquidation proceeds, Treasury is not yet reporting this loan as a loss in the TARP Transactions Report. To date, Treasury has collected $48.1 million in proceeds from the sale of collateral. Treasury includes these proceeds as part of the $26.4 billion repaid under the AIFP. U.S. Department of the Treasury, *Troubled Assets Relief Program Monthly 105(a) Report – September 2010* (Oct. 12, 2010) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/105/Documents105/September%20105(a)%20report_FINAL.pdf); Treasury conversations with Panel staff (Aug. 19, 2010 and Nov. 29, 2010); U.S. Department of the Treasury, *Troubled Asset Relief Program*

Transactions Report for the Period Ending March 8, 2011, at 18 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

[xxi] On April 5, 2010, Treasury terminated its commitment to lend to the GM special purpose vehicle (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 March 8, 2011,* at 19 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

[xxii] For the TALF, $1 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 was incrementally funded. When the program closed in June 2010, a total of $43 billion in loans was outstanding under the TALF, 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 the 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).

[xxiii] As of March 9, 2011, Treasury had provided $107 million to TALF LLC. This total is net of accrued interest payable to Treasury. Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1)* (Mar. 10, 2010) (online at www.federalreserve.gov/releases/h41/20110310/).

[xxiv] As of December 31, 2010, the total value of securities held by the PPIP fund managers was $21.5 billion. Non-agency residential mortgage-backed securities represented 81 percent of the total; commercial mortgage-backed securities represented the balance. U.S. Department of the Treasury, *Legacy Securities Public-Private Investment Program, Program Update – Quarter Ended December 31, 2010,* at 5 (Jan. 24, 2011) (online at www.treasury.gov/initiatives/financial-stability/investment-programs/ppip/s-ppip/Documents/ppip- 12-10 vFinal.pdf).

[xxv] This number is calculated as the sum of the disbursed equity and disbursed debt on the Daily Tarp Update. U.S. Department of the Treasury, *Daily TARP Update* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-daily-summary-report/TARP%20Cash%20Summary/Daily%20TARP%20Update%20-%2003.10.2011.pdf).

[xxvi] As of March 2, 2011, Treasury has received $713 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 March 8, 2011,* at 24 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

[xxvii] As of March 2, 2011, Treasury's purchases under the SBA 7(a) Securities Purchase Program totaled $368.1 million. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011,* at 23 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

[xxviii] Treasury has received to date $12.2 million in principal repayments through this program. U.S. Department of the Treasury, *Cumulative Dividends, Interest, and Distributions Report as of February 28, 2011* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/dividends-interest/DocumentsDividendsInterest/February%202011%20Dividends%20Interest%20Report.pdf).

[xxix] As of March 10, 2011, $1.04 billion was disbursed under this program. U.S. Department of the Treasury, *Daily TARP Update* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-

room/reports/tarp-daily-summary-report/TARP%20Cash%20Summary/Daily%20TARP%20Update%20-%2003.10.2011.pdf).

[xxx] On June 23, 2010, $1.5 billion was allocated to mortgage assistance through the Hardest Hit Fund (HHF). Another $600 million was approved on August 3, 2010. U.S. Department of the Treasury, *Obama Administration Approves State Plans for $600 Million of 'Hardest Hit Fund' Foreclosure Prevention Assistance* (Aug. 4, 2010) (online at www.treasury.gov/press-center/press-releases/Pages/tg813.aspx). As part of its revisions to TARP allocations upon enactment of the Dodd-Frank Act, Treasury allocated an additional $2 billion in TARP funds to mortgage assistance for unemployed borrowers through the 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.treasury.gov/press-center/press-releases/Pages/tg1042.aspx). In October 2010, 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.treasury.gov/press-center/news/Documents/TARP%20Two%20Year%20Retrospective_10%2005%2010_transmittal%20letter.pdf).

[xxxi] As of February 28, 2011, $125.1 million has been disbursed to fourteen states and the District of Columbia: Alabama ($8.0 million), Arizona ($6.3 million), California ($17.5 million), Florida ($10.5 million), Georgia ($8.5 million), Kentucky ($4.0 million), Michigan ($7.7 million), Nevada ($2.6 million), North Carolina ($15.0 million), Ohio ($11.6 million), Oregon ($15.5 million), Rhode Island ($3.0 million), South Carolina ($7.5 million), Tennessee ($6.3 million), and the District of Columbia ($1.1 million). Data provided by Treasury (Feb. 28, 2011).

[xxxii] This figure represents the amount Treasury disbursed to fund the advance purchase account of the Letter of Credit issued under the FHA Short Refinance Program. The $53.8 million in the FHA Short Refinance Program is broken down as follows: $50 million for a deposit into an advance purchase account as collateral to the initial $50 million Letter of Credit, $2.9 million for the closing and funding of the Letter of Credit, $115,000 in trustee fees, $175,000 in claims processor fees, $11,500 for a letter of credit fee, and $663,472 for an unused commitment fee for the Letter of Credit. Data provided by Treasury (Feb. 28, 2011).

[xxxiii] HAMP is not listed in this table because HAMP is a 100 percent subsidy program, and no profit is expected.

[xxxiv] U.S. Department of the Treasury, *Cumulative Dividends, Interest and Distributions Report as of February 28, 2011* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/dividends-interest/DocumentsDividendsInterest/February%202011%20Dividends%20Interest%20Report.pdf).

[xxxv] U.S. Department of the Treasury, *Cumulative Dividends, Interest and Distributions Report as of February 28, 2011* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/dividends-interest/DocumentsDividendsInterest/February%202011%20Dividends%20Interest%20Report.pdf).

[xxxvi] U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

[xxxvii] 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., TIB Financial Corp the Bank of Currituck, Treaty Oak Bancorp, and Cadence Financial Corp. This represents a $252.7 million loss on its CPP investments in these five banks. See Figure 37, CPP Settled and Unsettled Losses, for details on other banks likely to result in losses. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

[xxxviii] This figure represents net proceeds to Treasury from the sale of Citigroup common stock to date. 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. Treasury completed the sale of its Citigroup common shares on December 6, 2010. The gross proceeds of the common stock sale were $31.85 billion and the amount repaid under CPP was $25 billion. The difference between these two numbers represents the $6.85 billion in net profit Treasury has received from the sale of Citigroup common stock.. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011,* at 15 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

[xxxix] On March 8, 2011, Treasury received full payment for its share of the ALICO Junior Preferred Interests, which resulted in an associated payment of $18.5 million of accrued preferred returns since the recapitalization date (Jan. 14, 2011) on this segment of the AIG investment. This payment reflects a profit on a particular portion of Treasury's remaining investment, and does not account for the remaining ownership positions in the company or related SPVs.

[xl] This represents the cash received for the warrants related to the GMAC/Ally sale of trust preferred securities that closed on March 7, 2011. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011,* at 19 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

[xli] This represents a distribution fee of $28.2 million received in connection with the sale of GMAC/Ally trust preferred securities, as well as the additional note of $15.0 million received upon repayment of the Chrysler Financial investment. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011,* at 19 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

[xlii] Losses on the AIFP do not include projected losses on the GM stock sale as reported on the Daily TARP Update. U.S. Department of the Treasury, *Daily TARP Update* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-daily-summary-report/TARP%20Cash%20Summary/Daily%20TARP%20Update%20-%2003.10.2011.pdf). See endnote xx above for further details on the AIFP losses.

[xliii] 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 March 8, 2011,* at 19 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

[xliv] 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 $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 Temporary Liquidity Guarantee Program (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 March 8, 2011,* at 20 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.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.treasury.gov/initiatives/financial-stability/investment-programs/agp/Documents/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

www.treasury.gov/press-center/press-releases/Pages/tg887.aspx); Federal Deposit Insurance Corporation, *2009 Annual Report*, at 87 (June 30, 2010) (online at www.fdic.gov/about/strategic/report/2009annualreport/AR09final.pdf).

[xlv] As of January 31, 2011, Treasury has earned $456.1 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 February 28, 2011*, at 14 (Mar. 10, 2010) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/dividends-interest/DocumentsDividendsInterest/February%202011%20Dividends%20Interest%20Report.pdf); U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 24 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

[xlvi] Treasury has received approximately $183,555 in proceeds from senior indebtedness instruments associated with its investments in SBA 7(a) securities. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

[xlvii] 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.treasury.gov/initiatives/financial-stability/investment-programs/agp/Documents/BofA%20-%20Termination%20Agreement%20-%20executed.pdf).

[xlviii] 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 investments 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.

[xlix] Figures affected by rounding. All figures are as of March 8, 2010 unless otherwise noted.

[l] 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.

[li] *See* U.S. Department of the Treasury, *Treasury Update on AIG Investment Valuation* (Nov. 1, 2010) (online at www.treasury.gov/press-center/press-releases/Pages/pr_11012010.aspx). AIG values exclude accrued dividends on preferred interests in the AIA and ALICO SPVs and accrued interest payable to FRBNY on the Maiden Lane LLCs.

[lii] This number is comprised of the investments under the AIGIP/SSFI Program. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 21 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

[liii] 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 SPVs, AIA Aurora LLC and ALICO Holdings LLC. These SPVs were established to hold the common stock of two AIG subsidiaries: AIA and ALICO. This interest was exchanged as part of the AIG recapitalization plan and is now consolidated under the Treasury holdings. Board of Governors of the Federal

Reserve System, *Federal Reserve System Monthly Report on Credit and Liquidity Programs and the Balance Sheet*, at 18 (Dec. 2010) (online at www.federalreserve.gov/monetarypolicy/files/monthlyclbsreport201012.pdf).

Upon the completion of AIG's recapitalization plan, FRBNY no longer held an interest in the AIA and ALICO SPVs. The remaining holdings in these vehicles were consolidated under Treasury. After the March 2, 2011 sale of these MetLife equity units, Treasury, through the TARP, currently holds $11.3 billion in liquidation preference of preferred stock in the AIA Aurora LLC and no longer holds an interest in the ALICO SPV. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 21 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

[liv] This number represents the outstanding principal of the loans extended to the Maiden Lane II and III SPVs to buy AIG assets (as of March 10, 2011, $12.4 billion for each of the SPVs). Federal Reserve Bank of New York, *Factors Affecting Reserve Balances (H.4.1)* (Mar. 10, 2011) (online at www.federalreserve.gov/releases/h41/20110310/); Board of Governors of the Federal Reserve System, *Federal Reserve System Monthly Report on Credit and Liquidity Programs and the Balance Sheet* (Nov. 2010) (online at www.federalreserve.gov/monetarypolicy/files/monthlyclbsreport201011.pdf). 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 taxpayer's exposure to losses over time. Board of Governors of the Federal Reserve System, *Federal Reserve System Monthly Report on Credit and Liquidity Programs and the Balance Sheet*, at 15 (Nov. 2010) (online at www.federalreserve.gov/monetarypolicy/files/monthlyclbsreport201011.pdf).

On March 11, 2011, FRBNY announced that AIG had formally offered to purchase the assets in Maiden Lane II. There was no further news regarding the offer at the time this report was published. Federal Reserve Bank of New York, *Statement Related to Offer by AIG to Purchase Maiden Lane II LLC* (Mar. 11, 2011) (online at www.newyorkfed.org/newsevents/news/markets/2011/an110311.html).

[lv] The final sale of Treasury's Citigroup common stock resulted in full repayment of Treasury's investment of $25 billion. *See* endnote xxxviii, *supra*, for further details of the sales of Citigroup common stock. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 1, 13 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

[lvi] Bank of America repaid the $45 billion in assistance it had received through TARP programs on December 9, 2009. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 1 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

[lvii] U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 13 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

[lviii] On November 9, 2009, Treasury announced the closing of the CAP and that only one institution, GMAC/Ally Financial, was in need of further capital from Treasury. GMAC/Ally Financial, however, received further funding through the AIFP. Therefore, the Panel considers the CAP unused. U.S. Department of the Treasury, *Treasury Announcement Regarding the Capital Assistance Program* (Nov. 9, 2009) (online at www.treasury.gov/press-center/press-releases/Pages/tg359.aspx).

[lix] This figure represents the $4.3 billion adjusted allocation to the TALF SPV. However, as of March 3, 2011, TALF LLC had drawn only $107 million of the available $4.3 billion. Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1)* (Mar. 10, 2011) (online at www.federalreserve.gov/releases/h41/20110310/); U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 22 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

[lx] 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 banking.senate.gov/public/_files/GeithnerFINALfinancialstabilityfactsheet2.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, since the outstanding TALF Federal Reserve loans currently total $20.2 billion, the Federal Reserve's maximum potential exposure under the TALF is $15.9 billion. *See* Board of Governors of the Federal Reserve System, *Federal Reserve Announces Agreement with Treasury Regarding 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); Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1)* (Instrument Used: Term Asset-Backed Securities Loan Facility, Wednesday Level) (Mar. 3, 2011) (online at www.federalreserve.gov/releases/h41/20110303/).

[lxi] No TARP resources were expended under the PPIP Legacy Loans Program, a TARP program that was announced in March 2009 but never launched.

[lxii] These numbers are a staff calculation, subtracting the amount repaid from the funds obligated to find the maximum current commitment. U.S. Department of the Treasury, *Daily TARP Update* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-daily-summary-report/TARP%20Cash%20Summary/Daily%20TARP%20Update%20-%2003.10.2011.pdf). On January 24, 2010, Treasury released its fifth quarterly report on PPIP. The report indicates that as of December 31, 2010, all eight investment funds had realized an internal rate of return (on equity) since inception (net of any management fees or expenses owed to Treasury) of at least 27 percent. The highest performing fund, thus far, is AG GECC PPIF Master Fund, L.P., which has a net internal rate of return (on equity) of 59.7 percent. These figures do not include the taxpayer's additional exposure under PPIP for credit extended to these investment funds. As noted in Section VIII.C of this report, when calculated as a (blended) return on both equity and debt, the total return is only 9.7 percent. U.S. Department of the Treasury, *Legacy Securities Public-Private Investment Program*, at 8 (Jan. 24, 2010) (online at www.treasury.gov/initiatives/financial-stability/investment-programs/ppip/s-ppip/Documents/ppip-12-10 vFinal.pdf).

[lxiii] The total amount of TARP funds committed to HAMP is $29.9 billion. U.S. Department of the Treasury, *Troubled Assets Relief Program Monthly 105(a) Report – November 2010*, at 4 (Dec. 10, 2010) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/105/Documents105/December105(a)%20report_FINAL_v4.pdf). However, as of March 4, 2011, only $1.04 billion in non-GSE payments have been disbursed under HAMP. U.S. Department of the Treasury, *Daily TARP Update* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-daily-summary-report/TARP%20Cash%20Summary/Daily%20TARP%20Update%20-%2003.10.2011.pdf).

[lxiv] A substantial portion of the total $81.3 billion in debt instruments 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). $48.8 billion represents Treasury's current obligation under the AIFP after accounting for repayments, an additional note payment, and losses. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 18 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

[lxv] At its maximum, $400 million was outstanding under the ASSP. These funds were fully repaid and Treasury earned $101 million in proceeds from additional notes associated with the program. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

[lxvi] U.S. Department of the Treasury, *Daily TARP Update* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-daily-summary-report/TARP%20Cash%20Summary/Daily%20TARP%20Update%20-%2003.10.2011.pdf).

[lxvii] U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 17 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

[lxviii] 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. $264.6 billion of debt subject to the guarantee is currently outstanding, which represents approximately 53.5 percent of the current cap. Federal Deposit Insurance Corporation, *Monthly Reports Related to the Temporary Liquidity Guarantee Program: Debt Issuance Under Guarantee Program* (Feb. 23, 2011) (online at www.fdic.gov/regulations/resources/TLGP/total_issuance01-11.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* (Feb. 23, 2011) (online at www.fdic.gov/regulations/resources/TLGP/fees.html).

[lxix] This figure represents the amount of funds on the FDIC's balance sheet at the end of the third quarter of 2010 dedicated to the resolution of bank failures. These metrics are "liabilities due to resolutions" as well as "contingent liabilities: future failures." As of Q3 2010, $42.8 billion was earmarked as "liabilities due to resolutions" and $21.3 billion was marked as "contingent liabilities: future failures." Federal Deposit Insurance Corporation, *Chief Financial Officer's (CFO) Report to the Board* (Instrument Used: DIF Balance Sheet, Third Quarter 2010) (online at www.fdic.gov/about/strategic/corporate/cfo_report_3rdqtr_10/balance.html) (accessed Mar. 11, 2011).

[lxx] Outlays are comprised of the Federal Reserve Mortgage Related Facilities. On November 25, 2008, the Federal Reserve announced that it would purchase $100 billion of debt and $500 billion of MBS guaranteed by Fannie Mae, Freddie Mac, and Ginnie Mae. Federal Housing Finance Agency, *Mortgage Market Note 10-1* (Jan. 20, 2010) (online at www.fhfa.gov/webfiles/15362/MMNote_10-1_revision_of_MMN_09-1A_01192010.pdf). In March 2009, these amounts were increased to $1.25 trillion of MBS guaranteed by Fannie Mae, Freddie Mac, and Ginnie Mae, and $200 billion of agency debt securities from Fannie Mae, Freddie Mac, and the Federal Home Loan Banks. The intended purchase amount for agency debt securities was subsequently decreased to $175 billion. Board of Governors of the Federal Reserve System, *Federal Reserve System Monthly Report on Credit and Liquidity Programs and the Balance Sheet*, at 5 (Dec. 2010) (online at federalreserve.gov/monetarypolicy/files/monthlyclbsreport201012.pdf). As of March 2, 2011, the Federal Reserve held $949 billion of agency MBS and $143 billion of agency debt. Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1)* (Mar. 10, 2011) (online at www.federalreserve.gov/releases/h41/20110310/).

[lxxi] Federal Reserve Liquidity Facilities classified in this table as loans include primary credit, secondary credit, central bank liquidity swaps, loans outstanding to Commercial Paper Funding Facility LLC, seasonal credit, term auction credit, and loans outstanding to Bear Stearns (Maiden Lane LLC). Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1)* (Mar. 10, 2011) (online at www.federalreserve.gov/releases/h41/20110310/) (accessed Mar. 4, 2011). For further information, see the data that the Federal Reserve recently disclosed on these programs pursuant to its obligations under the Dodd-Frank Act. Board of Governors of the Federal Reserve System, *Credit and Liquidity Programs and the Balance Sheet: Overview* (May 11, 2010) (online at www.federalreserve.gov/monetarypolicy/bst.htm); Board of Governors of the Federal Reserve System, *Credit and Liquidity Programs and the Balance Sheet: Reports and Disclosures* (Aug. 24, 2010) (online at www.federalreserve.gov/monetarypolicy/bst_reports.htm); Board of Governors of the Federal Reserve System, *Usage of Federal Reserve Credit and Liquidity Facilities* (Dec. 3, 2010) (online at www.federalreserve.gov/newsevents/reform_transaction.htm).

Section Two: Oversight Activities

Recent Hearings

The Panel held its final hearing on March 4, 2011 in Washington, DC. The top official in Treasury's Office of Financial Stability answered questions about the overall effectiveness of the TARP in meeting its statutory goals and also provided insight into the future strategy for the TARP as it continues to wind down in the coming years. Officials from the FDIC, the FHFA, and the Federal Reserve offered testimony about their respective agencies' credit, liquidity, and housing initiatives that worked in concert with the TARP in the government's broader efforts to stabilize the financial system. Finally, four academic economists each offered their overall assessment of the effectiveness of the TARP and the government's other financial stability efforts.

Correspondence with Treasury

The Panel's Chairman, Senator Ted Kaufman, sent a letter to the Secretary of the Treasury, Timothy F. Geithner, on March 7, 2011.[605] The letter raised concerns about transparency with respect to Treasury's recent redesign of its Office of Financial Stability website.

In response to this letter, Timothy Massad, the Acting Assistant Secretary for Financial Stability, sent a letter to Senator Kaufman on March 14, 2011.[606] The letter outlined the steps Treasury has taken to address the issues raised by the Panel and promised future steps to ensure TARP transparency via Treasury's website.

[605] *See* Appendix I of this report, *infra*.

[606] *See* Appendix II of this report, *infra*.

Section Three: 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 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 was 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 was charged with overseeing Treasury's actions, assessing the impact of spending to stabilize the economy, evaluating market transparency, ensuring effective foreclosure mitigation efforts, and guaranteeing that Treasury acted 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.

A. Members

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, William B. 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.

B. Reports

12/10/2008 Questions About the $700 Billion Emergency Economic Stabilization Funds

This report offered an initial impression of Treasury's use of authority under EESA. In order to set the agenda for the Panel's future work, the Panel posed ten primary questions regarding Treasury's goals and methods for the TARP. Among these questions: What is the scope of Treasury's authority? What is Treasury's strategy and is it working to stabilize markets and help reduce foreclosures? What have financial institutions done with taxpayers' money? Is the public receiving a fair deal?

1/9/2009 Accountability for the Troubled Asset Relief Program

The report documented the efforts to get answers to the questions posed in the Panel's first report. It detailed both the answers received from Treasury and the many questions that remained unaddressed or unanswered. It specifically highlighted four key areas of concern: the rising tide of foreclosures, insufficient bank accountability, poor transparency in the use of TARP funds, and a lack of clarity in Treasury's overall strategy.

1/29/2009 Special Report on Regulatory Reform

Fulfilling a mandate from Congress, this special report discussed how shortcomings in the financial regulatory regime contributed to the financial crisis by failing to effectively manage risk, require transparency, and ensure fair dealings. The report identified eight specific areas most urgently in need of reform and three key areas of risk management, concluding that financial regulation requires good risk management, transparency, and fairness.

2/6/2009 February Oversight Report: Valuing Treasury's Acquisitions

This report presented the results of a detailed, technical analysis of the value of Treasury's largest transactions under the TARP in an effort to determine whether taxpayers were receiving fair value. The Panel determined that, in the ten largest transactions made with TARP funds, for every $100 spent by Treasury, it received assets worth, on average, only $66. This disparity translated into a $78 billion shortfall for the first $254 billion in TARP funds spent.

3/6/2009 Foreclosure Crisis: Working Toward a Solution

The Panel examined the causes of the foreclosure crisis and developed a checklist providing a roadmap for foreclosure mitigation program success. Among the questions on the Panel's checklist: Will the plan result in modifications that create affordable monthly payments?

Does the plan deal with negative equity? Does the plan address junior mortgages? Will the plan have widespread participation by lenders and servicers?

4/7/2009 Assessing Treasury's Strategy: Six Months of TARP

In this report, the Panel looked back on the first six months of Treasury's TARP efforts and offered a comparative analysis of previous efforts to combat banking crises in the past. The Panel found that the successful resolution of past financial crises involved four critical elements: transparency of bank accounting, particularly with respect to the value of bank assets; assertiveness, including taking early aggressive action to improve salvageable banks and shut down insolvent institutions; accountability, including willingness to replace failed management; and clarity in the government response.

5/7/2009 Reviving Lending to Small Businesses and Families and the Impact of the TALF

This report surveyed the state of lending for small businesses and families and examined the TALF. The report raised concerns about whether TALF was well-designed to help market participants meet the credit needs of households and small businesses. It also raised serious doubts about whether the program would have a significant impact on access to credit.

6/9/2009 Stress Testing and Shoring Up Bank Capital

The Panel examined how effectively Treasury and the Federal Reserve conducted stress tests of America's 19 largest banks. The Panel found that, on the whole, the stress tests were based on a solidly designed working model, but that serious concerns remained, including the possibility that economic conditions could deteriorate beyond the worst-case scenario considered in the tests. The Panel recommended that, if the economy continued to worsen, stress testing should be repeated.

7/10/2009 TARP Repayments, Including the Repurchase of Stock Warrants

The July report examined the repayment of TARP funds and the repurchase of stock warrants. At that time, 11 banks had repurchased their warrants from Treasury. The Panel's analysis indicated that the taxpayers had received only 66 percent of the Panel's best estimate of the value of the warrants. In order to ensure that taxpayers received the maximum values as banks exited the TARP, the Panel urged Treasury to make its process, reasoning, methodology, and exit strategy absolutely transparent.

7/21/2009 Special Report on Farm Loan Restructuring

This special report fulfilled a mandate under the Helping Families Save Their Homes Act of 2009 to issue a report that "analyzes the state of the commercial farm credit markets and the use of loan restructuring as an alternative to foreclosure by recipients of financial assistance under the Troubled Asset Relief Program (TARP)."

8/11/2009 The Continued Risk of Troubled Assets

The August report found that substantial troubled assets backed by residential mortgages remained on banks' balance sheets and presented a potentially serious obstacle to economic stability. The risk to the health of small and mid-sized banks was especially high. The Panel recommended that Treasury and the bank supervisors carefully monitor the condition of the troubled assets held by financial institutions and that Treasury should move forward with one or more initiatives aimed at removing troubled whole loans from bank balance sheets.

9/9/2009 The Use of TARP Funds in Support and Reorganization of the Domestic Automotive Industry

In this report, the Panel examined the use of TARP funds to assist the domestic automotive industry. The Panel recommended that Treasury provide a legal analysis justifying the use of TARP funds in the domestic automotive industry. The Panel further recommended that, in order to limit the impact of conflicts of interest and to facilitate an effective exit strategy from ownership, Treasury should consider placing its Chrysler and GM shares in an independent trust.

10/9/2009 An Assessment of Foreclosure Mitigation Efforts After Six Months

The Panel's October report examined Treasury's efforts to prevent home foreclosures. The Panel expressed concern about the limited scope and scale of the Making Home Affordable program and questioned whether Treasury's strategy would lead to permanent mortgage modifications for many homeowners.

11/6/2009 Guarantees and Contingent Payments in TARP and Related Programs

The November oversight report found that the income of several government-backed guarantee programs will likely exceed their direct expenditures, and that guarantees played a major role in calming financial markets. At their height, these same programs, however, exposed American taxpayers to trillions of dollars in guarantees and created significant moral hazard that can distort the marketplace.

12/9/2009 Taking Stock: What Has the Troubled Asset Relief Program Achieved?

The Panel's December oversight report concluded that the TARP was an important part of a broader government strategy that stabilized the U.S. financial system. It was apparent after 14 months that significant underlying weaknesses remained, including a foreclosure crisis that showed no signs of abating and record unemployment, as well as market distortions caused by moral hazard.

1/14/2010 Exiting TARP and Unwinding Its Impact on the Financial Markets

Even after Treasury's authority to make new TARP commitments expires in October 2010, taxpayers will hold a diverse collection of assets worth many billions of dollars. The Panel's January oversight report expressed concern that the stated principles guiding Treasury's divestment strategy may frequently conflict and are broad enough to justify a wide range of actions. Furthermore, any effective exit strategy must help to unwind the implicit guarantee created by the TARP.

2/11/2010 Commercial Real Estate Losses and the Risk to Financial Stability

The Panel expressed concern that, over the next several years, a wave of CRE loan failures could jeopardize the stability of many banks, particularly community banks. Because community banks play a critical role in financing the small businesses that help the American economy create new jobs, their widespread failure could disrupt local communities, threaten America's weakened financial system, and extend an already painful recession.

3/11/2010 The Unique Treatment of GMAC Under the TARP

The Panel examined the ways the TARP was used to support GMAC with funds from the Auto Industry Financing Program. The Panel found the government's early decisions to rescue GMAC resulted in missed opportunities to increase accountability and to better protect taxpayers' money.

4/14/2010 Evaluating Progress on TARP Foreclosure Mitigation Programs

The Panel applauded recent changes to the mortgage modification program, but found that Treasury's response lagged behind the pace of the crisis, Treasury's programs would not reach the overwhelming majority of homeowners in trouble, and even families who navigate all the way through these programs will have a precarious hold on their homes.

5/13/2010 The Small Business Credit Crunch and the Impact of the TARP

The May report found little evidence that the TARP had successfully spurred small business lending, and it raised questions about whether the program helped to restore stability to the smaller banks that provide substantial amounts of small business credit. The Panel also evaluated the proposed SBL) and found that, even if approved by Congress, its prospects were far from certain. The program might not be fully operational for some time, may not be embraced by banks, and may not address the root causes of the small business credit crunch.

6/10/2010 The AIG Rescue, Its Impact on Markets, and the Government's Exit Strategy

This report found that the Federal Reserve and Treasury failed to exhaust all other options before undertaking their unprecedented, taxpayer-backed rescue of American

International Group (AIG) and its creditors. This rescue resulted in extraordinary risk to taxpayers and a fundamental redefinition of the relationship between the government and the country's most sophisticated financial institutions.

7/14/2010 Small Banks in the Capital Purchase Program

The July report found that the CPP's "one-size-fits-all" design served Wall Street banks much better than smaller banks. Moving forward, small banks may find it difficult to repay their TARP funds because the capital they need is difficult to obtain. If so, they are at risk of being unable to raise enough money to exit the program, even as many continue to struggle to pay their TARP dividends. If this leads smaller banks to consolidate or collapse, one lasting effect of the TARP could be an even more concentrated banking sector.

8/12/2010 The Global Context and International Effects of the TARP

This report found that America targeted its bailouts very differently than other nations. While most nations targeted their funds to save individual banks, America simply flooded the markets with money to stabilize the system. As a result, it appeared that America's bailouts had much greater impact internationally than other nations' bailouts had on America. Additionally, the crisis revealed the need for an international plan to handle the collapse of major, globally significant financial institutions. The Panel recommended that U.S. regulators encourage regular crisis planning and "war gaming" for the international financial system.

9/16/2010 Assessing the TARP on the Eve of Its Expiration

The September report found that, although the TARP quelled the financial panic in the fall of 2008, it was less successful in fulfilling its broader statutory goals. After the TARP's extension, Treasury's policy choices were increasingly constrained by public anger about the TARP. The Panel concluded that this stigma proved an obstacle to future financial stability efforts. In addition, in preparing the report, the Panel consulted a variety of prominent economists, who cited significant concerns about moral hazard.

10/14/2010 Examining Treasury's Use of Financial Crisis Contracting Authority

This report found that Treasury's extensive use of private contractors in TARP programs created significant concerns about transparency and potential conflicts of interest. Private businesses performed many of the TARP's most critical functions, operating under 91 different contracts worth up to $434 million. They may have had conflicts of interest, were not directly responsible to the public, and were not subject to the same disclosure requirements as government actors. Although Treasury took significant steps to ensure the appropriate use of private contractors, the Panel recommended further improvements.

11/16/2010 Examining the Consequences of Mortgage Irregularities for Financial Stability and Foreclosure Mitigation

The November report reviewed allegations that companies servicing $6.4 trillion in American mortgages may in some cases have bypassed legally required steps to foreclose on a home. The implications of these irregularities were unclear, but the Panel expressed concerns about the possibility that "robo-signing" may have concealed deeper problems in the mortgage market that potentially threatened financial stability and put foreclosure prevention efforts at risk.

12/14/2010 A Review of Treasury's Foreclosure Prevention Programs

This report found that Treasury's main foreclosure mitigation effort, HAMP, would not make a significant dent in the foreclosure crisis. The Panel estimated that, if current trends held, HAMP would prevent only 700,000 foreclosures – far fewer than the three to four million foreclosures that Treasury initially aimed to stop. While Treasury intended to devote $30 billion to the program, it appeared that only $4 billion would be spent. Since the TARP had already expired, it was too late for Treasury to revamp its foreclosure prevention strategy, but Treasury could still have taken steps to wring every possible benefit from its programs.

1/13/2011 An Update on TARP Support for the Domestic Automotive Industry

The January report found that, although it remained too early to tell whether Treasury's intervention in the U.S. automotive industry would prove successful, the government's ambitious actions appeared to be on a promising course. Even so, the companies that received automotive bailout funds continued to face uncertain futures, taxpayers remained at financial risk, concerns remained about the transparency and accountability of Treasury's efforts, and moral hazard lingered as a long-run threat to the automotive industry and the broader economy.

2/10/2011 Executive Compensation Restrictions in the Troubled Asset Relief Program

This report examined Treasury's efforts to implement restrictions on executive pay at TARP-recipient institutions and, in particular, examined the work of the Special Master for Executive Compensation. The Panel found that, amidst intense media scrutiny and in a time of deep public anger, the Special Master achieved significant changes at the institutions under his review. Overall compensation at the companies under the Special Master's jurisdiction fell by an average of 55 percent, and cash salaries were generally limited to $500,000. Unfortunately, the Special Master fell short in his far broader goal of permanently changing Wall Street's pay practices.

3/16/2011 The Final Report of the Congressional Oversight Panel

For its final report the Panel summarized and revisited its comprehensive body of monthly oversight work. To provide a context for understanding and evaluating the TARP, the report described the major events of the financial crisis in the fall of 2008 and the economic conditions prevailing during the crisis and response, as well as the broad array of federal initiatives undertaken to promote financial stability and liquidity as a result of the crisis. For each area in which it has done oversight work, the Panel provided a summary of its key findings and recommendations, along with an update since the Panel's prior work and the current status of the Panel's recommendations. The report concluded with a summation of the key lessons learned in order to guide policymakers should they find it necessary to respond to financial crises in the future.

C. Hearings

Date	Hearing
12/16/2008	Clark County, NV: Ground Zero of the Housing and Financial Crises
1/14/2009	Modernizing America's Financial Regulatory Structure
2/27/2009	COP Field Hearing: Coping with the Foreclosure Crisis: State and Local Efforts to Combat Foreclosures in Prince George's County, Maryland
3/19/2009	Learning from the Past: Lessons from the Banking Crises of the 20th Century
4/21/2009	COP Hearing with Treasury Secretary Timothy F. Geithner
5/28/2009	COP Field Hearing in New York City: The Impact of Economic Recovery Efforts on Corporate and Commercial Real Estate Lending
6/24/2009	COP Hearing with Herb Allison, Assistant Secretary of the Treasury for Financial Stability
7/7/2009	COP Field Hearing in Greeley, CO on Farm Credit
7/27/2009	Oversight of TARP Assistance to the Automobile Industry
9/10/2009	COP Hearing with Treasury Secretary Timothy F. Geithner
9/24/2009	COP Field Hearing in Philadelphia: Foreclosure Mitigation Under the Troubled Asset Relief Program
10/22/2009	COP Hearing with Herbert M. Allison, Jr., Assistant Secretary of the Treasury Secretary for Financial Stability
11/19/2009	Taking Stock: Independent Views on TARP's Effectiveness
12/10/2009	COP Hearing with Treasury Secretary Timothy Geithner
1/27/2010	COP Field Hearing in Atlanta on Commercial Real Estate
2/25/2010	GMAC Financial Services and the Troubled Asset Relief Program
3/4/2010	Citigroup and the Troubled Asset Relief Program
4/27/2010	COP Field Hearing in Phoenix on Small Business Lending
5/26/2010	TARP and Other Government Assistance for AIG
6/22/2010	COP Hearing with Treasury Secretary Timothy Geithner
9/22/2010	Treasury's Use of Contracting Authority Under the TARP

Date	Hearing
10/21/2010	COP Hearing on the TARP and Executive Compensation Restrictions
10/27/2010	COP Hearing on TARP Foreclosure Mitigation Programs
12/16/2010	COP Hearing with Treasury Secretary Timothy Geithner
2/4/2011	COP Hearing on Commercial Real Estate
3/4/2011	COP Hearing on the TARP's Impact on Financial Stability

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Wilson Abney, Ethics Counsel
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Thomas Smith
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Don Snyder
Benjamin Steiner
Alexa Strear
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E. Budget

Section 125(g)(2) of EESA required that Panel expenses be paid equally from the contingent fund of the Senate and an "applicable" fund of the House of Representatives. Such expenses were then to be reimbursed to the House and Senate by the Treasury Department from funds made available to the Secretary of the Treasury pursuant to the Act. Congressional leadership designated the Senate as the "administrating entity" for the Panel. All contracts entered into by the Panel received written approval from the Senate Committee on Rules and Administration and adhered to all Senate policies and procedures.

Projected Total Panel Expenses through April 3, 2011

Compensation and Benefits	$8,738,630
Office Space Rental	619,000
Office Equipment and Expenses	358,904
Printing Costs for Hearings and Reports	768,851
Hearings and Travel	199,037
Total	**$10,684,422**

APPENDIX I:

LETTER TO SECRETARY TIMOTHY GEITHNER FROM CHAIRMAN TED KAUFMAN RE: REDESIGN OF WEBSITE, DATED MARCH 7, 2011

SEN. TED KAUFMAN, CHAIRMAN
RICHARD H. NEIMAN
DAMON SILVERS
J. MARK MCWATTERS
KENNETH R. TROSKE

732 NORTH CAPITOL STREET, NW
ROOM C-320
WASHINGTON, DC 20401

Congress of the United States

CONGRESSIONAL OVERSIGHT PANEL

March 7, 2011

The Honorable Timothy F. Geithner
Secretary of the Treasury
United States Department of the Treasury
Room 3300
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Dear Mr. Secretary:

On behalf of the Congressional Oversight Panel, I am writing to express concern about Treasury's handling of the recent redesign of its main website, Treasury.Gov, as well as its website for the Troubled Asset Relief Program (TARP), FinancialStability.Gov. In particular, I am troubled that the redesign has relocated thousands of documents critical to oversight, rendering it difficult – and in some cases even impossible – for oversight bodies, outside experts, or the public to review Treasury's work.

As you are aware, in our monthly oversight reports on the TARP, the Panel relies heavily on official materials published by Treasury. Our reports commonly cite dozens of documents on Treasury's website, including TARP program guidelines, transaction reports, and press releases. In keeping with common government practice, the Panel cites these documents using their Uniform Resource Locators (URLs) on Treasury's website. We intend for these citations to provide outside and future experts with the information needed to verify or expand upon the Panel's work. The continued availability of cited documents represents a meaningful part of the Panel's legacy and an important resource to future policymakers.

Unfortunately, Treasury's redesign of its website has broken nearly a thousand hyperlinks from the Panel's past oversight reports – as well as countless hyperlinks from other oversight bodies, newspaper websites, and other Internet users. Visitors attempting to follow a hyperlink from a past Panel report in order to view, for example, a TARP contract that disbursed billions of taxpayer dollars, or a summary of Treasury's disbursements under TARP to date, will no longer find this critical information. Instead, visitors are redirected to the front page of Treasury's website, which contains no explanation of the redesign and no guidance on how users can proceed to find their requested document. Regrettably, Treasury provided no advance notice to the Panel of its website redesign or the implications for the TARP's transparency.

It is important to note that the accessibility problems posed by a website redesign are well-recognized within the federal government, and the Office of Management and Budget has proposed "best practices" to ensure that redesigns do not improperly obscure public information. In particular, the Interagency Committee on Government Information issued a 2004 report entitled "Recommended Policies and Guidelines for Federal Public Websites," which states:

> [E]very visitor needs to know about changes to URLs that may affect bookmarks and other links to the website. Since many federal organizations link to each other, it's important to keep URLs current, or provide redirect pages, so content on other federal websites also stays current.... For individual page URL changes, organizations should insert a "redirect" notice that will automatically take visitors to the new URL. When a significant number of page URLs change at one time (for example, as part of a redesign or conversion to an automated content management system), organizations should provide as many ways as possible for visitors to locate the new page locations.

The Panel is troubled that Treasury does not appear to have followed these "best practices" in its recent redesign. Although a small handful of outdated URLs on the Treasury website include a redirect code that points users directly to their requested page, the vast majority of URLs do not; they direct users only to Treasury's front page.

To Treasury's credit, your staff has been accessible and helpful to the Panel when we have requested updated URLs for now-outdated hyperlinks. Unfortunately, our staff conversations have revealed that, in many cases, Treasury itself has no readily available record of where old files have been relocated on the new website. Of even greater concern is the fact that Treasury appears to have removed certain documents from its website entirely during the redesign. For example, when the Panel recently requested the updated URL for a TARP contract with GMAC, Treasury responded that "this was an old file that was removed from the [Financial Stability] website" during the redesign. Although Treasury has offered to provide the Panel with copies of all removed or revised documents for our archival purposes, it is concerning that these documents are not otherwise available to the public.

The Panel urges Treasury to consider updating your website to redirect users who attempt to visit outdated URLs to the same information at its new location. If Treasury determines that it is not technically feasible to provide a redirect notice for all outdated URLs, Treasury should provide visitors to those addresses with a clear explanation of the website's redesign and specific, actionable instructions on how they may find their requested information. Further, the Panel urges Treasury to ensure that all public records that were available on its old website remain available on its new website.

The Panel appreciates that website redesigns are occasionally a necessary and important step in government outreach. Indeed, Treasury deserves credit for creating a new website that is, in general, more accessible and more readily navigable than earlier versions. Even so, Treasury's steps toward the future must not shroud its past. The TARP provided Treasury the authority to spend a staggering $700 billion in taxpayer funds, and Americans deserve full and ready access to the information necessary to learn from the TARP's experience and to judge the program's legacy.

Sincerely,

Senator Ted Kaufman
Chairman
Congressional Oversight Panel

Cc: Mr. Vivek Kundra,
U.S. Chief Information Officer,
Office of Management & Budget

Mr. Damon Silvers
Mr. J. Mark McWatters
Mr. Richard Neiman
Dr. Kenneth Troske

APPENDIX II:

LETTER TO CHAIRMAN TED KAUFMAN FROM ACTING ASSISTANT SECRETARY TIMOTHY MASSAD RE: REDESIGN OF WEBSITE, DATED MARCH 14, 2011

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

ASSISTANT SECRETARY

March 14, 2011

Senator Ted Kaufman, Chairman
Congressional Oversight Panel
732 North Capitol Street, NW
Room C-320
Washington, DC 20401

Dear Senator Kaufman:

I am writing in response to your letter of March 7 regarding the redesign of the Department of the Treasury's websites, and in particular, the website for the Troubled Asset Relief Program (TARP), FinancialStability.gov.

Your letter notes that our website redesign project inadvertently broke numerous hyperlinks from the Congressional Oversight Panel's (COP) past oversight reports. We regret the inconvenience to the Panel and to those that rely on its reports.

The redesign of the FinancialStability.gov website was part of a Treasury-wide website modernization project intended to make all Treasury websites more accessible, user-friendly and informative. The website was created to provide the public with information about TARP and ensure that we implement TARP programs in as transparent a manner as possible. Thus, we have posted thousands of documents on FinancialStability.gov, enabling the public to easily access information about the programs. FinancialStability.gov was not, however, created as a records management system and we add and remove content as appropriate. For example, to make the site as clear and useful as possible, we may remove legal documents that have been superseded by more recent contracts or agreements, or we may remove documents that are no longer relevant or applicable to TARP programs.

Nevertheless, we have worked hard to ensure that your staff has all of the new links and documents needed to complete the archiving of COP's records. Soon after COP staff first expressed concerns about the new website, I made my staff available to explain our process for the website changes. To facilitate the identification of old and new hyperlinks, our technical experts sent a master spreadsheet that mapped the majority of these links from the old site to the new site. Thereafter, we worked with COP staff to provide them with each of the new links they requested, and, in the case of any removed documents, we provided PDFs to ensure all documents cited in COP's reports were available. It is our understanding that at this point all problematic links have been addressed.

You point out that we could have uniformly utilized redirect notices as was recommended by the Interagency Committee on Government Information in a report issued in 2004. We have already implemented a number of changes to the site, including a new page explaining site changes, an updated redirect notification, and expanded language on error pages explaining the redesign and offering ways for people to find the information they are looking for. We will be making additional adjustments in the near future.

We are always open to suggestions on how we can do a better job in using technology to keep the public informed, and we appreciate your input on this matter. Thank you again for your letter.

Sincerely,

Tim Massad

Timothy G. Massad
Acting Assistant Secretary for Financial Stability

Cc: Mr. Damon Silvers
Mr. J. Mark McWatters
Mr. Richard Neiman
Dr. Kenneth Troske

PREPARED STATEMENT OF TIMOTHY G. MASSAD

ACTING ASSISTANT SECRETARY, OFFICE OF FINANCIAL STABILITY,
DEPARTMENT OF THE TREASURY

MARCH 17, 2011

Chairman Johnson, Ranking Member Shelby, and other Members of the Committee, thank you for the opportunity to testify about the Troubled Asset Relief Program ("TARP"). As the Acting Assistant Secretary for Financial Stability, I am responsible for overseeing the program on a day-to-day basis. I would like to provide you today with Treasury's assessment of the impact of TARP on the U.S. economy and financial sector.

Introduction

Two and a half years after Congress created TARP through the Emergency Economic Stabilization Act ("EESA"), it is clear that this program has been remarkably effective by any objective measure.

First, TARP, in conjunction with the other emergency programs initiated by the Government and the Federal Reserve, helped prevent a catastrophic collapse of our financial system and helped pave the way for an economic recovery. Today, banks are better capitalized, and the weakest parts of the financial system no longer exist. The credit markets on which small businesses and consumers depend—for auto loans, for credit cards, and other financing—have reopened. Businesses can raise capital, and mortgage rates are at historic lows. There is still more work ahead, of course. TARP was not a solution to all our economic problems, nor was it designed to be. Unemployment remains unacceptably high and the housing market remains weak. But the worst of the storm has passed and our economy is on the road to recovery.

Second, we accomplished all this with fewer funds than were originally appropriated, and we are unwinding TARP faster than anyone thought possible. Congress originally authorized $700 billion for the program. We will spend no more than $475 billion. Of the $411 billion disbursed to date, we have already received back a total of $287 billion. Taxpayers have now recovered an amount equal to 70 percent of total TARP disbursements, and I am hopeful that we will recover most of the outstanding amount within the next few years, market conditions permitting.

Third, the ultimate cost of TARP will be far less than ever contemplated. The total cost was initially projected to be approximately $356 billion. That number has steadily declined over the past 2½ half years. The latest estimates, both from Treasury and from the Congressional Budget Office ("CBO"), are that the overall cost of TARP will be between $25 and $50 billion. The TARP investment programs taken as a whole—including financial support for banks, AIG, the domestic auto industry, and targeted initiatives to restart the credit markets—are expected to result in very little or no cost to the taxpayer.

And finally, our financial system is in better shape today than before the crisis. Congress has adopted the most sweeping overhaul of our regulatory structure in generations, which will give us tools we did not have in the fall of 2008. This work is not yet completed either, but great progress has been made since TARP's inception.

Overview of the Government's Actions

Before I review in more detail the impact of TARP and the results of our actions, I think it is helpful to go back to where we were in the fall of 2008 and review the actions taken.

In September 2008, we faced the risk of a second Great Depression. The forces that led to that moment had been building for years, but had accelerated in the preceding 6 months. As the crisis spread, the Bush administration and the Federal Reserve took a series of unprecedented steps to stabilize a financial system that teetered at the edge of catastrophic collapse. These steps included:

- Provision of broad-based guarantees to the financial system through programs such as the Federal Deposit Insurance Corporation's ("FDIC") Temporary Liquidity Guarantee Program and the Treasury Money Market Fund guarantee program;
- Initiation of extraordinary facilities through the Federal Reserve to support liquidity across the financial system; and
- Support for Government-Sponsored Enterprises ("GSEs") pursuant to the Housing and Economic Recovery Act.

But, the severe conditions required additional resources and authorities. Therefore, the Bush administration proposed EESA, which created TARP. It was enacted into law on October 3, 2008, with bipartisan support in Congress.

Actions Taken by the Bush Administration Under TARP

The Bush administration originally proposed TARP as a mechanism for the Government to buy mortgage loans, mortgage-backed securities, and certain other "troubled assets" from banks. By early October 2008, lending between banks had practically stopped, credit markets had shut down, and many financial institutions were under severe stress. It was clear that there was insufficient time to implement a new program in order to buy mortgage-related assets. The Bush administration determined that the financial system required immediate capital injections in order to stabilize the banks and to avert a potential catastrophe. EESA provided this authority because Congress had broadened the statute during the legislative process.

During the fall and winter of 2008, the Bush administration employed approximately $300 billion of TARP authority as follows:

- $234 billion was invested in banks and thrifts, including $165 billion in eight of the largest financial institutions (plus commitments of additional funds to two of those banks);
- $40 billion was invested in American International Group ("AIG") along with additional funds from the Federal Reserve; and
- Approximately $20 billion was provided to the domestic auto industry.

The combined effect of the actions taken by Treasury, the Federal Reserve, and the FDIC helped to stop the panic and to slow the financial crisis. Despite these efforts, when President Obama took office in early 2009, the financial system remained paralyzed and the economy continued to contract at an accelerating rate.

The nation had already lost 3.5 million jobs in 2008, and was losing additional jobs at the rate of 750,000 per month. Home prices were falling and foreclosures were increasing. Household wealth had fallen by 20 percent from December 2007 to December 2008, more than five times the decline in 1929. Businesses were cutting back on investments and could not raise capital. For individual families who needed credit—to buy a house or a new car—it was more difficult to borrow money than at any time since the Great Depression.

Actions Taken by the Obama Administration Under TARP

Against this backdrop, the Obama administration, working alongside the Federal Reserve, adopted a broad strategy to restore economic growth, free up credit, and return private capital to the financial system. The Administration's strategy combined the American Recovery and Reinvestment Act ("Recovery Act"), a powerful mix of targeted tax measures and investments, with a comprehensive plan to repair the financial system.

The Administration's Financial Stability Plan had three central components:

- To recapitalize and rebuild confidence in the banking system;
- To restart the credit markets that are critical to borrowing for businesses, individuals, and State and local governments; and
- To stabilize the crisis in the housing market.

The Financial Stability Plan represented an important change in strategy. It shifted the focus from supporting individual institutions to restarting the broad markets for capital and credit that are critical for economic growth. It was designed to maximize the chance that private capital would bear the burden of solving the crisis. To facilitate broader economic recovery, we provided support for the housing market and for homeowners. And when we provided extraordinary assistance to individual firms, it came with tough conditions.

Recapitalizing the Banking System

Our financial system needed to be recapitalized. But private capital could not be raised until the condition of the major financial institutions was made clear. Treasury worked with the Federal banking regulators to conduct the Supervisory Capital Assessment Program ("SCAP"), a comprehensive, forward-looking "stress test" for the 19 largest U.S.-owned bank holding companies. The stress test determined which institutions would need more capital to remain well-capitalized if economic conditions deteriorated significantly more than expected. It was conducted with unprecedented openness and transparency, which helped restore market confidence in our financial system. Treasury allowed banks needing capital to reapply for further assistance under TARP, but only one did so. Since completion of the stress test, these banks have raised $150 billion in private capital, saving hundreds of billions of TARP dollars, restoring market confidence, reopening credit markets, and laying the groundwork for recovery and economic growth.

Jumpstarting the Credit Markets

A second key aspect of the Financial Stability Plan was to commit resources to restart critical channels of credit to households and businesses.

- Through the Term Asset-Backed Securities Loan Facility ("TALF"), a joint program with the Federal Reserve, we helped to restart the asset-backed securitization markets that provide credit to consumers and small businesses. Since TALF was launched in March 2009, new issuances of asset-backed securities have averaged $10.5 billion per month, compared to less than $2 billion per month at the height of the crisis.
- Through the Public-Private Investment Program ("PPIP") for legacy securities, we matched TARP funds with private capital to purchase legacy mortgage-related securities. This program returned liquidity to key markets for financial assets and cleaned up the balance sheets of major financial institutions. Since the announcement of PPIP in March 2009, prices for eligible residential and commercial mortgage-backed securities have increased by as much as 75 percent. The program continues to mature. Each of the Public-Private Investment Funds are now approximately halfway through their investment periods and have each generated positive returns to the taxpayer to date.
- Through the SBA 7(a) Securities Purchase Program, we unlocked credit for small business by purchasing securities backed by small business loans. Markets for these securities have since returned to healthy levels.

Easing the Housing Crisis

Finally, the Administration took aggressive steps to address the crisis facing many American homeowners. Our strategy has focused on providing stability to housing markets and giving Americans who are struggling but, with a little help, could afford to stay in their homes a chance to do so. TARP provided sensible incentives for mortgage modifications to prevent avoidable foreclosures, and Treasury and the Federal Reserve worked to keep interest rates at historic lows. Together, these policies have put a floor under housing prices and have enabled millions of Americans to stay in their homes.

The Economic Impact of Our Policies

In any assessment of a response to a financial crisis, there are several important measures of success. What is the effect on availability of credit and economic growth? How quickly is the Government able to return the financial system to private hands? What was the direct financial cost of the interventions? Has the response left the financial system able to support—rather than impede—economic growth? On all of these measures, I believe TARP and the Government's other emergency actions have succeeded.

Macroeconomic Impact

Treasury has discussed various measures of the effectiveness of these programs in the TARP Retrospective that we published on the 2-year anniversary of the program, as well as in recent testimony. Let me briefly recap our views, and then review in more detail the impact of the major TARP programs.

At the peak of the crisis, banks were not making new loans to businesses, or even to one another. Businesses could not get financing in our capital markets. Municipalities and State governments could not issue bonds at reasonable rates. The asset-backed securitization markets, which provide financing for credit cards, auto loans, and other consumer financing, had stopped functioning. And where credit was available, it was prohibitively expensive.

Due to the combined actions under TARP and the other Government interventions, the cost of credit has fallen dramatically. For businesses, the cost of long-term investment grade borrowing has fallen from a peak of approximately 570 basis points to just 125 basis points over benchmark Treasury securities today.[1] Non-investment grade corporate bond spreads have fallen from approximately 2,200 basis points to 440 basis points over benchmark Treasuries.[2]

American families are spending less on mortgage payments. At the peak of the crisis, a family with an average 30-year, $180,000 mortgage was borrowing at ap-

[1] Based upon 10-year Treasury yield and FINRA/Bloomberg Investment Grade U.S. Corporate Bond Index yield as of February 25, 2011 according to Bloomberg LP.

[2] Based upon 10-year Treasury yield and FINRA/Bloomberg High Yield U.S. Corporate Bond Index yield as of February 25, 2011 according to Bloomberg LP.

proximately 6.40 percent a year.[3] Today, that family is borrowing at approximately 4.85 percent, saving about $2,100 each year.[4]

The securitization markets have also restarted. Although volumes have not reached pre-crisis levels, auto lending in particular has recovered, with spreads now below pre-crisis levels.

The economy as a whole has made substantial progress since the recession ended last summer. Real GDP has risen for six straight quarters, and GDP growth was stronger in the fourth quarter of 2010 than in the fourth quarter of 2007. Private sector firms have started hiring again. The housing market remains weak, although certain measures are stabilizing.

Although we can never be sure where we would have been today without these emergency policies, one of the most comprehensive independent analyses of the overall impact of our response, by economists Mark Zandi and Alan Blinder, concluded that without the Recovery Act, TARP, and other Government actions, GDP would have contracted further in 2010 at the astonishing rate of 3.7 percent, unemployment would have reached 16.5 percent, and we would be experiencing deflation. In short, they say, "this dark scenario constitutes a 1930s-like depression."

Impact of Particular TARP programs

Let me now turn to review the status of the major programs and initiatives taken under TARP.

Support for the Banking System

We have moved very quickly to reduce the dependence of the financial system on emergency support and to return our financial institutions to private hands as quickly as possible. Under the Capital Purchase Program ("CPP") and the Targeted Investment Program ("TIP"), Treasury invested $245 billion in our financial institutions, including $165 billion in eight of the largest financial institutions and an additional $80 billion in another 700 banks. Treasury further committed to guarantee certain assets of Bank of America and Citigroup under the Asset Guarantee Program ("AGP").

We have already recovered a total of $243 billion from banks, including $211 billion in repayments and $32 billion in additional income. From today on, practically every dollar we recover from banks will constitute a positive return to the taxpayer-one that we estimate will ultimately total around $20 billion. When President Obama took office, the U.S. Government had made investments in financial institutions representing 75 percent of the entire banking system by assets. Today, our remaining investments in banks represent only about 10 percent of the banking system.

The stress test in particular was critical to facilitating this recapitalization. The 19 banks subject to the stress test have raised $150 billion in new equity, and 13 of the institutions that received TARP assistance have fully repaid.

Citigroup was one of the largest recipients of TARP assistance; we invested a total of $45 billion. At the time, many doubted whether Citigroup would survive and be able to repay the Government. As of last December, we recovered the entire $45 billion, and we realized a positive return in excess of $12 billion on our overall investment. As a recent report by the Special Inspector General for TARP concluded, the Government assistance provided to Citigroup was carefully designed and achieved its primary goal of restoring market confidence.

I want to address in particular the status of the smaller banks which have received TARP funds. While Treasury under the Obama administration made no further investments in the nation's largest banks, Treasury did invest an additional $11 billion in more than 400 other banks and thrifts, most of which were small and community banks. The Obama administration focused on small banks not only because EESA required that assistance be made available to financial institutions regardless of size, but also because of the critical role small banks play in our nation's communities. Small banks finance small businesses, which generate a large percentage of our private sector jobs, as well as serve the needs of many families. While it may ultimately take longer for Treasury to recoup its investment in these small banks, the fact remains that without TARP, many more of these institutions, and the communities they serve, would have been in jeopardy.

Today, Treasury maintains investments in 539 small banks and thrifts. Their path to recovery is longer because these institutions have less access to the capital

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[3] The U.S. average mortgage balance was $181,225 in 2007 according to the Federal Reserve Bank of Kansas City.

[4] The U.S. 30-year fixed mortgage average rate was 4.85 percent as of February 25, 2011 according to BankRate (*www.bankrate.com*).

markets and greater exposure to the commercial real estate ("CRE") market. Although these institutions continue to face challenges, there are signs that the sector is strengthening. Over the past year, the CRE market and credit conditions have shown signs of stabilization and, in some areas, modest signs of improvement. With the launch of the Small Business Lending Fund ("SBLF"), which is outside of TARP, Treasury will provide capital to qualified small banks. Treasury has received many applications from small banks across the country including from eligible TARP recipients who wish to refinance into SBLF. Treasury plans to announce the first round of SBLF investments in the coming weeks.

Stabilizing the Auto Industry

The Bush administration provided loans to old GM and old Chrysler in December 2008 to prevent their uncontrolled liquidations and the loss of as many as one million jobs. The Obama administration thereafter provided additional assistance, but only on the condition that fundamental changes occur.

These changes involved sacrifices from all stakeholders—shareholders, unions, auto dealers, and creditors—and they enabled the industry to become more competitive. This assistance also helped the many suppliers and ancillary businesses that depend on the automotive industry. Our actions saved jobs across the country—as many as one million, by one estimate—and created many new ones.

Our strategy is helping to restore the domestic auto industry to profitability, and we have already begun to recoup our investments. Recently, General Motors reported net income of $4.7 billion for 2010. Old GM had not reported an annual profit since 2004. Chrysler reported four consecutive quarters of operating profit in 2010 totaling $763 million. Ford's 2010 net income reached $6.6 billion, its best level in more than 10 years.

To date, we have recovered a total of almost $30 billion of the $80 billion invested in the domestic auto industry (including the recently sold Ally securities). We completed a highly successful initial public offering of General Motors in November of last year, and the Government has recovered almost half of its $50 billion investment and has reduced its stake in GM from 60.8 percent to 33.3 percent. We now have a pathway for exiting the remaining investment. We also are working to exit our investments in Chrysler and Ally Financial.

Restructuring AIG

One of the most controversial actions taken by the Government in response to the crisis in the fall of 2008 was the assistance provided to AIG. That assistance was provided because the failure of AIG, in the circumstances we faced in September of 2008, would have been catastrophic to our financial system and our economy. Many doubted whether we would ever recover those funds. Now, 2 ½ years later, we have not only helped restructure the company but the Government is potentially in position to recover every dollar we invested.

Over the last 2 years, Treasury and the Federal Reserve have worked with AIG as it has taken aggressive steps to stabilize its business and sell its non-core assets. As part of this effort, Treasury and the Federal Reserve worked with AIG to recruit an almost entirely new board of directors and several new members of senior management, including the Chief Executive Officer. The management team, in turn, has taken a variety of steps to reduce risk and to focus on AIG's core insurance businesses.

In January, AIG, the Treasury, and the Federal Reserve Bank of New York closed a major restructuring plan, which represented the culmination of 2 years of efforts to resolve AIG. This plan will accelerate the repayment of U.S. taxpayer funds and puts us in a position to recover our entire investment. AIG has since repaid the Federal Reserve $47 billion, converted Treasury's preferred stock investment into common shares, and repaid Treasury $9.1 billion.

Since market prices will fluctuate, there is no guarantee of what the ultimate returns will be. However, if we are able to sell our investments in AIG at current market values, including the AIG shares that Treasury received from the trust established by the Federal Reserve, taxpayers will get back every dollar put into AIG and will realize a positive return. This is a dramatic turnaround, and a result that stands in sharp contrast to what most observers expected in the fall of 2008.

Helping Responsible but Struggling Homeowners

We acknowledge that our housing programs have not been without criticism, and that housing is an area where there is still much work to be done. It should be remembered, however, that the forces that created this housing crisis had been building for nearly a decade. In particular, when the Obama administration took office in January 2009, home prices had fallen for 30 consecutive months. Home values had fallen by nearly one-third and were expected to fall by another 5 percent by the end of 2009. Stresses in the financial system had reduced the supply of mortgage credit and crippled the ability of Americans to buy homes. Fannie Mae and Freddie Mac had been in conservatorship for over 4 months. Millions of American families could not make their monthly mortgage payments—having lost jobs or income—and were unable to sell, refinance, or find meaningful modification assistance.

The Obama administration took several actions to confront this situation, including: the purchase of agency mortgage backed securities in order to help keep mortgage rates low; efforts to provide refinancing opportunities to homeowners; and the launch, under TARP, of the Making Home Affordable ("MHA") Program to help responsible homeowners avoid foreclosure. The Home Affordable Modification Program ("HAMP"), the largest MHA program, has helped more than 600,000 struggling homeowners secure permanent modifications of their mortgages and stay in their homes. HAMP has reduced these homeowners' mortgage payments by a median of more than $500 each month, bringing their total savings to approximately $5 billion. Currently, an average of 25,000 to 30,000 additional homeowners receive assistance from HAMP permanent modifications each month. Beyond direct assistance, many more homeowners have been helped by the standards that HAMP has catalyzed across mortgage modifications industry-wide.

As the housing crisis evolved, Treasury responded with additional actions, including several at the suggestion of our oversight bodies. The suggestion that we focus more on the problems of unemployed homeowners and negative equity were particularly valuable. We expanded MHA to: address the problem of second liens; provide incentives for other alternatives to foreclosure, such as short sales; provide additional help to the unemployed; and encourage targeted principal reduction. In addition:

- Treasury launched the Housing Finance Agency Hardest Hit Fund to help State housing finance agencies provide additional relief to homeowners in the States hit hardest by unemployment and house price declines.
- Treasury and the Department of Housing and Urban Development created the FHA Short Refinance program to enable homeowners whose mortgages exceed the value of their homes to refinance into more affordable mortgages.

Many have criticized HAMP because it will not achieve 3 million to 4 million permanent modifications. It is important to remember that the program was not intended to prevent all foreclosures. Today, there are approximately 5 million delinquent mortgages. Yet, about 1.4 million seriously delinquent homeowners are currently eligible for HAMP because the program's eligibility requirements exclude:

- High cost mortgages in excess of $729,750;
- Mortgages on vacation, second homes or investor-owned properties;
- Mortgages on vacant homes;
- Homeowners who can afford to pay their mortgage without Government assistance; and
- Homeowners with mortgages that are unsustainable even with Government assistance.

To further protect taxpayer resources, HAMP and most of our other housing initiatives have pay-for-success incentives: funds are spent only when transactions are completed and continue only for as long as those modifications remain in place. Accordingly, most of the funds have not yet been disbursed.

Beyond those immediately helped, TARP housing programs also have had a positive impact on mortgage servicing. At the outset of the crisis, we faced a mortgage industry that was ill-equipped and unwilling to respond to the foreclosure crisis. Mortgage servicers lacked sufficient resources to meet the needs of a market reeling from increasing foreclosures. In addition, their servicing expertise and infrastructure were focused on overseeing collections and foreclosing on those who failed to pay. HAMP provided servicers with standards that could be applied to all modifications, such as the need to make modifications affordable for the homeowner. As a result, these standards soon became national, industry-wide models that also have been applied to many servicers' own proprietary modifications.

Over the past 2 ½ years, we developed policies and procedures in the MHA program to ensure that responsible homeowners who meet the eligibility criteria are offered meaningful modifications, or where appropriate, other alternatives to foreclosure. To address servicer shortcomings, we urged servicers to increase staffing and to improve customer service. We developed specific guidelines and certifications on how and when homeowners must be evaluated for HAMP and other options before foreclosure. We developed a defined process for escalating homeowner complaints to be resolved promptly and fairly. We also have a comprehensive compliance program to ensure that homeowners are fairly evaluated for HAMP, and that servicer operations comply with Treasury guidance.

We faced many challenges in developing and implementing these programs. We often must balance conflicting policy goals—such as how to design programs that encourage the participation of struggling borrowers and help them get back on their feet, while minimizing the cost to the Government, moral hazard, adverse selection, and operational and financial risks and complexity. Implementation has been difficult, and much work remains to ease the housing crisis. But that should not obscure the importance of what has been accomplished, nor the fact that these programs can continue to help ease the pain of this terrible crisis. Struggling families from around the country have avoided the intense pain, cost, and disruption of losing their homes because of these programs. Their neighbors and their local communities have also benefited, since a vacant home is dangerous and costly to a neighborhood.

Congress is considering legislation to end HAMP. We strongly oppose any efforts to end our necessary housing programs. Terminating HAMP would prevent us from helping tens of thousands of additional families each month, relax the pressure on mortgage companies to offer better assistance to struggling homeowners, and damage the prospects of recovery in our still-fragile housing market. In addition, the House has already passed bills that would terminate the FHA Refinance Program, and the Emergency Homeowners' Relief Program, and is scheduled to vote on a bill to terminate the Neighborhood Stabilization Program this week. Ending these essential programs would further destabilize an already weak housing market.

Reform

It is important to also take stock of the fact that our financial system is stronger today. The weakest parts no longer exist, the system has substantially higher levels of capital relative to risk than before the crisis, and our financial institutions are better capitalized than their international competitors. Moreover, Congress has enacted a comprehensive overhaul of financial industry regulation. The Dodd-Frank Act provides the Government with critical tools that will help us fix the fundamental failures that led to this crisis. These include consolidated supervision of the largest, most inter-connected financial companies and the ability to liquidate in an orderly manner firms that pose a significant threat to our financial system.

TARP Achieves Results at Fraction of Anticipated Costs

In terms of direct financial cost, TARP will rank as one of the most effective crisis response programs ever implemented. Independent observers, such as the CBO, initially estimated that TARP would cost $356 billion or more. Now, because of the success of the program, TARP is likely to cost only a fraction of that amount. Most recently, CBO estimated that the cost of the program would be as little as $25 billion.

The cost of TARP is likely to be roughly equal to the amount spent on the program's housing initiatives—expenditures that were necessary to prevent even greater losses and hardships to American families and local communities and that were never intended to be returned. The remainder of the programs under TARP—the investments in banks, AIG, credit markets, and the auto industry—likely will result in very little or no cost.

Furthermore, the cost of the Government's broader response efforts is remarkably low when compared to past systemic crises. An International Monetary Fund study found that the average net fiscal cost of resolving roughly 40 banking crises since 1970 was 13 percent of GDP. The Government Accountability Office ("GAO") estimates that the cost of the U.S. Savings and Loan Crisis was 2.4 percent of GDP. In contrast, the direct fiscal cost of all our interventions, including the actions of the Federal Reserve, the FDIC, and our efforts to support the GSEs, is likely to be less than 1 percent of GDP. The true cost of this crisis to the economy, however—the jobs, wealth, and growth that it erased—is much higher than previous crises, but that damage would have been far worse without the Government's emergency response.

Robust and Effective Oversight

TARP has been subjected to unprecedented oversight since its inception. ESSA established four separate oversight avenues for TARP: the Financial Stability Oversight Board ("FinSOB"); specific responsibilities for the GAO; the Special Inspector General for TARP ("SIGTARP"); and Congressional Oversight Panel ("COP").

Treasury cooperates with each oversight body's efforts to review TARP programs and to produce periodic audits and reports. To date, Treasury has responded to 75 reports from GAO, COP, and SIGTARP; and Treasury has participated in at least

25 Congressional hearings on TARP. Individually and collectively, the work performed by TARP's oversight bodies has made, and continues to make, important contributions to the development, strength, and transparency of TARP programs. Treasury welcomes this oversight and, to date, has adopted more than 120 of the recommendations made by the oversight bodies.

In addition, Treasury has taken many steps that have made TARP one of the most transparent programs in the Federal Government. Pursuant to EESA, Treasury prepares separate, audited financial statements for TARP. In its first 2 years of operations, TARP's financial statements received unqualified ("clean") audit opinions from the GAO, and separate reports on internal control over financial reporting were unqualified and found no material weaknesses-unprecedented achievements for a startup operation with an extraordinary emergency mission. As a result of these efforts, the Office of Financial Stability received a Certificate of Excellence in Accountability Reporting ("CEAR") award from the Association of Government Accountants.

In addition, Treasury has published hundreds of comprehensive reports and other information about TARP, so that the public knows how its money was spent, who received it, and on what terms. This includes:

- A monthly report to Congress that details how TARP funds have been used, the status of recovery of such funds by program, and information on the estimated cost of TARP;
- A monthly housing report containing detailed metrics on the housing programs;
- A quarterly report on the PPIP program that provides detailed information on the funds, their investments, and returns;
- A report on each transaction (such as an investment in or repayment by an institution) within two business days of its completion;
- A quarterly report that details all dividend and interest payments;
- Periodic reports on the sale of warrants, including information on auctions as well as on how the sale price was determined in the case of any repurchase of warrants by a TARP recipient;
- Monthly lending and use-of-capital surveys that contain detailed information on the lending and other activities of banks that have received TARP funds;
- A list of all the institutions participating in TARP programs and of all the investments Treasury has made; and
- Publishing every contract and financial agency agreement it has entered into.

In a further commitment to transparency, Treasury publishes valuations of the TARP investments in its annual financial statements and periodically during the year. Treasury has introduced new disclosures in its monthly reports that make it easier to track TARP funds and the current cost of the programs. These disclosures allow the public to understand the value of the investments that Treasury has made.

Conclusion

TARP succeeded in what it was designed to do: it brought stability to the financial system and laid the foundation for economic recovery. And it did so at a fraction of the expected cost. TARP was not designed to solve all our economic problems. The damage from this financial crisis has not yet been completely repaired, and many American families are still struggling in its aftermath. We will continue to manage our exit from our remaining investments in the interest of the taxpayer and the recovery. Nevertheless, today, thanks to a comprehensive and careful strategy to address the financial crisis, we are in a much stronger position to address remaining economic challenges.

SIGTARP | OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR THE TROUBLED ASSET RELIEF PROGRAM

ADVANCING ECONOMIC STABILITY THROUGH TRANSPARENCY, COORDINATED OVERSIGHT AND ROBUST ENFORCEMENT

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SENATE COMMITTEE ON BANKING, HOUSING AND URBAN DEVELOPMENT

STATEMENT OF NEIL BAROFSKY

SPECIAL INSPECTOR GENERAL
TROUBLED ASSET RELIEF PROGRAM

BEFORE THE
SENATE COMMITTEE ON BANKING, HOUSING AND URBAN DEVELOPMENT

MARCH 17, 2011

Chairman Johnson, Ranking Member Shelby, and members of the Committee, I am honored to appear before you today to discuss the Department of the Treasury's Troubled Asset Relief Program ("TARP").

This past quarter, the Office of the Special Inspector General for the Troubled Asset Relief Program ("SIGTARP") marked its second anniversary. I want to thank Congress and members of this committee for the tremendous support that SIGTARP has received in its brief existence. As a direct result of that support, in the time since its inception in December 2008, SIGTARP has had notable success in fulfilling its goals of transparency, oversight, and enforcement. To date, through nine quarterly reports and 13 completed audits, SIGTARP has brought light to some of the darkest areas of the financial crisis and the Government's response to it, and has offered Treasury 68 recommendations to help program effectiveness and protect the taxpayer from losses due to fraud. Where fraud has managed to slip in, we have acted as TARP's "cop on the beat," and SIGTARP's Investigations Division has already produced outstanding results. To date, 51 individuals and 18 entities have already been subject to criminal or civil actions related to SIGTARP investigations, with 17 individuals criminally convicted. SIGTARP's investigative efforts have helped prevent $555.2 million in taxpayer funds from being lost to fraud, and have assisted in the recovery of over $151 million, already assuring that as an agency SIGTARP will more than pay for itself. And with 153 ongoing investigations, including 74 into executives and senior officers at financial institutions that applied for and/or received TARP funding through TARP's Capital Purchase Program ("CPP"), much more remains to be done.

We are approaching the two-and-a-half year anniversary of the enactment of the Emergency Economic Stabilization Act of 2008 ("EESA"), which authorized the creation of TARP. While Treasury's authority to initiate new TARP investments expired on October 3, 2010, signifying an important milestone in TARP's history, this also led to the widespread but mistaken belief that TARP is at or near its end. Approximately $150 billion in TARP funds are still outstanding, and although no new TARP obligations can be made, close to $60 billion already obligated to existing programs may still be expended. While it is therefore premature to deliver a comprehensive evaluation of TARP, the approach of this anniversary makes this a fitting time for an interim assessment. Now in its third year of operation, TARP remains a study in contrasts.

In terms of direct financial costs, TARP's outlook continues to improve. While Congress originally authorized $700 billion for the program, as a result of subsequent Congressional action, Treasury will spend no more than $475 billion. Of the approximately $411 billion disbursed as of the end of last week, Treasury has received back a total of approximately $250 billion in repayments, not including interest, dividends, or sale of warrants. The most recent estimate from the Office of Management and Budget ("OMB") is that the total financial cost of TARP will be approximately $48 billion (assuming all housing funds are spent), compared to its August 2009 estimate of $341 billion, while the most recent estimate from the Congressional Budget Office ("CBO") contains the more optimistic projection of $25 billion. Just last week, taxpayers received $9.6 billion in TARP repayments. And while recent events such as American International Group, Inc.'s ("AIG") recapitalization plan and General Motors Company's recent initial public offering are also cause for continued optimism, it is also important to remember that Treasury's ultimate return on its TARP investments depends on a host of variables that are largely unknowable at this time. Just recently, for example, the pace at which taxpayer funds will be repaid by AIG was unexpectedly slowed after Treasury waived repayment of $2 billion of net cash proceeds from the sale of AIG's two Japanese-based life insurance subsidiaries so that AIG could shore up the capital of one of its wholly owned subsidiaries, which took an unexpected charge of more than $4 billion to its reserves. Nonetheless, TARP's financial prospects are without question far better today than anyone could have dared to hope just two years ago. One reason for this is the vigorous oversight by the entities represented on this panel today, as well as Treasury's implementation of numerous recommendations from SIGTARP and others designed to protect taxpayer dollars from those who would seek to criminally profit from TARP. As a result, it appears that TARP will experience losses from fraud at a substantially lesser rate than what is typically expected for comparable Government programs.

While the financial costs of TARP may be dramatically lower than earlier anticipated, costs can involve far more than just dollars and cents. Treasury's far too common tunnel-vision focus on the good financial news should not distract from the hard work still ahead, or from the careful and necessary assessment of TARP's considerable, non-financial costs that, while more difficult to measure, may be even more significant. Those costs include the increased moral hazard and potentially disastrous consequences associated with the continued existence of financial institutions that are "too big to fail," the damage to Government credibility that has plagued the program from its inception, and TARP's failure to meet certain goals targeted to help Main Street as well as Wall Street.

In January, SIGTARP published the audit report "Extraordinary Financial Assistance Provided to Citigroup, Inc.," which details how the Government assured the world that it would use TARP to prevent the failure of any major domestic financial institution. Indeed, public statements by then-Secretary of the Treasury Henry Paulson in late 2008 and Treasury Secretary Timothy Geithner in early 2009 made clear that they were ready, willing, and able to use TARP funds to ensure that none of the nation's largest banks would be permitted to fail, and then stood behind Citigroup Inc. ("Citigroup"), along with others such as AIG and Bank of America Corp. While these actions and statements succeeded in reassuring troubled markets, they also did much more. By effectively guaranteeing these institutions against failure, they encouraged future high-risk behavior by insulating the risk-takers who had profited so greatly in the run-up to the crisis (and indeed, in many cases, since then), from the consequences of failure, and gave an unwarranted competitive advantage, in the form of enhanced credit ratings and access to cheaper credit and capital, to institutions perceived by the market as having an implicit Government guarantee.

Financial institutions now operate in an environment where size matters because the Government guarantee that naturally flowed from the mid-crisis statements by Secretaries Paulson and Geithner that they will not be allowed to fail grossly distorts normally functioning markets, in which an institution's creditors, shareholders, and executives bear the brunt of poor decisions, not the taxpayers. For executives at such institutions, the Government safety net provides the motivation to take greater risks than they otherwise would in search of ever-greater profits. Ratings agencies continue to give such "too big to fail" institutions higher credit ratings based on the existence of an implicit Government backstop. Creditors, in turn, give those institutions access to debt at a price that does not fully account for the risks created by their behavior. Cheaper credit is effectively a Government-granted subsidy, which translates into greater profits, and which allows the largest institutions to become even larger relative to the economy while materially disadvantaging smaller banks. The prospect of a Government bailout also reduces market discipline, giving creditors, investors, and counterparties less incentive to monitor vigilantly those institutions that they perceive will not be allowed to fail. Unfortunately, TARP's most significant legacy may be the exacerbation of the problems posed by "too big to fail." The biggest banks are now larger than ever, fueled by Government support and taxpayer-assisted mergers and acquisitions. According to Kansas City Federal Reserve Bank President Thomas Hoenig, "after this round of bailouts, the five largest financial institutions are 20 percent larger than they were before the crisis. They control $8.6 trillion in financial assets – the equivalent of nearly 60 percent of gross domestic product."

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or "Act"), signed into law by President Obama last July, was intended, in part, "to end 'too big to fail'" and "to protect the American taxpayer by ending bailouts." Secretary Geithner, testifying before the Congressional Oversight Panel ("COP") in June 2010, shortly before the Act's passage, proclaimed that "The reforms will end 'too big to fail.'" The Act's proponents cite several provisions as particularly important components of this effort. These include creation of the Financial Stability Oversight Council ("FSOC"), charged with, among other things, the responsibility for developing the specific criteria and analytic framework for assessing systemic significance; granting the Federal Reserve new power to supervise institutions that FSOC deems systemically significant; granting the Federal Deposit Insurance Corporation ("FDIC") new resolution authority for financial companies deemed systemically significant; requiring the development of "living wills" designed to assist in the orderly liquidation of such companies; and granting regulatory authority to set more stringent capital, liquidity, and leverage requirements and to limit certain activities that might increase systemic risk.

Whether these provisions will ultimately be successful remains to be seen. They rely heavily on many of the very same financial regulators whose "widespread failures in financial regulation and supervision proved devastating to the stability of the nation's financial markets," according to the Financial Crisis Inquiry Commission ("FCIC"). Many commentators, from Government officials to finance academics to legislators, have expressed concern that the Act does not solve the problem. Kansas City Federal Reserve Bank President Thomas Hoenig remains unconvinced "that our too-big-to-fail problem has been solved," noting just last month that "[m]arket participants and large financial institutions have little reason to doubt that they will be bailed out again" and that "the existence of too big to fail financial institutions poses the greatest risk to the U.S. economy." Massachusetts Institute of Technology professor Simon Johnson agrees, stating in September 2010 that "there is nothing [in the Act] that ensures our biggest banks will be safe enough or small enough or simple enough so that in the future they cannot demand bailout — the bailout potential exists as long as the government reasonably fears global financial panic if such banks are allowed to default on their debts." In his recent testimony before COP, Nobel laureate and Columbia University Professor Joseph E. Stiglitz stated that "too-big-to-fail institutions, whether they be mortgage companies, insurance houses or commercial investment banks, pose an ongoing risk to our economy and the solidness of government finances," and emphasized that the Act's "[r]esolution authority has made little difference, because few believe that the government will ever use the authority at its disposal with these too-big-to-fail banks." Professor Stiglitz thus concluded that the Act "did not go far enough; it was riddled with exceptions and exemptions. It did not adequately deal with the too-big-to-fail banks. . . ." Senators Sherrod Brown and Ted Kaufman, now the chairman of COP (and my co-panelist today), have argued that the Dodd-Frank Act could not and did not by itself provide the *global* regulatory framework required to resolve incredibly complex megabanks operating around the world. Professor Johnson recently testified before COP that without a cross-border resolution authority, we "cannot handle in orderly fashion the failure of a bank like Goldman Sachs or JPMorgan Chase or Citigroup, which operate in 50, 100, 120 countries." Other critics of the Dodd-Frank Act, including Congressman Spencer Bachus, Speaker of the House John Boehner, and Senator Mike Crapo of this committee, have expressed concern that the Act's provisions, particularly those relating to designation and resolution, will not only fail to solve "too big to fail" but actually make it worse by "institutionalizing" Government bailouts.

As even its proponents now concede, the new authorities in the Dodd-Frank Act are a work in progress — a tremendous amount of research and rule making by FSOC, FDIC, and a host of other regulators remains to be done. Their tasks will not be easy. Secretary Geithner told SIGTARP in December 2010, for example, that identifying non-bank financial institutions as systemically significant, one of the Act's premier mandates, "depends too much on the state of the world at the time." If the Secretary is correct, and regulators have difficulty properly identifying non-banks as systemically significant and therefore subject to the Dodd-Frank Act's restrictions, then the Act's effectiveness will undoubtedly be undermined.

The path regulators choose to take could make all the difference. FDIC Chairman Sheila Bair, for example, has argued repeatedly that regulators should use the Dodd-Frank Act's "living will" provisions as a tool to force companies to simplify their operations and shrink their size if necessary to ensure that orderly liquidation is possible, emphasizing that "[i]f [large financial institutions] can't show they can be resolved in a bankruptcy like process ... then they should be downsized now," and that "[i]f we fail to follow through, and don't ensure that these institutions can be unwound in an orderly fashion during a crisis, we will have fallen short of our goal of ending 'too big to fail.'" If Chairman Bair prevails in ensuring that the Dodd-Frank Act is used to simplify and shrink large institutions as necessary, or if some other effective regime is adopted along with similar provisions being implemented internationally, then perhaps in the long run the Dodd-Frank Act will have a chance to end "too big to fail." But as Secretary Geithner acknowledged to SIGTARP in December 2010, "In the future we may have to do exceptional things again if we face a shock that large," even though "[w]e have better tools now thanks to Dodd-Frank. But you have to know the nature of the shock."[1]

Regardless of whether all the required regulations are properly calibrated and fully implemented, the ultimate success of the Dodd-Frank Act depends to a certain degree on market perception. Thus far, the Act has clearly not solved the perception problem. Reflecting Secretary Geithner's candid assessment of the likely limits of Dodd-Frank in the event of a full blown financial crisis, the largest institutions continue to enjoy access to cheaper credit based on the existence of the implicit Government guarantee against failure. Standard & Poor's ("S&P") and Moody's Investors Service ("Moody's"), two of the world's most influential credit rating agencies, recently reinforced this significant advantage for those institutions. In January of this year, S&P announced its intention to make permanent the prospect of Government support as a factor in determining a bank's credit rating, a radical change from pre-TARP practice, stating its expectation that "this pattern of banking sector boom and bust and government

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[1] It was apparent to SIGTARP from the context of the interview, including the reference to doing something exceptional "again" in the face of a future financial crisis, that Secretary Geithner was referring to the possibility of future bailouts. While Treasury has not disputed the quotation attributed to Secretary Geithner or the context in which it was presented in SIGTARP's audit report, "Extraordinary Financial Assistance to Citigroup, Inc.," at least one Treasury official has suggested that Secretary Geithner was actually referring to using the tools of the Dodd-Frank Act.

support to repeat itself in some fashion, regardless of governments' recent and emerging policy response." Similarly, also in January, Moody's stated its belief that the proposed resolution regime "will not work as planned, posing a contagion risk and most likely forcing the government to provide support in order to avoid a systemic crisis." Because of this belief, Moody's intends to continue assuming government support for the eight largest banking organizations. In short, S&P and Moody's are telling the market that they do not believe that the Dodd-Frank Act has yet ended the problems of "too big to fail," and given the discounts that such institutions continue to receive, the market seems to be listening. In fact, some recent reports suggest that the largest banks' funding advantage over their smaller competitors has actually *increased* since the passage of the Dodd-Frank Act. As former Treasury Secretary and National Economic Council Director Lawrence Summers said more than a decade ago, "a healthy financial system cannot be built on the expectation of bailouts." Unless and until institutions viewed by the market as "too big to fail" are either broken up, so that they are no longer a threat to the financial system, or a structure is put in place to assure the market that they will be left to suffer the full consequences of their folly, the prospect of more bailouts will potentially fuel more bad behavior with potentially disastrous results. In this sense, TARP's price tag goes far beyond dollars and cents, and its ultimate cost will remain unknown until the next financial crisis occurs.

Another fundamental non-financial cost of TARP is the potential harm to the Government's credibility and the public's eroding trust in Government that has attended this program. Despite the recent surge in reporting on TARP's successes, many Americans continue to view TARP with anger, cynicism, and mistrust. While some of that hostility may be misplaced, much of it is based on entirely legitimate concerns about the lack of transparency, program mismanagement, and flawed decision-making processes that continue to plague the program. When Treasury refused for more than a year to require TARP recipients to account for the use of TARP funds, or claimed that Capital Purchase Program participants were "healthy, viable" institutions knowing full well that some were not, it damaged the public's trust to a degree that is difficult to repair. When Treasury revised its AIG loss estimate in October 2010 without disclosing that the new lower estimate followed a change in the methodology Treasury previously used to calculate losses on its investment, and that it would be required by its auditors to use the older, less favorable, methodology in the official audited financial statements in mid-November 2010, it left itself vulnerable to charges that it placed short-term political concerns ahead of transparency in its communications with the American people. Similarly, when the Government failed to negotiate robustly on behalf of the taxpayer, as it did when agreeing to compensate AIG's counterparties 100 cents on the dollar for securities worth less than half that amount, or when Treasury made critical and far-reaching decisions without taking an even modestly broad view of their impact, such as pushing for dramatically accelerated automobile dealership closings without considering the potential for devastating job losses, or when it promotes programs without meaningful goals or metrics for success, such as its mortgage modification programs, the public's negative perception of TARP should hardly come as a surprise.

According to recent testimony from a Treasury official, Treasury acknowledges that it "certainly could have done a better job explaining what [it was] doing" and "why [it was] doing it." Transparency, of course, should not be a program afterthought, and TARP's problems, which are ongoing, run much deeper than mere failures of explanation. When we face the next financial crisis, public confidence will be essential to buttress the political will necessary to undertake the difficult and expensive steps that may be needed. Unfortunately, the avoidable damage to Government credibility occasioned by the mishandling of TARP has dangerously undermined the Government's ability to respond effectively in the future. In other words, for all its help in rescuing the financial system from the brink of collapse, TARP may have left a truly frightening legacy: It has increased the potential need for future Government bailouts by encouraging the "too big to fail" financial institutions to become even bigger and more interconnected than before, therefore *increasing* their ultimate danger to the financial system, while at the same time, Treasury's mismanagement of TARP and the resulting deep unpopularity of the program have *decreased* the Government's ability to actually accomplish such bailouts in the future, even if necessary.

Part of the potential harm to the Government's credibility that has attended this program relates to TARP's failure to meet several of the most fundamental goals set for it by both Treasury in announcing TARP programs and Congress in providing Treasury authorization to expend TARP funds – in particular, "increas[ing] lending," "provid[ing] public accountability," "preserv[ing] homeownership," and "promot[ing] jobs and economic growth." In Treasury's view, although EESA included these goals, the authorities Congress provided Treasury "were narrower than that." According to recent testimony from a Treasury official, Congress directed Treasury specifically to "promote the stability and liquidity of the financial system" through the purchase of troubled assets and in doing so, Treasury was only "supposed to take those other considerations into account," but it was not, for example, given $700 billion and told to "reduce the unemployment rate in any way [it saw] fit." In short, Treasury apparently now contends that the issues surrounding unemployment, foreclosures, and credit provision are not its responsibility under TARP. Treasury's view, however, runs contrary to what many believe TARP was designed to accomplish. For example, during his recent testimony before COP, Professor Stiglitz emphasized that "TARP was justified to the American people as necessary to maintain the flow of credit, the lifeblood of an economy. It was hoped that it would play a pivotal role in dealing with the flood of mortgage foreclosures and the collapse of the real estate market that led to the financial crisis." Treasury's remarkably late complaint about the lack of authority from Congress sounds more like excuse than explanation.

In measuring TARP's success in fulfilling its goals, it is useful to compare its impact on both Wall Street and Main Street. By fulfilling the goal of avoiding a financial collapse, there is no question that the dramatic steps taken by Treasury and other Federal agencies through TARP and related programs were a success for Wall Street. Those actions have helped garner a swift and striking turnaround, accompanied by a return to profitability and seemingly ever-increasing executive bonuses. For large Wall Street banks, credit is cheap and plentiful and the stock market has made a tremendous rebound. And as noted above, the largest of the Wall Street financial institutions continue to reap tangible benefits from Treasury's explicit proclamation in late 2008 and early 2009 that it would not let them fail. Main Street, too, has reaped a significant benefit from the prevention of a complete collapse of the financial industry and domestic automobile manufacturers and the ripple effects such collapses would have caused, as well as from rising stock market prices. Main Street, however, has largely suffered alone with respect to those areas in which TARP has fallen short of its other goals.

As SIGTARP's quarterly reports to Congress have well chronicled, TARP's Main Street goals of "increas[ing] lending" and "promot[ing] jobs and economic growth" have been largely unmet. Indeed, it bears noting, as Joseph Stiglitz did at the most recent COP hearing, that "TARP and the recovery of troubled assets were not ends in themselves, but means to an end, namely the recovery of the economy." After two years of steady decreases in overall lending following the hundreds of billions of TARP dollars provided to banks with the express purpose to increase lending, only now are there signs that lending is beginning to increase. TARP's failure in this regard may in part be due to Treasury's failure to require or incentivize increased lending through TARP's capital infusion programs for financial institutions – the Capital Purchase Program, the Targeted Investment Program, and the Community Development Capital Initiative. In addition, for more than a year, Treasury did not even require TARP recipients to report on how they used TARP funds, providing an opaque cover for those institutions that continued to cut lending, and avoiding accountability for Treasury itself. And while the large banks were rescued, many of the smaller community and regional banks that are responsible for much of the lending to consumers and small businesses are in trouble. According to the FDIC, the number of banks at risk of failing rose for the 17th straight quarter to 884 during the fourth quarter of 2010, which means that one in nine FDIC-insured institutions is at risk of collapse.

TARP's failure to realize EESA's most specific Main Street goal, "preserving homeownership," has had perhaps the most devastating and tragic consequences. To be clear, notwithstanding Treasury's recent claims that Congress did not give it the necessary tools to achieve the Main Street focused goals of EESA, there is little question that the promise of providing foreclosure relief was part and parcel of the prior Administration's ability to secure the passage of EESA in 2008. At the time, it was generally understood in Congress that Treasury was going to use the $700 billion to purchase mortgage-related assets, such as whole loans and mortgage-backed securities. As Representative Luis Gutierrez recently noted, for many members of Congress, their votes in support of EESA were based on the understanding that after these mortgages were purchased, the goal of "preserving homeownership" would be pursued through Treasury's modification of those mortgages for eventual resale into the market, a sentiment that was marked by Senator Reed of this committee at the time EESA was passed, stating "we cannot simply assist Wall Street," but also "homeowners who are facing foreclosure."

Treasury's decision to abandon its plan to purchase troubled assets did not relieve it of its obligation to fulfill its promise to members of Congress and to the American people that TARP would be used to meet the goal of preserving home ownership. Unfortunately, notwithstanding recent attempts to redefine this obligation, Treasury has come up tragically short. The Home Affordable Modification Program ("HAMP"), the Administration's signature foreclosure prevention program, began with much promise to meet this goal, with initial expectations to "help up to 3 to 4 million at-risk homeowners avoid foreclosure" "by reducing monthly payments to sustainable levels." But as SIGTARP and the other TARP oversight bodies represented at this hearing today – COP and the Government Accountability Office ("GAO") – have detailed in various audits and reports, HAMP has been beset by problems from the outset and, despite frequent retooling, continues to fall woefully short of meeting its original expectations. Today the program is under siege from all quarters, with near universal agreement that the program has failed to meet its goals, and the current debate understandably centering on whether the program should be terminated, replaced or revamped.

The frustration expressed from both sides of the aisle is understandable. The problems that HAMP and its companion programs are meant to address, unfortunately, remain painfully clear as the housing crisis continues to have devastating consequences for millions of families across the nation. As SIGTARP described in its January 2011 Quarterly Report to Congress, the housing market conditions at the end of 2010 were remarkably discouraging. According to RealtyTrac data, a record 2.9 million homes received foreclosure filings in 2010, up from 2.8 million in 2009, and 2.3 million in 2008. Realty Trac had estimated a 20 percent increase in 2011, although that number may be affected by its recent report that foreclosure filings were down last month. It appears, however, that the decrease was driven by allegations of improper foreclosure processing, which have disrupted court dockets and severely restricted the industry's capacity to process foreclosures, rather than an improving housing market. RealtyTrac expects that the number of foreclosure filings will increase again, but that could take several months. Some estimate that as many as 13 million homes will be subject to foreclosure filings during the operative stage of HAMP.

In contrast, only a small fraction of struggling homeowners are the beneficiaries of ongoing permanent mortgage modifications under HAMP. While Treasury's recent press releases indicate that close to 608,000 homeowners have received permanent modifications, that number ignores the approximately 68,000 of these "permanent" modifications that were later cancelled. According to Treasury's January 2011 Making Home Affordable Program report, the number of *ongoing* permanent modifications has now reached just less than 540,000. Less than half of those, almost 246,000, were funded by and attributable to TARP. The remaining modifications were funded outside of TARP by the Government Sponsored Entities ("GSEs"). A combined total of more than 808,000 trial and permanent modifications have been cancelled, with more than 145,000 trial modifications still in limbo. Based upon extensive research conducted by ProPublica, HAMP has not materially altered the average rate of industry-wide modifications over the past two years, which still stands at the pre-HAMP monthly rate, and only about one in five homeowners who applied for a HAMP modification have received a permanent modification.[2] These permanent modification numbers pale in comparison not only to foreclosure filings, but also to Treasury's initial prediction that HAMP would "help up to 3 to 4 million at-risk homeowners" "by reducing monthly payments to sustainable levels." As Senator Whitehouse stated last month, "[t]he HAMP program is operating at one-fifth of its self-defined level of success, which is about less than half of the actual foreclosure liability that we face as a country. So that can't be seen as anything resembling a success."

HAMP's failure to meet its original expectations has many causes, starting with a rushed launch based on deficient analysis, a flawed incentive structure that could not overcome the conflicts of interest inherent in the Treasury-designed program, and insufficiently developed rules requiring frequent changes to program guidelines. The unnecessary confusion and delay that accompanied the hasty rollout were exacerbated by Treasury's initial decision (later corrected) to encourage servicers to accept homeowners into trial modifications without requiring adequate documentation of income, despite SIGTARP's warning of the hazards of doing so. And while Treasury now acknowledges that "when HAMP was launched in early 2009, servicers were totally unequipped to deal with a crisis," Treasury's design of HAMP as a program so entirely dependent on servicer competence, along with its decision to flood those same "unequipped" servicers with trial modifications based on unverified data, in no small part contributed to the well-documented servicer failures that followed.

Any credible assessment of whether HAMP should be permitted to continue must start with Treasury's clear articulation of the number of sustained permanent modification it believes HAMP will deliver.

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[2] Olga Pierce and Paul Kiel, "By the Numbers: A Revealing Look at the Mortgage Mod Meltdown," ProPublica (Mar. 8, 2011) (online at www.propublica.org/article/by-the-numbers-a-revealing-look-at-the-mortgage-mod-meltdown).

Remarkably, despite consistent and repeated recommendations from SIGTARP and the other TARP oversight bodies, as well as members of Congress, Treasury has steadfastly refused to adopt expectations and goals for the most meaningful aspect of HAMP – permanent modifications that offer secure, sustainable relief to the program's intended beneficiaries. Rather than develop such goals and metrics, which would allow more meaningful oversight, promote accountability, and provide guidance for useful change, a Treasury official in recent testimony before the House Financial Services Committee merely promised "to reach out to as many eligible homeowners as possible to our program's expiration in 2012."

In December 2010, COP attempted to fill the void left by Treasury by estimating that, if current trends hold, HAMP will result in only 700,000 to 800,000 effective permanent modifications. Since then, other entities have formulated their own estimates, with Mark Zandi, chief economist of Moody's Analytics, recently predicting that HAMP will result in approximately 750,000 effective permanent modifications, while just last week, CBO estimated that if the HAMP Termination Act of 2011 (H.R. 839) were to be enacted by June 2011, it would prevent a total of 100,000 new modifications of non-GSE mortgages in the eighteen months spanning between June 2011 and December 2012. Unfortunately, these bleak projections appear all too reasonable, with participation trends getting worse each quarter.

Rather than confirm or reject COP's estimate, or provide one of its own, Treasury does something astonishing: albeit in the context of calculating HAMP's total cost, it suggests both that COP's estimate might be accurate, which would mean roughly an additional 160,000 to 260,000 ongoing permanent modifications by program's end, or that the total might be *twice* COP's estimate, which would mean roughly an additional 850,000 to 1,050,000 ongoing permanent modifications by program's end. Treasury's suggestion that the number of new ongoing permanent modifications might vary by a factor of close to 10 can hardly give comfort to those interested in saving HAMP. Nor does it provide the American people and their representatives in Congress with the kind of information that is absolutely necessary in evaluating whether the program should be shut down, significantly revamped, or permitted to stay on its current course.

The foundation for Treasury's claim that HAMP should be permitted to continue in its current form appears to be that while HAMP is not designed to help every homeowner at risk of foreclosure, at least the program is helping *some* families, even if it is nowhere near the number originally promised. Treasury continues to rely on trial modifications as a measure of success – just last month it highlighted the "temporary relief" such modifications provide, reinforcing its prior declaration that "every person who is in a temporary modification is getting a significant benefit." Treasury has also regularly changed its criteria for success, citing at different times the total number of trial modification offers extended to borrowers, regardless of whether they were accepted, and then the total number of trial modifications, regardless of whether they became permanent, which far fewer than half have actually done. While the close to 540,000 families that benefit from ongoing permanent HAMP modifications have certainly met with success, this does not make the program itself successful. A more meaningful measure is the potentially millions of homeowners who the program expected to help, but may never be provided with meaningful assistance because of flaws in the program's design, management and execution. And while Treasury's descriptions of the individuals and families helped by HAMP, now featured prominently in Treasury's daily blog postings, are no doubt powerful testaments to HAMP's potential to help individual struggling homeowners remain in their homes and avoid foreclosure, they only highlight the lost opportunity to help so many more. At the same time, they also ignore, and arguably disserve, the individuals and families who have suffered real and demonstrable harm from failed trial modifications under HAMP. In SIGTARP's October 2010 Quarterly Report, SIGTARP provided examples of the damage that failed trial modifications have inflicted, including complaints received through SIGTARP's hotline. Since then, there have been countless published reports of HAMP participants who end up far worse off for having engaged in a futile attempt to obtain the sustainable relief that the program promised. Failed trial modifications often leave borrowers with more principal outstanding on their loans, less home equity, depleted savings, and worse credit scores. And even in situations where those homeowners never missed a payment, servicers are permitted, with Treasury's explicit approval, to impose on them back payments, penalties, and even late fees that become due once their trial modification is cancelled. The impact of these added burdens becomes even greater when trial modifications are allowed to continue long past the three-month period called for by the program.

To be sure, if HAMP continues in the status quo, some incremental number of families will certainly benefit from new, ongoing permanent modifications.[3] But without any estimate from Treasury about what that incremental number will be, it is nearly impossible to measure the incremental benefit against the additional costs of continuing at the current pace, including the additional administrative costs, the opportunity costs of not pursuing potentially more effective alternatives, the harm inflicted on those who will inevitably enter into modifications that later fail, and further harm to Government credibility.

[3] Although Treasury argues that the proposed termination of HAMP would prevent up to 30,000 homeowners a month from receiving a permanent modification, the estimates provided by COP, Moody's Analytics, and CBO all suggest that HAMP will generate results lower than an additional 30,000 permanent modifications per month. Moreover, it is important to note that the majority of HAMP modifications are done by the GSEs, without the benefit of TARP funds. Indeed, Treasury reported that in January of this year there were only 13,555 new TARP funded permanent modifications, which were offset by 5,373 cancellations.

One additional defense Treasury offers against terminating HAMP is its claim that the servicing industry "was not and still is not fully equipped to deal with this crisis. Ending HAMP now will mean that the fate of struggling homeowners will be solely up to the servicers." While Treasury's acknowledgement of the abysmal performance of servicers is important, its use of that observation to justify the continuation of HAMP has a through the looking glass quality to it. By its very design, HAMP puts the "fate of struggling homeowners" squarely in the hands of servicers. Under HAMP, servicers not only operate as the point of contact for distressed homeowners seeking to participate in the program but also administer the loans on behalf of investors. In short, Treasury has already placed virtually all of HAMP's eggs in the servicer basket. Further, Treasury's implicit suggestion that it can and will control servicer behavior within HAMP is utterly belied by experience, and more recently, by its own admission of impotence in the face of servicer misconduct in HAMP. Despite nearly daily accounts of servicer errors and more serious misconduct, Treasury reported to SIGTARP that as of December 31, 2010, it had yet to impose a financial penalty on, or withhold or claw back incentives from, a single servicer for any reason other than failure to provide data. ProPublica's analysis of Treasury data over the past year indicates that borrower complaints about servicers are increasing, despite Treasury's claims that servicers have improved. Any hope for meaningful changes to servicer practices, it seems, will have to come from outside of HAMP.

In recent months, Treasury's evolving defense of HAMP has also featured the claim that HAMP has had a beneficial impact on private modifications that occur outside of the HAMP program. This too is a questionable measure of success. While Treasury may deserve credit for having had a positive, if inadvertent, impact on industry practice, according to a December 2010 COP report, "when pressed, Treasury acknowledges that there is no clear causal link between HAMP and proprietary modifications." Furthermore, while data suggests that proprietary modifications have generally improved from the homeowner's perspective since the launch of HAMP, the terms of such modifications are typically far less advantageous, often including more unfavorable terms for the borrower, higher rates of redefault, and broader imposition of servicer fees that are specifically prohibited in HAMP. This view was made clear in recent testimony from a HUD official, who stated that "the HAMP program clearly is more effective" and advantageous for homeowners than any proprietary modification programs, which he confirmed have lower reductions in monthly payments and higher redefault rates. In other words, it is odd for Treasury to celebrate modifications whose terms would largely be unacceptable from both the borrower's and Treasury's perspective in HAMP. In addition, ProPublica's research indicates that mortgage servicers, in a return to pre-HAMP practices, have increasingly been putting struggling homeowners into repayment plans instead of modifications, which are a more onerous option for those borrowers because they increase monthly payments. Furthermore, touting such proprietary modifications as a HAMP "success" also undermines Treasury's defense of the need to continue HAMP. If it truly views these modifications in such an admiring light, it raises the very serious question as to why taxpayers should continue to fund HAMP.

Secretary Geithner has at least begun to acknowledge the program's obvious shortcomings, recently conceding that HAMP "won't come close" to the initial estimate of helping 3 to 4 million at-risk homeowners avoid foreclosure. Secretary Geithner has also finally acknowledged what SIGTARP and the other oversight entities have been stating for some time, that loan servicers – which by design bear the central responsibility for implementing HAMP – "are still doing a terribly inadequate job." Further, the Secretary admitted that the program suffers from a design flaw that goes to its very heart, with the recognition that the incentives to servicers that were intended to serve as the engine of HAMP simply "have not been powerful enough" within the program as designed by Treasury. While these admissions about the fundamental flaws in HAMP represent a step forward, they come very late in the game and unaccompanied by any consequential changes to the program or meaningful statement of program goals. Indeed, notwithstanding Secretary Geithner's recent statements, those responsible for administering HAMP continue to celebrate the status quo, expressing no intent to meaningfully respond to these failures in performance or design, choosing instead both to accept and to tout HAMP's dismal results. In late February, a Treasury official reportedly declared to applauding servicers at a Mortgage Bankers Association conference that the attendees would not "see any major new programs coming out," and that while Treasury "may tweak around the edges," its "primary objective in 2011 is excellence in the program we have."[4] In blog postings, Treasury officials have actually been touting HAMP's abysmal numbers as a *defense* to those calling for its termination. In short, Treasury stands alone in defending the status quo, with those opposed to terminating HAMP calling on the Administration to make deep and necessary changes.

As a result of HAMP's failures, considerable TARP funds that could have been made available through better program design and administration may well never reach the distressed homeowners on Main Street whom Congress intended to benefit from TARP just as much as the rebounding Wall Street financial institutions. As a result, we have little reason to hope that a program that began with much promise will be anything more than it is today – a program that assists only the small portion of distressed homeowners who benefit from a sustainable permanent modification, offers others little more than false hope, and in certain cases causes more harm than good.

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[4] Jon Prior, *Treasury makes adjustments to give HAMP a chance*, HousingWire (Feb. 24, 2011) (online at www.housingwire.com/2011/02/24/treasury-makes-adjustments-to-give-hamp-a-chance).

While TARP is undoubtedly winding down, it is far from over. With the sunsetting of the Congressional Oversight Panel and the excellent work it has done, the remaining oversight bodies will need to redouble their efforts. For SIGTARP, in addition to our continued commitment to program transparency and accountability through our reporting and auditing functions, the work will also increasingly focus on criminal and civil investigations into the conduct of those who have stolen or attempted to steal from the taxpayers' investment in TARP, as well as those who would fraudulently exploit the existence of TARP programs for their own gain.

Finally, on a personal note, today likely represents my last time testifying before the United States Senate before I step down at the end of the month to join New York University's School of Law as an adjunct professor and senior fellow for its Center on the Administration of Criminal Justice and the Mitchell Jacobson Leadership Program on Law and Business. In the nearly two-and-a-half years since I first appeared before this Committee at my confirmation hearing, I have been blessed with the opportunity to serve our country as it has struggled through this financial crisis, and I would like to thank the members of this Committee for their unwavering and bipartisan support of our office. Without that support, it is unlikely that SIGTARP would have ever been able to achieve our goals of bringing transparency to TARP, holding its participants accountable, and deterring and prosecuting those who have sought to take criminal advantage of this national crisis.

Chairman Johnson, Ranking Member Shelby, and members of the Committee, thank you again for this opportunity to appear before you, and I would be pleased to respond to any questions that you may have.

If you are aware of fraud, waste, abuse, mismanagement or misrepresentations affiliated with the troubled asset relief program, please contact the SIGTARP Hotline.

Via Online: WWW.SIGTARP.GOV
Via Toll Free Phone: 877-SIG-2009
Via Fax: 202-622-4559

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United States Government Accountability Office

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Testimony

Before the Committee on Banking, Housing, and Urban Affairs, U.S. Senate

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TROUBLED ASSET RELIEF PROGRAM

Status of Programs and Implementation of GAO Recommendations

Statement of Thomas J. McCool, Director
Applied Research and Methods

GAO
Accountability * Integrity * Reliability

GAO-11-467T

Chairman Johnson, Ranking Member Shelby, and Members of the Committee:

I am pleased to be here today to discuss our work on the Troubled Asset Relief Program (TARP), which Congress established on October 3, 2008, in response to the financial crisis that threatened the stability of the U.S. financial system and the solvency of many financial institutions. Under the original TARP legislation, the Department of the Treasury (Treasury) had the authority to purchase or insure $700 billion in troubled assets held by financial institutions.[1] The Secretary of the Treasury extended the authority originally provided under EESA through October 3, 2010. However, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)—signed into law on July 21, 2010—set a new spending ceiling for TARP, in effect prohibiting Treasury from incurring any additional obligations for programs that had not been initiated prior to June 25, 2010.[2]

A broad range of activities have been initiated under TARP. Specific initiatives have injected capital into key financial institutions; implemented programs to address problems in the securitization markets; provided assistance to the automobile industry and American International Group, Inc. (AIG); and offered incentives for modifying residential mortgages, among other things. As TARP passes the 30-month mark, U.S. financial markets appear to be less volatile than they were in 2008. But questions about a sustained economic recovery continue, and certain areas of the economy still face significant challenges. For example, foreclosures and mortgage delinquencies continue to linger and small businesses still face tight credit conditions. As a result, TARP has been

[1]The Emergency Economic Stabilization Act of 2008 (EESA), Pub L. No. 110-343, 122 Stat. 3765 (2008) (codified at 12 U.S.C. §§ 5201 *et seq.*). EESA originally authorized Treasury to purchase or guarantee up to $700 billion in troubled assets The Helping Families Save Their Homes Act of 2009, Pub L. No. 111-22, Div. A, 123 Stat. 1632 (2009), amended EESA to reduce the maximum allowable amount of outstanding troubled assets under EESA by almost $1.3 billion, from $700 billion to $698.741 billion. EESA requires that the appropriate committees of Congress be notified in writing when the Secretary of the Treasury, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, determines that it is necessary to purchase other financial instruments to promote financial market stability. Section 3(9) of EESA (codified at 12 U.S.C. § 5202(9)).

[2]The Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), (1) reduced Treasury's authority to purchase or insure troubled assets to a maximum of $475 billion and (2) prohibited Treasury, under EESA, from incurring any additional obligations for a program or initiative unless the program or initiative had already been initiated prior to June 25, 2010.

transformed into a program that focuses primarily on preserving homeownership and improving financial conditions for small financial institutions and businesses. While many other programs have ended and begun winding down operations and some participating institutions have repaid part or all of their TARP funds, the prospect of repayment from some other institutions, both large and small, remains uncertain.

EESA required GAO to report at least every 60 days on findings from our oversight of actions taken under the programs.[3] We have been monitoring TARP programs since their inception and our reports have highlighted challenges facing many of these programs. To date, we have issued more than 40 reports and testimonies related to TARP and made more than 60 recommendations to Treasury and the Board of Governors of the Federal Reserve System (Federal Reserve) to improve the transparency and accountability of TARP operations.

This statement is primarily based on our January 12, 2011, report and focuses on (1) the status of TARP programs; (2) Treasury's progress in implementing an effective management structure for TARP, including staffing the Office of Financial Stability (OFS), overseeing contractors, and establishing a comprehensive system of internal controls; and (3) trends in key relevant economic indicators.[4] To do our work, we leveraged our prior reports, reviewed documents provided by Treasury's OFS, and conducted interviews with Treasury and OFS officials. We conducted this performance audit from March 2010 and January 2011 and updated selected information in March 2011 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

[3]Section 116 of EESA, 12 U.S.C § 5226 (codified at 12 U S C § 5226)

[4]GAO, *Troubled Asset Relief Program: Status of Programs and Implementation of GAO Recommendations*, GAO-11-74 (Washington, D.C.: Jan. 12, 2011).

Summary

Some TARP programs—Capital Assistance Program, Asset Guarantee Program, and Targeted Investment Program—have been terminated. Others, like the Capital Purchase Program (CPP) and the Term Asset-Backed Securities Loan Facility (TALF), have closed and are winding down operations, and several programs that focus on preserving homeownership and that have provided assistance to auto companies and AIG remain active.

- CPP, which closed in December 2009, had $30.8 billion outstanding as of March 9, 2011, and had received about $171 billion in full and partial repayments from CPP participants. However, Treasury faces various oversight and management challenges in addressing missed dividend and interest payments and monitoring repayment requests.
- Funding of TALF loans by the Federal Reserve Bank of New York (FRBNY) closed in June 2010, and no TARP funds had been expended as of March 9, 2011, to purchase collateral from FRBNY because no collateral had been surrendered to TALF LLC. TALF will continue to pose potential risks to Treasury until all loans are repaid to FRBNY and the program is terminated.
- While the Home Affordable Modification Program (HAMP) remains Treasury's primary program to assist homeowners facing foreclosure, the program had a slow start and has not performed as anticipated. Treasury announced several new programs in 2010. As of March 9, 2011, $1.2 billion, none of it recoverable, had been disbursed for TARP housing programs. Our most recent work shows there is more Treasury can do to better ensure the effective implementation of this program.
- The Automotive Industry Financing Program (AIFP) had an outstanding balance of just more than $44.2 billion as of March 9, 2011. At that time, approximately $29.5 billion had been repaid, but Treasury still owned 33.3 percent equity in General Motors (GM), 9.2 percent in Chrysler, and 73.8 percent in Ally. While the auto companies' financial conditions have shown signs of improvement, their ability to fully repay the AIFP debt and equity investments depends on a variety of factors, which will require Treasury's ongoing oversight.
- AIG has continued to receive assistance over the last year via an equity capital line established in 2009. As of March 9, 2011, AIG has repaid $9.1 billion to Treasury. This reduced the balance of Treasury's assistance to AIG to $58.7 billion, which included owning about 92.2 percent of the company. The government's prospects for recouping the assistance it has

provided largely rests with the return that Treasury earns when it sells its common stock in AIG.

- The Public-Private Investment Program (PPIP) continues to be an active program with $15.9 billion disbursed as of March 9, 2011, and $15.2 billion outstanding. Of this investment, Treasury had seen unrealized capital gains of approximately $750 million. Treasury still holds oversight responsibility for the fund managers until the fund no longer holds assets.

- The Community Development Capital Initiative (CDCI) and the SBA 7(a) Securities Purchase Program are small business programs that account for a small portion of TARP funding. CDCI closed in September 2010, and as of March 9, 2011, Treasury had provided about $570 million to 84 CDFIs, 28 of which had already participated in CPP. SBA 7(a) Securities Purchase Program closed in September 2010, and as of March 9, 2011, Treasury had made 31 purchases of SBA 7(a) securities totaling about $370 million.

Staffing remains important in OFS as some programs are still being implemented and others require continued monitoring, but staff retention could be a challenge for OFS going forward. OFS has begun to take steps that will help retain staff by addressing succession planning for critical senior positions, but its workforce plan has not been updated since March 2009. In addition, partly in response to our recommendations, OFS has strengthened its management and oversight of contractors and financial agents and its system of internal control for financial reporting and compliance with program requirements.

Indicators that we monitor to assess the effectiveness of TARP showed that credit markets have largely held the gains they achieved since October 2008. While the degree of effectiveness has varied across programs, some programs have reportedly had the desired effects, especially if stabilizing and restoring confidence in the financial system are considered the principal goals of the government's interventions. These effects included declines in perceptions of risks in various financial markets, such as asset spreads in asset-backed securities; declines in interest rates in interbank, mortgage, and bond markets; a renewed ability by banks to access capital markets; increasing securitizations; and price recovery for some legacy or "troubled" assets.

Some TARP Programs, Including Those That Have Ended and Those That Remain Active, Continue to Present Challenges

According to OFS, from the inception of TARP through March 9, 2011, it has disbursed $410 billion, and received more than $286 billion primarily from interest, dividends, and principal repayments on direct loans, repurchases of investments, and sales of investments. OFS reported $150 billion in gross direct loans and investments outstanding as of March 9, 2011 (see table 1).

Table 1: Status of TARP Programs, as of March 9, 2011 [unaudited]

Dollars in billions

Program	Asset purchase price[a]	Total cash disbursed[b]	Repayments	Write-offs and realized losses on sales[c]	Outstanding balance[d]	Additional proceeds[b]
CPP	$204.9	$204.9	$171.1	$2.6	$30.8	$24.6
Targeted Investment Program	40.0	40.0	40.0	0.0	0.0	4.4
AIFP	81.8	79.7	29.5	6.0	44.2	3.8
AIG	69.8	67.8	9.1	0.0	58.7	0.1
Housing programs	45.6	1.2	n/a	n/a	n/a	n/a
PPIP	22.4	15.9	0.7	0.0	15.2	0.6
SBA 7a	0.4	0.4	less than 0.1	0.0	0.4	less than 0.1
CDCI	0.6	0.2	0.0	0.0	0.6	0.0
TALF	4.3	0.1	0.0	0.0	0.1	0.0
Asset Guaranty Program	5.0	0.0	0.0	0.0	0.0	3.0
Total	**$474.8**	**$410.2**	**$250.4**	**$8.6**	**$150.0**	**$36.5**

Source GAO analysis of Treasury (OFS) data

[a]"Asset purchase price" reflects the aggregate amount Treasury agreed to pay to purchase or guarantee outstanding troubled assets subject to the $475 billion limit in section 115 of EESA, as amended by Section 1302 of the Dodd-Frank Act This amount includes signed contract amounts not yet disbursed.

[b]"Additional proceeds" include dividends from equity securities, interest income from loans and securities, proceeds from repurchases of warrants and warrant preferred stock, and proceeds from warrant auctions. Treasury also received $31 9 billion in proceeds from sales of 7 7 billion shares of Citigroup common stock, of which $25 0 billion is included in "repayments," and $6 9 billion of proceeds in excess of cost is included in "additional proceeds "

[c]Treasury's write-offs include $2.3 billion in CPP investments relating to CIT Group and $1.6 billion in loans to Chrysler pursuant to a settlement agreement. Proceeds from the sale of 412 million shares of GM common stock amounting to $13 5 billion are included in "repayments" and Treasury reported $4.4 billion of realized losses (cost in excess of proceeds) on the sale of these securities

[d]The "outstanding balance" amounts for CPP and CDCI include the effect of $0.4 billion in exchanges of investments under CPP for investments under CDCI.

The reported net cost of TARP transactions from inception through September 30, 2010, was $18.5 billion; however, the ultimate cost of TARP will change as a result of (1) differences between the estimated values of the direct loans and investments as of September 30, 2010, and the amounts OFS will ultimately realize (as the assumptions and estimates underlying the valuation of these assets are inherently subject to substantial uncertainty), and (2) further disbursements, such as those relating to the housing programs which are not subject to repayment.

CPP Investments Present Continued Oversight Challenges for Treasury

Under CPP, Treasury invested $205 billion in over 700 financial institutions nationwide. Treasury provided capital to qualifying financial institutions from October 2008 to December 2009 by purchasing preferred shares or subordinated debentures.[5] In return for its investment, Treasury received preferred stock or debentures, which provided for dividend payments (if declared by the issuer) or interest payments, as well as warrants. As table 1 shows, through March 9, 2011, Treasury had received about $171 billion in full and partial repayments. However, Treasury continues to face challenges in managing its remaining investments. For example, a growing number of CPP participants have missed scheduled dividend or interest payments.[6] As of February 28, 2011, 189 institutions had not made at least one scheduled dividend or interest payment by the end of the reporting month in which the payments were due, for a total of 697 missed payments.[7] Over the past 2 years, the number of CPP institutions missing dividend or interest payments by quarter has increased steadily from 8 in February 2009 to 152 in February 2011, or about 27 percent of existing CPP participants. Although the number of CPP institutions missing dividend payments is large and increasing, they represent a small share of

[5]For the purposes of CPP, financial institutions generally include qualifying U.S.-controlled banks, savings associations, and both bank and savings and loan holding companies.

[6]Institutions are required to pay dividends only if they declare dividends, although unpaid cumulative dividends generally accrue and the institution must pay them before making payments to other types of shareholders, such as holders of common stock

[7]These figures differ from the number of dividend or interest payments outstanding because some institutions made their payments after the end of the reporting month. CPP dividend and interest payments are due on February 15, May 15, August 15, and November 15 of each year, or the first business day subsequent to those dates. The reporting period ends on the last day of the calendar month in which the dividend or interest payment is due.

the total dollar amount of original CPP investments.[8] Generally, if an institution has not paid in full a total of six dividend or interest payments, Treasury has the right to elect two members to the institution's board of directors. As of February 28, 2011, 32 institutions had at least six missed payments that remained unpaid, and Treasury had not yet exercised its right to nominate directors for these institutions. However, 31 CPP institutions that have missed at least five payments have agreed to have Treasury observers attend meetings of their boards of directors. As more institutions miss scheduled dividend payments, Treasury faces a significant challenge of determining the extent to which it will exercise its right to nominate board members. In August 2010, Treasury began addressing this challenge by publicly releasing information on its policies and procedures for nominating board members to these institutions. These plans include using OFS staff to observe board meetings of institutions missing at least five dividend or interest payments and using a variety of considerations—such as an institution's financial condition and function of its board of directors—to decide whether to nominate a board member.

In addition, in order to protect its interests in CPP investments and promote financial stability, Treasury has conducted a limited, but growing, number of exchanges and dispositions. Over the last 2 years, Treasury has restructured the assistance provided to 16 CPP participants by swapping its preferred stock for other forms of equity securities or selling the preferred stock to new investors involved in a merger or capital restructuring with a CPP institution. OFS finalized policies and procedures governing exchanges and dispositions of TARP securities, including CPP investments, in October 2009. OFS stated that it would consider various factors when assessing an institution's proposal for an asset exchange, including the impact on the institution's capital, the possible impact on Treasury's position relative to holders of similar securities, the U.S. government's overall economic position, and whether any premiums paid over market prices are reasonable and consistent with similar transactions in the marketplace.

Through February 2011, Treasury had received about $171 billion in full and partial repayments from 146 institutions, including 28 institutions that exchanged $363 million of their CPP investments for investments under

[8]According to Treasury, the total investment amount of CPP institutions with unpaid dividends or interest payments was $3.8 billion as of January 31, 2011, compared to a total outstanding investment amount of $49.4 billion and an original investment amount of $204.9 billion.

Treasury's CDCI program. However, questions about the health of smaller banks continue, and small institutions participating in CPP may face challenges in fulfilling the terms needed to exit the program. According to Treasury data, 75 percent of the total dollar amount of CPP investments in institutions under $10 billion in assets remains outstanding compared to only 10 percent for investments in institutions over $10 billion. Our recent report on CPP identified weaknesses in Treasury's monitoring of regulators' decisions to approve or deny requests to repay CPP investments.[9] The American Recovery and Reinvestment Act of 2009 included provisions modifying the terms of CPP repayments to require that Treasury allow any institution to repay its CPP investment subject only to consultation with the appropriate federal bank regulator. Treasury officials indicated that, as a result of these changes, they had not provided guidance or criteria to regulators on deciding when to allow institutions to repay CPP investments and had not collected information on the reasons for these decisions. However, according to Treasury, it helped facilitate meetings among the regulators in the spring of 2009 at which they discussed standards for permitting TARP recipients to repay.

Bank regulatory officials said they used existing supervisory procedures that were generally applicable to capital reductions as a basis for reviewing CPP repurchase requests. In our recent report, we found that while the decision ultimately lies with the regulators, without collecting information on or monitoring regulators' decisions, Treasury had no basis for determining whether decisions involving similar institutions were being made consistently and, thus, whether CPP participants were being treated equitably. Further, absent information on why regulators made repayment decisions, Treasury cannot provide feedback to regulators. Accordingly, we recommended that Treasury periodically collect and review certain information from bank regulators on the analysis and conclusions supporting their decisions on CPP repayment requests and provide feedback for the regulators' consideration on the extent to which regulators are evaluating similar institutions consistently. In its response, Treasury stated that it would consider ways to address the objectives of our recommendations while also noting the constraints presented by the law and principles of regulatory independence.

[9]GAO, *Troubled Asset Relief Program: Opportunities Exist to Apply Lessons Learned from the Capital Purchase Program to Similarly Designed Programs and to Improve the Repayment Process*, GAO-11-47 (Washington, D.C.: Oct. 4, 2010)

About Half of the TALF Loans Have Been Repaid, but Continued Monitoring is Important

TALF provided loans to private investors to purchase asset-backed securities (ABS) and commercial mortgage-backed securities (CMBS) to encourage the issuance of new securitizations and provide liquidity for new consumer and business loans. To assist in this effort, Treasury provides credit protection for TALF. TALF made about $71 billion in loans from March 2009 through June 2010, with most of them secured by credit card ABS, auto loan ABS, legacy CMBS, and student loan ABS. According to the Federal Reserve, more than half of these loans have been repaid. Moreover, Treasury has not had to disburse any TARP funds to cover losses from unpaid loans. However, until all loans are repaid to FRBNY, it is important for Treasury to continue to monitor TALF to anticipate future needs for credit support.

Treasury has addressed concerns that we raised about Treasury's role in TALF, including monitoring risks related to commercial mortgage-backed securities, formalizing the decision-making process with the Federal Reserve, and conducting an assessment of how to track and report on assets that might be surrendered.

AIFP Illustrates both Progress and Ongoing Uncertainty in Recouping Assistance

From December 2008 through December 2009, Treasury announced $86.3 billion in funding available to help stabilize the auto industry and disbursed $79.7 billion of this funding, including (1) about $62 billion to fund Chrysler and GM while they restructured, (2) about $16.3 billion to provide capital assistance to Ally Financial, and (3) $1.5 billion to a special purpose vehicle (SPV) created by Chrysler Financial.[10] In return for its assistance to Chrysler and GM, Treasury received 9.85 percent equity in the reorganized Chrysler, 60.8 percent equity and $2.1 billion in preferred stock in the reorganized GM, and $13.8 billion in debt obligations between the two companies. In return for its investment in Ally Financial, Treasury received preferred shares equaling ownership of more than half of Ally Financial by the end of 2009 and almost three-quarters by the end of 2010.

[10]The total announced amount of $86.3 billion includes $5 billion for the Supplier Support Program announced in March 2009. However, in July 2009, the commitment for the Supplier Support Program was reduced by $1.5 billion, and in July 2010 an additional $3 billion was deobligated. As such, there is a $4.5 billion difference between the total AIFP announced amount of $86.3 billion and the asset purchase price of $81.8 billion referenced in table 1.

As of March 9, 2011, approximately $29.5 billion had been repaid[11] and Treasury owned 33.3 percent equity in GM, 9.2 percent in Chrysler, and 73.8 percent in Ally.[12] A substantial portion of these repayments come from GM, via its initial public offering (IPO). In total, Treasury sold over 412 million of its shares in GM's IPO, for which it received $13.5 billion in net proceeds to repay the government's initial investment.[13] In March 2011, Treasury sold $2.7 billion of trust preferred securities in Ally Financial.

Since emerging from bankruptcy in the summer of 2009, Chrysler and GM have shown signs of progress in returning to profitability; however, their ability to fully repay the AIFP debt and equity investments depends on a variety of factors, which will require Treasury's ongoing oversight.[14] One sign of progress is that vehicle sales increased substantially for both companies in January and February of 2011 compared to the prior year (23 percent and 49 percent for GM; 23 percent and 13 percent for Chrysler). In addition, in 2010 both companies released financial statements that, according to Treasury officials, exceeded Treasury's projections for revenues, operating earnings, and cash flows. Also, GM held an IPO in late 2010 and Chrysler expects to hold an IPO in 2011. Nevertheless, while GM's and Chrysler's financial conditions have improved, each faces challenges that could affect their financial future. For example, although sales are improving, volumes are highly dependent on economic and market conditions—such as unemployment levels, consumer confidence, and credit availability—that currently remain fragile. Similarly, high fuel

[11]In April 2010, GM repaid the remaining $4.7 billion of the $6.7 billion in debt by using funds that remained from the $30.1 billion Treasury had provided in June 2009 to assist with its restructuring. As of March 9, 2011, Chrysler has made $567 million in interest payments on its loan from Treasury.

[12]Treasury's current equity stake in Chrysler is 9.2 percent—down from the original 9.85 percent because Fiat increased its ownership stake, as a result of the company achieving the first of its three performance-related targets as agreed to with Treasury, thereby reducing Treasury's overall equity.

[13]GM held the IPO on November 17, 2010, with 478 million common stock shares held by several stockholders, including Treasury. On November 26, 2010, the underwriters for the IPO exercised the overallotment option, bringing the total number of shares sold to almost 550 million and raising $23.1 billion. As a result of selling 412 million shares, Treasury's ownership stake in GM has decreased from 60.8 percent to 33.3 percent.

[14]Treasury's oversight of GM and Chrysler, including its strategies for monitoring and divesting its financial interests in the companies, is discussed in GAO, *Troubled Asset Relief Program: Continued Stewardship Needed as Treasury Develops Strategies for Monitoring and Divesting Financial Interests in Chrysler and GM*, GAO-10-151 (Washington, D.C.: Nov. 2, 2009).

prices could negatively impact sales of the companies' most profitable vehicles such as pickup trucks and sport utility vehicles. Furthermore, the companies' U.S. pension plans are underfunded, and they will face large future payments to their pension plans to make up this underfunding.

Ally Financial, a bank holding company, has also shown signs of an improved financial condition, posting $1.1 billion in profit in 2010, but the government's ability to recoup its investment in Ally relies on the health of the auto industry, as well as the company's ability to compete with other credit providers. Ally Financial's chief executive officer noted that the recent conversion of $5.5 billion of Treasury's shares to common equity should help the company in its efforts to conform its capital structure to that more typical of a bank holding company.[15] Treasury also reported the conversion may improve Ally's ability to raise debt financing. Regardless, Ally Financial could face increased competition for its business in the future, including potentially from GM, which acquired Americredit, an auto finance company. Treasury officials noted they are confident Ally Financial will hold an IPO and expected that it would likely take Treasury a year or 2 to sell all of its shares.

In our ongoing monitoring of AIFP, we have made several recommendations to help Treasury monitor and assess its investment in the auto companies, and we are working with Treasury to help ensure their implementation.[16] We are continuing to monitor the financial condition of the industry, and are reviewing the current financial condition and outlook of GM and Chrysler in ongoing work. As part of that ongoing work, we also are reviewing the status of the federal government's efforts to assist workers and communities that have relied on the auto industry for their economic viability.

[15]On December 30, 2010, Treasury converted $5.5 billion of its preferred stock in Ally Financial into common stock, raising its total common equity stake in the company to 73.8 percent.

[16]GAO-10-151.

Treasury's Exposure to AIG Under TARP is Tied to the Current and Future Health of the Company and the Insurance Industry

In November 2008, Treasury began providing assistance to AIG, and with the closing of AIG's recapitalization plan in January 2011, this assistance has risen still further, but AIG has recently started repaying its debt to Treasury. On January 14, 2011, AIG closed on a plan to recapitalize the company, which included several transactions that terminated FRBNY's direct assistance to the company while increasing Treasury's equity interests to $67.8 billion, which included owning about 92.2 percent of the company. On March 8, 2011, AIG repaid $6.9 billion to Treasury, which included $1.4 billion for Treasury's remaining preferred interests in the American Life Insurance Company (ALICO) SPV and $5.5 billion for Treasury's remaining preferred interests in the AIA Group Limited (AIA) SPV, leaving Treasury with preferred interests of $11.3 billion in the AIA SPV. This repayment reduced the outstanding balance of AIG's assistance to $58.7 billion.

Since early 2009, we have been monitoring the status of federal assistance to AIG and the company's financial condition using GAO-developed indicators and have issued three reports that have included information on them.[17] In our January 2011 report, our indicators showed that AIG's financial condition had generally remained relatively stable or showed signs of improvement, largely due to the federal assistance from the Federal Reserve and Treasury.[18] Federal assistance has continued to play a key role in stabilizing AIG's liquidity, equity structure, and credit ratings. The government's prospects for recouping the assistance it has provided largely rests with the return that Treasury earns when it sells its common stock in AIG. We will continue to monitor the government's investment and the status of AIG's repayment efforts. In addition, our ongoing work on AIG also includes a review of the Federal Reserve facilities implemented to assist AIG.

[17]GAO, *Troubled Asset Relief Program: Status of Government Assistance to AIG*, GAO-09-975 (Washington, D.C.: Sept. 21, 2009), *Troubled Asset Relief Program: Update of Government Assistance to AIG*, GAO-10-475 (Washington, D.C.: Apr. 27, 2010), *Troubled Asset Relief Program: Third Quarter 2010 Update of Government Assistance Provided to AIG and Description of Recent Execution of Recapitalization Plan*, GAO-11-46 (Washington, D.C.: Jan. 20, 2011).

[18]GAO-11-46.

Treasury Has Faced Challenges in Implementing its Making Home Affordable Program and Relatively Few Borrowers Have Received Permanent Loan Modifications

As we have noted in our past reports, Treasury's efforts to help borrowers facing potential foreclosures continue to face challenges.[19] Since Treasury first announced the framework for its Making Home Affordable (MHA) program over 2 years ago, the number of homeowners facing potential foreclosure has remained at historically high levels. The Home Affordable Modification Program (HAMP), the key component under MHA, seeks to help eligible homeowners avoid foreclosure by reducing their monthly mortgage payments to more affordable levels—specifically to 31 percent of the homeowner's income. As of December 31, 2010, there were a total of 143 active MHA servicers.[20] Through January 2011, $29.9 billion in TARP funds had been committed to these servicers for modification of non-government-sponsored enterprise (GSE) loans.[21] Based on the MHA Servicer Performance Report through January 2011, nearly 1.8 million HAMP trial modifications had been offered to borrowers of GSE and non-GSE loans as of the end of January 2011, and nearly 1.5 million of these had begun HAMP trial modifications.[22] Of the trial modifications that had begun, approximately 145,000 were in active trial modifications, roughly 539,000 were in active permanent modifications, roughly 740,000 trial modifications had been canceled, and roughly 68,000 permanent modifications had been canceled. Recently, the number of new trial and permanent modifications started each month has declined (fig. 1). As of December 31, 2010, $1 billion in TARP funds had been disbursed for TARP-funded housing programs, of which $840 million has been disbursed for HAMP-related activity.

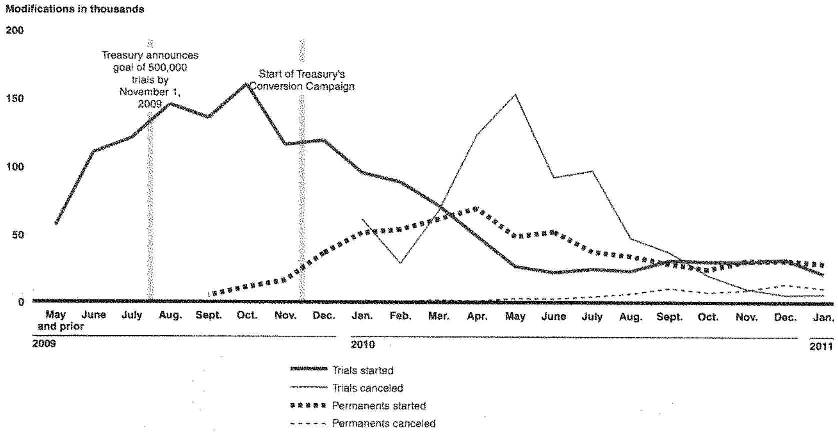
[19]GAO, *Troubled Asset Relief Program: Treasury Actions Needed to Make the Home Affordable Modification Program More Transparent and Accountable*, GAO-09-837 (Washington, D.C: July 23, 2009) and GAO, *Troubled Asset Relief Program: Further Actions Needed to Fully and Equitably Implement Foreclosure Mitigation Programs*, GAO-10-634 (Washington, D.C: June 24, 2010).

[20]The GSEs have directed all of their approximately 2,000 servicers to implement parallel HAMP programs on first-lien mortgages owned or guaranteed by the GSEs.

[21]The balance of the difference between this amount and the $45.6 billion allocated to housing programs was allocated to the Federal Housing Administration Short Refinance Program and the Housing Finance Agency Hardest Hit Fund.

[22]Roughly 46 percent of borrowers who were either in trial or permanent modifications as of September 30, 2010, had non-GSE loans and, therefore, fell under the TARP-funded portion of HAMP.

Figure 1: GSE and Non-GSE HAMP Trial and Permanent Modifications Made and Canceled Each Month, through January 2011



Source: GAO analysis of Treasury data.

In July 2009 and June 2010, we reported on the challenges Treasury faced in implementing HAMP and made recommendations to improve the transparency and equitable implementation of the program.[23] For example, in July 2009 we noted that while Treasury required borrowers with high levels of total debt to agree to obtain counseling before receiving a HAMP modification, it was not monitoring whether these borrowers, in fact, received counseling. In addition, we noted that Treasury had yet to establish a comprehensive system of internal control for HAMP, including metrics and benchmarks for servicers' performance. Three out of the six recommendations we made in July 2009 have yet to be fully implemented and, as such, remain open.

In June 2010, we reported on several inconsistencies in the way servicers treated borrowers under HAMP that could lead to inequitable treatment of

[23]GAO-09-837 and GAO-10-634.

similarly situated borrowers. These inconsistencies involved how servicers solicited borrowers for the program, how they evaluated borrowers who were not yet 60-days delinquent on their mortgage payments, and how they handled borrower complaints. In addition, we noted that while Treasury had taken some steps to ensure servicer compliance with program requirements, it had not yet finalized consequences for servicer noncompliance. We made eight recommendations to improve the transparency and accountability of HAMP in June 2010. Treasury stated that it intended to implement some of the recommendations, but little action has been taken to date.

In addition to the HAMP first-lien modification program, Treasury has begun implementing several other TARP-funded programs for struggling homeowners under the MHA program, including the Second-Lien Modification Program (2MP), the Principal Reduction Alternatives (PRA) program for borrowers who owe more on their mortgages than the value of their homes, and the Home Affordable Foreclosure Alternatives (HAFA) program for those who are not successful in HAMP modifications.[24] As noted in the report we are issuing today, the implementation of 2MP, HAFA, and PRA has been slow and limited activity has been reported to date (see table 2).[25] This slow pace is attributed in part to several implementation challenges. For example, servicers told us that the start of 2MP had been slow due to problems with the database Treasury required them to use to identify potentially eligible loans. Additionally, borrowers may not be aware of their potential eligibility for the program. While Treasury recently revised its guidelines to allow servicers to bypass the database for certain loans, servicers could do more to alert HAMP first-lien modification borrowers about the new second-lien program. Implementation of the foreclosure alternatives program has also been slow due to program restrictions, such as the requirement that borrowers be evaluated for a first-lien modification even if they have already identified a potential buyer for a short sale. Although Treasury has

[24]Treasury has also put in place the Federal Housing Administration (FHA)-HAMP, Rural Development-HAMP, the FHA Short Refinance Option, the Housing Finance Agency Innovation Fund for the Hardest -Hit Markets, and the Home Affordable Unemployment Program. Information on the progress made by these TARP-funded programs in stemming avoidable foreclosures will be discussed in a future report.

[25]GAO, *Troubled Asset Relief Program: Treasury Continues to Face Implementation Challenges and Data Weaknesses in Its Making Home Affordable Program*, GAO-11-288 (Mar. 17, 2011).

recently taken action to address some of these concerns, the potential effects of its changes remain unclear.

Table 2: Activity Under the 2MP, Foreclosure Alternative, and PRA as of December 31, 2010

Program	Date announced	Implementation date	Funding allocation	Reported activity as of December 31, 2010
2MP	March 2009	March 2010	Nearly $133 million	$2.9 million in incentives paid
Home Affordable Foreclosure Alternatives	March 2009	April 5, 2010	$4.1 billion	$9.5 million in incentives paid
PRA	March 2010	October 1, 2010	$2.0 billion	Activity not yet reported[a]

Source Treasury

[a]PRA incentives are paid on an annual basis contingent upon successful performance of the modified mortgage during the preceding 12 months

Our most recent work shows there is more Treasury can do to ensure the effective implementation of these programs, including ensuring that servicers have sufficient capacity to implement them and that borrowers are notified about potential eligibility for second-lien modifications. We also believe it will be important for Treasury to have clear and accurate information on the dispositions of borrowers who are denied or fall out from HAMP modifications. Without accurate reporting of borrower outcomes, Treasury cannot know the actual extent to which borrowers who are denied, canceled, or redefaulted from HAMP are helped by other programs or evaluate the need for further action to assist this group of homeowners. We continue to believe there are opportunities to improve the transparency, accountability, and effectiveness of MHA.

Assets under PPIP Have Shown Positive Returns, but Continued Monitoring is Important

Treasury still has important monitoring responsibilities for PPIP investments. The legacy securities program of PPIP, announced in March 2009, was designed to facilitate price discovery in markets for these assets, repair balance sheets throughout the financial system, and increase the availability of credit to households and businesses through the purchase of "legacy" residential mortgage-backed securities (RMBS) and CMBS. Through the program, Treasury and private-sector fund managers and investors partnered to purchase eligible securities from banks, insurance companies, mutual funds, pension funds, and other eligible sellers—though the fund managers have sole discretion in making purchases and investment decisions according to the terms of the agreements between Treasury and the Public Private Investment Funds (PPIF). Treasury still holds oversight responsibility for the fund managers until the funds no longer hold assets.

The eight PPIFs have had positive returns and have invested in a variety of legacy assets, including CMBS, subprime RMBS, prime RMBS, Alt-A RMBS, and option adjustable-rate RMBS. The PPIFs paid $228 million in interest and dividends to Treasury over fiscal year 2010. But returns could fluctuate over time, as they are subject to market risk factors until the PPIFs close. As of March 9, 2011, Treasury's investments accounted for about $15.9 billion of about $22.4 billion available to fund PPIP. Of this investment, about $15.2 billion remained outstanding. Treasury had seen unrealized capital gains of approximately $750 million.

Treasury Initially Launched Programs under TARP to Assist Small Businesses but Has Shifted These Efforts outside of TARP

Given the importance of small businesses to the overall economy, Treasury created several programs under TARP to help address small business credit constraints. The existing TARP programs that are intended to assist small businesses focused on capitalizing certain depository institutions and stabilizing secondary markets for SBA-guaranteed loans. They included:

- CDCI, which was announced in October 2009 and closed in September 2010. As of March 9, 2011, Treasury had provided about $570 million to 84 CDFIs, 28 of which had already participated in CPP.

- SBA 7(a) Securities Purchase Program, which was announced in March 2009 and closed in September 2010. As of March 9, 2011, Treasury had made 31 purchases of SBA 7(a) securities totaling about $370 million.

- TALF, which was announced in November 2008 and closed in June 2010. TALF loans secured by SBA 7(a) and 504 securitizations represented 3 percent of TALF loans. The Federal Reserve estimates that about 850,000 small business loans were financed in part by securities supported by TALF.

Treasury has taken steps to address concerns we identified about the implementation of some of these programs. For example, although the purpose of CDCI was initially unclear to some participants, public communications about the dual purposes of the program—to assist small business lending and to support the mission of Community Development Financial Institutions—was clarified toward the end of the program.

Treasury has addressed concerns that we raised about Treasury's role in TALF, including monitoring risks related to commercial mortgage-backed securities, formalizing the decision-making process with the Board of Governors of the Federal Reserve System, and conducting an assessment of how to track and report on assets that might be surrendered.

Given concerns about the TARP stigma, Treasury shifted its efforts to assist small businesses outside of TARP by proposing a separate Small Business Lending Fund. The Small Business Jobs Act of 2010 created a $30 billion bank capital support program encouraging small and midsize banks to lend to small businesses and contains metrics for measuring increases in small business lending. We are currently reviewing the fund, as required by the Small Business Jobs Act of 2010.

OFS has Made Progress in Staffing Key Positions, but Needs to Finalize Its Workforce Plan

OFS has continued to make progress in staffing key positions, managing its contracts, and maintaining internal controls. While OFS's organizational structure has stabilized as it moves into maintenance mode, more could be done to address retention of key staff as TARP winds down. Treasury continues to rely on a network of financial agents and contractors for certain activities and will likely do so as the program comes to a close. Finally, Treasury has taken steps to develop a system of internal control.

OFS Staffing Has Stabilized, but OFS Has Not Finalized a Plan for Addressing Staff Retention Challenges as TARP Winds Down

In the last year, OFS staffing and its organizational structure have stabilized. Over the past 2 years, the number of OFS employees has increased steadily with the number of employees increasing and the number of detailees decreasing. In addition, Treasury has filled key leadership positions in OFS, including the position of Chief of the Homeownership Preservation Office. However, this stability is uncertain as OFS faces new challenges. For example, the Assistant Secretary of Financial Stability resigned in September 2010 and this key leadership position is temporarily filled.

With more than 200 employees, staffing at OFS remains important. As we have seen, some programs are still being implemented and others, while having been closed or terminated, have assets that must be managed, repaid, and divested. More than half of OFS's employees, including key leaders, are term appointments (many with 4-year term limits). OFS has begun to take steps that will help to retain staff. OFS is also addressing succession planning for critical senior positions, and in response to our recommendation in the January 2011 report is finalizing its Human Capital

Strategic Plan. According to OFS, this plan is a roadmap to ensure that OFS manages its workforce effectively and continues to attract, develop, and retain high caliber employees.

Treasury Continues to Strengthen Management and Oversight of Financial Agents and Contractors and Is Addressing Conflicts-of-Interest Requirements

Since the inception of TARP, Treasury has continued to rely on private-sector resources to assist OFS with a variety of activities. Treasury has used two mechanisms for engaging private-sector firms. First, Treasury has exercised its statutory authority to retain 15 financial agents (depository and related financial institutions designated to perform assigned functions on its behalf). Second, Treasury has entered into contract and blanket purchase agreements under the Federal Acquisition Regulation for a variety of legal, investment consulting, accounting, and other services and supplies. According to Treasury's data, as of September 30, 2010, Treasury had 81 contracts and blanket purchase agreements, up from 39 from the previous year. In total, Treasury had 96 financial agency agreements and contractual arrangements with a total potential value of almost $841 million, as of September 30, 2010.

When Treasury set up OFS in 2008 and quickly began to implement numerous TARP initiatives, OFS lacked complete procurement procedures and internal controls to oversee its growing number of contractors and financial agents, as well as a comprehensive compliance system to monitor and fully address vendor-related conflicts of interest. We made a series of recommendations between December 2008 and June 2009 that were intended to strengthen Treasury's management and oversight of its vendors and improve the transparency of contracted operations. One year after implementation, OFS had put in place an appropriate infrastructure to manage and monitor its network of financial agents and contractors, as well as a system to oversee conflicts of interest that may arise with financial agents or contractors seeking or performing work under TARP. OFS has continued to make management and oversight enhancements.

OFS Has Taken Steps to Develop a System of Internal Control for TARP Programs

Treasury has taken steps to develop an internal control system to ensure compliance with program requirements, including limitations on executive compensation, stock repurchase, and dividends. OFS's Office of Internal Review has a key role in helping to ensure such compliance. Treasury also relies on financial agents to perform additional oversight responsibilities. Although Treasury has generally developed an overall system of internal control for compliance with program requirements, we have identified areas in which certain controls for specific programs, such as HAMP, could be improved. In particular, Treasury has not fully implemented our recommendation to develop a comprehensive system of internal control for HAMP, including developing benchmarks or goals for specific HAMP performance measures such as conversion and redefault rates. We will continue to monitor Treasury's actions to address identified deficiencies.

In addition, our 2010 financial audit report concluded that although certain internal controls could be improved, OFS maintained, in all material respects, effective internal control over financial reporting as of September 30, 2010. These controls provided reasonable assurance that misstatements, losses, or noncompliance material in relation to the financial statements would be prevented or detected and corrected on a timely basis.[26] Our opinion on internal control over financial reporting is based on criteria established under 31 U.S.C. §3512 (c), (d), commonly known as the Federal Manager's Financial Integrity Act.

Indicators Suggest That Credit Markets Have Largely Held the Gains They Achieved since October 2008

The concerted actions by Treasury, the Federal Reserve, and others since the crisis began have been credited with helping to avert a more severe financial crisis, but the ultimate impact of the interventions on the economy as a whole remains to be seen. Since the passage of EESA, indicators generally suggest that credit markets have improved and while the effectiveness of the TARP programs have varied, some have reportedly had the desired effects, especially if stabilizing the financial system and restoring confidence was considered to be the principal goal of the intervention. However, the strength of the economic recovery remains uncertain, and the ultimate impact of the interventions on the real economy remains to be seen.

While movements in most of these indicators during the second year of TARP are likely more reflective of other non-TARP market developments, some metrics we have monitored for programs with later start dates (PPIP, HAMP, and to a lesser extent TALF) show some improvements. For example, PPIP indicators show substantial improvement and TALF indicators continue to improve. However, indicators for MHA continue to highlight the challenges in the area of residential housing. Finally, our indicators suggest that credit markets have largely held the gains achieved since October 2008, despite the unwinding of TARP programs, the early

[26] GAO, *Financial Audit: Office of Financial Stability (Troubled Asset Relief Program) Fiscal Year 2010 and 2009 Financial Statements*, GAO-11-174 (Washington, D.C.: Nov. 15, 2010).

termination of TARP's authority, the general exit from other government interventions, and the turmoil in Europe. Over time, analysis of the exits from remaining TARP programs will provide a more complete assessment of the resilience of the financial system.

Mr. Chairman and Members of the Committee, I appreciate the opportunity to discuss these critically important issues and would be happy to answer any questions that you may have. Thank you.

For further information on this testimony, please contact Thomas J. McCool on (202) 512-2642 or mccoolt@gao.gov, or Orice Williams Brown on (202) 512-8678 or williamso@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement.

Related GAO Products

Troubled Asset Relief Program: Treasury Continues to Face Implementation Challenges and Data Weaknesses in Its Making Home Affordable Program, GAO-11-288, March 17, 2011.

Troubled Asset Relief Program: Third Quarter 2010 Update of Government Assistance Provided to AIG and Description of Recent Execution of Recapitalization Plan. GAO-11-46. January 20, 2011.

Troubled Asset Relief Program: Status of Programs and Implementation of GAO Recommendations. GAO-11-74. January 12, 2011.

Financial Audit: Office of Financial Stability (Troubled Asset Relief Program) Fiscal Years 2010 and 2009 Financial Statements. GAO-11-174. November 15, 2010.

Troubled Asset Relief Program: Opportunities Exist to Apply Lessons Learned from the Capital Purchase Program to Similarly Designed Programs and to Improve the Repayment Process. GAO-11-47. October 4, 2010.

Troubled Asset Relief Program: Bank Stress Test Offers Lessons as Regulators Take Further Actions to Strengthen Supervisory Oversight. GAO-10-861. September 29, 2010.

Financial Assistance: Ongoing Challenges and Guiding Principles Related to Government Assistance for Private Sector Companies. GAO-10-719. August 3, 2010.

Management Report: Improvements are Needed in Internal Control Over Financial Reporting for the Troubled Asset Relief Program. GAO-10-743R. June 30, 2010.

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Troubled Asset Relief Program: Further Actions Needed to Fully and Equitably Implement Foreclosure Mitigation Programs. GAO-10-634. June 24, 2010.

Debt Management: Treasury Was Able to Fund Economic Stabilization and Recovery Expenditures in a Short Period of Time, but Debt Management Challenges Remain. GAO-10-498. May 18, 2010.

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Troubled Asset Relief Program: Automaker Pension Funding and Multiple Federal Roles Pose Challenges for the Future. GAO-10-492. April 6, 2010.

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Financial Audit: Office of Financial Stability (Troubled Asset Relief Program) Fiscal Year 2009 Financial Statements. GAO-10-301. December 9, 2009.

Troubled Asset Relief Program: Continued Stewardship Needed as Treasury Develops Strategies for Monitoring and Divesting Financial Interests in Chrysler and GM. GAO-10-151. November 2, 2009.

Troubled Asset Relief Program: Capital Purchase Program Transactions for October 28, 2008, through September 25, 2009, and Information on Financial Agency Agreements, Contracts, Blanket Purchase Agreements, and Interagency Agreements Awarded as of September 18, 2009. GAO-10-24SP. October 8, 2009.

Troubled Asset Relief Program: One Year Later, Actions Are Needed to Address Remaining Transparency and Accountability Challenges. GAO-10-16. October 8, 2009.

Debt Management: Treasury Inflation Protected Securities Should Play a Heightened Role in Addressing Debt Management Challenges. GAO-09-932. September 29, 2009.

Troubled Asset Relief Program: Status of Government Assistance Provided to AIG. GAO-09-975. September 21, 2009.

Troubled Asset Relief Program: Treasury Actions Needed to Make the Home Affordable Modification Program More Transparent and Accountable. GAO-09-837. July 23, 2009.

Troubled Asset Relief Program: Capital Purchase Program Transactions for October 28, 2008, through March 20, 2009, and Information on Financial Agency Agreements, Contracts, Blanket Purchase Agreements, and Interagency Agreements Awarded as of June 1, 2009. GAO-09-707SP. June 17, 2009.

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Auto Industry: Summary of Government Efforts and Automakers' Restructuring to Date. GAO-09-553. April 23, 2009.

Small Business Administration's Implementation of Administrative Provisions in the American Recovery and Reinvestment Act. GAO-09-507R. April 23, 2009.

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Troubled Asset Relief Program: March 2009 Status of Efforts to Address Transparency and Accountability Issues. GAO-09-504. March 31, 2009.

Troubled Asset Relief Program: Status of Efforts to Address Transparency and Accountability Issues. GAO-09-296. January 30, 2009.

High-Risk Series: An Update. GAO-09-271. January 22, 2009.

Troubled Asset Relief Program: Additional Actions Needed to Better Ensure Integrity, Accountability, and Transparency. GAO-09-161. December 2, 2008.

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RESPONSE TO WRITTEN QUESTIONS OF SENATOR SHELBY FROM TED KAUFMAN

Q.1. Did you ask the Treasury Department to submit a comprehensive analysis of its legal authority to bail out automobile companies with TARP funds? If so, please provide any analysis you received.

A.1. Yes, the Panel requested on several occasions that Treasury provide a comprehensive analysis of its legal authority to use TARP funds to intervene in the domestic automotive industry. For example, in his questions for the record for Secretary Geithner following the Panel's September 10, 2009 hearing, former Panel member Jeb Hensarling requested "a formal written legal opinion justifying the: (i) use of TARP funds to support Old Chrysler and Old GM prior to their bankruptcies; [and] (ii) use of TARP funds in the Chrysler and GM bankruptcies."

The Secretary responded; in relevant part:

> We believe the Secretary had the authority under the Emergency Economic Stabilization Act (EESA) to make the investments in the auto industry, both with respect to old Chrysler and old GM and in connection with the new companies that acquired their assets.
>
> The purpose of EESA was to provide the Secretary of Treasury with the flexibility to take the actions necessary to restore U.S. financial stability. Congress provided the Secretary broad authority by including broad definitions of "troubled" assets and financial institution." Providing assistance to the auto companies at the time the determinations were made was consistent with both the language and intent of the statute. The auto companies were and are interrelated with entities extending credit to consumers and dealers and because of the effects a disruption in the industry would have had at such time to financial stability employment and the market as a whole.
>
> The GAO noted in testimony before the Senate Banking Committee last December that the authority was sufficient to permit the purchase of troubled assets from the auto companies.

In addition to Congressman Hensarling's request, the Panel recommended in its September 2009 oversight report "that Treasury provide a legal opinion justifying the use of TARP funds for the automotive bailout." As the Panel reported in March 2011; "In response, Treasury directed the Panel to certain materials associated with the automotive companies' bankruptcies. These materials did not provide a sufficiently robust analysis of Treasury's legal justification and so constitute, at most, only a partial response to the Panel's recommendation."

I should note that I joined the Panel in October 2010, so I did not participate in any of the Panel's deliberations prior to that date.

Q.2. Were members of the Congressional Oversight Panel afforded the opportunity to hire a dedicated staff member paid for out of the Panel's budget? If not, did any Panelist ask to hire a dedicated staff member? If so, what was the process by which the decision was made not to allow panelists to hire a staffer to assist them with their work on the Panel?

A.2. Although the Panel adopted its procedural rules before my appointment my understanding is that the Panel considered it a priority to ensure that all members had access to the staff resources required to ensure that their needs were met and their ideas were reflected in the Panel's work. As such, the Panel's final rules state:

> The Panel's Executive Director shall assign to each Panel member an existing member of the Panel staff acceptable to the Panel member who, as part of his or her Panel responsibilities, shall serve as a liaison with and as a source of support for the assigned Panel member. The staff member's support to the Panel member shall include responding to the member's requests for information, seeking the member's views on the matters to the staff and representing the Panel member at external meetings where requested by the member.

In accordance with this rule, each Panel member had ready access upon request to a member of the staff able to assist with his or her needs.

My understanding is that prior to the adoption of this rule, the Panel's staff consulted with the staff of nearly a dozen past Federal or Congressional commissions and panels to learn about their practices. The Panel's approach was in keeping with the model followed by virtually all of the bodies consulted. This approach I believe, greatly contributed to the Panel's success in reaching a bipartisan consensus in the vast majority of its oversight reports.

Q.3. Please provide minutes of all Congressional Oversight Panel meetings and conference calls.

A.3. Minutes of all of the Panel's internal meetings and conference calls are attached. These minutes have also been provided, along with other Panel materials, to the National Archives.

Q.4. Many of the duties of the Congressional Oversight Panel required panel members to have access to sensitive financial information from financial institutions as well as the auto Companies. While participating on the panel however, many of the panelists continued to work in areas where conflicts may have arisen. For example, a Bloomberg article stated that Elizabeth Warren was paid $90,000 to be an expert witness in a class action lawsuit against several major TARP banks. Senator Kaufman, what is the COP's recusal policy for conflicts of interest?

A.4. Panel members are generally subject to the Senate Code of Official Conduct including the strict prohibition against providing compensated or uncompensated service to outside entities when such service creates a conflict with an individual's official duties. To further ensure public trust and confidence in the Panel's work, the Panel employed a full-time Ethics Counsel to examine all potential or apparent conflicts of interest, and the Panel consulted regularly with the Senate Select Committee on Ethics. In cases where a conflict of interest was determined to exist, Panel members were required to recuse themselves from all related official work.

It is important to note that, due to the fact that Panel members were part-time Congressional employees who were expected to continue their outside employment, the Senate Select Committee on

Ethics chose to waive very specific provisions of the Senate Code of Official Conduct that would otherwise create significant, if not insurmountable, obstacles to the service of Panel members. In a letter dated December 31, 2008, Chairman Barbara Boxer and Vice Chairman John Cornyn notified the Panel of a limited waiver to:

> Senate Rule 36 (limiting outside earned income); Senate Rule 37, paragraphs 5 (a), (b), and 6 (prohibiting affiliation with a firm, providing compensated professional services, and serving as an officer or board member for compensation); and Senate Rule 41, paragraphs 4 and 6 (agreeing to comply with the Code of Official Conduct and reporting on individuals who perform Senate services) . . . This decision reflects the Committee's recognition that the Panel members are individuals with special expertise and the task at hand is one that needs to be undertaken expeditiously and will be of a limited duration. Furthermore, the Committee considered the fact that the services provided by the Panel are not solely to the Senate, but to Congress as a whole.

I should note that I joined the Panel in October 2010, so I did not participate in any deliberations related to Panel activities prior to that date.

DRAFT

Minutes of the Congressional Oversight Panel

Meeting of the Congressional Oversight Panel occurred by telephone on December 8, 2008.

Agenda:
Approval of December Report

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved the adoption of the Panel's December Report.

The Report was adopted.

The following Panel members voted in the affirmative:

Mr. Silvers

Mr. Neiman

Ms. Warren

The following Panel member voted in the negative:

Rep. Hensarling

Action Items for staff: None.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on December 15, 2008.

Agenda:
Update on Nevada Hearing
Update on the January report
Update on the Regulatory Reform report
Update on TARP assets valuation project
Update on March report
Update on bank report on lending activity

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

Update on the January report

The Chair proposed sending a letter to Treasury posing the questions from the December report for response. The Chair also proposed setting up a meeting with Treasury. Representative Hensarling proposed holding a hearing with Treasury before the January report.

Action Items for staff: None.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on December 22, 2008, 10:06 am.

Agenda:
Introduction of Executive Director
Update on the TARP assets valuation project

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

Duff & Phelps

Update on TARP assets valuation project

The Chair proposed holding another meeting in one week to consider a final contract with an outside consultant to provide a valuation study of Treasury's TARP transactions. This proposal was approved.

Senator Sununu proposed adding a discussion of Panel rules to the agenda of the next meeting. This proposal was approved.

Representative Hensarling moved for the discussion of Panel rules to be placed as the first item on the agenda.

The motion failed for lack of a second.

Action Items for staff:

--Ms. Baum to send minutes of previous meetings to Hon. John Sununu.

--Ms. Baum to prepare formal rules of procedure for Panel proceedings.

The meeting adjourned at 11:57 am.

DRAFT

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on December 30, 2008.

Agenda:
Approval of the contract with Duff & Phelps for TARP assets valuation
Approval of Panel procedural rules
Update on Hearings
Update on January report
Update on Regulatory Reform report

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

Senator Sununu's Office

Approval of Contract with Duff & Phelps for the TARP assets valuation project

The Chair moved the adoption of the Duff & Phelps contract.

The contract was adopted.

The following Panel members voted in the affirmative:

Mr. Silvers

Mr. Neiman

Ms. Warren

Rep. Hensarling

The following Panel member abstained:

Sen. Sununu

Approval of Panel procedural rules

Representative Hensarling offered an amendment to the proposed rules. The original proposed rule required the agenda for the Panel's weekly meeting be circulated to Panel members at least two days before the meeting. Rep. Hensarling's amendment changed this language to require circulation at least two business days before a meeting. After discussion, this amendment was altered to require circulating the agenda at least two business days or three calendar days prior to the weekly meeting. This amendment was approved.

Representative Hensarling offered an amendment to the proposed rules. The original proposed rule required the agenda for any Panel hearing to be circulated to Panel members at least two days before the hearing. Rep. Hensarling's amendment changed this language to require circulation at least two business days or three calendar days prior to the hearing. This amendment was approved.

Representative Hensarling offered an amendment to the proposed rules. The original proposed rule required notice of hearings to be given a week in advance unless notice was waived by three Panel members. Rep. Hensarling's amendment changed this language to require four Panel members to waive notice. This amendment was approved.

Representative Hensarling offered an amendment to the proposed rules. The original proposed rules stated that on request by a Panel member, recommendations of the Panel "may" include supplemental minority or additional views. Rep. Hensarling's amendment changed the language from "may" to "shall." This amendment was approved.

Mr. Neiman offered an amendment to the proposed rules. The original proposed rules required Panel members have two days to review the final draft of a report before voting on that report. Mr. Neiman's amendment changed this language to require three days to review. The amendment was approved.

<u>Rep. Hensarling moved the adoption of the proposed rules.</u>

<u>The proposed rules were adopted</u>.

The following Panel members voted in the affirmative:

Mr. Silvers

Mr. Neiman

Ms. Warren

Rep. Hensarling

Sen. Sununu

<u>Action Items for staff:</u>

--Staff to consider Panel comments on specific terms in the proposed contract with Duff & Phelps.

--Ms. Baum to prepare formal Panel rules on authorizing contracts.

--Ms. Baum to draft a proposed rule clarifying the right of Panel members to call Administration witnesses to hearings.

<u>The meeting adjourned.</u>

DRAFT

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on January 5, 2009.

Agenda:
Update on January report
Update on Regulatory Reform report
Update on Hearings
Approval of Panel rules regarding contracting
Update on TARP assets valuation project

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

Senator Sununu's Office

Update on January report

The Chair moved that the Panel suspend its rules to allow for two-day notice of the final draft of the January report before the vote.

The motion to suspend the rules was approved by unanimous consent.

Approval of Panel rule regarding contracting

Representative Hensarling offered an amendment to the proposed rules. The original proposed rule did not require the statement of work be circulated to the Panelists prior to approval of the contract. Rep. Hensarling's amendment changed this language to require circulation of the statement of work at least two business days or three calendar days before approval. This amendment was approved.

The Chair moved the adoption of the proposed rule.

The proposed rule was rejected.

The following Panel member voted in the affirmative:

Mr. Silvers

The following Panel members voted in the negative:

Mr. Neiman

Rep. Hensarling

Sen. Sununu

Mr. Neiman offered an amendment to the proposed rules. The original proposed rule had a threshold of $500,000. Mr. Neiman's amendment changed this requirement to $100,000. After discussion, this amendment was altered to set the threshold requirement to $200,000. This amendment was approved.

The Chair moved the adoption of the proposed rules.

The proposed rules were adopted.

The following Panel members voted in the affirmative:

Mr. Silvers

Mr. Neiman

Ms. Warren

Rep. Hensarling

Sen. Sununu

Action Items for staff:

--Ms. Baum to examine and draft a proposed rule clarifying the right of Panel members to call Administration witnesses to hearings.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Meeting of the Congressional Oversight Panel occurred by telephone on January 8, 2009.

Agenda:
Approval of January Report
Update on Hearings

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

Senator Sununu's Office

Approval of January Report

The Chair moved the adoption of the Panel's January Report.

The Report was adopted.

The following Panel members voted in the affirmative:

Mr. Silvers

Mr. Neiman

Sen. Sununu

Ms. Warren

The following Panel member voted in the negative:

Rep. Hensarling

Action Items for staff: None.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on January 12, 2009.

Agenda:
Update on Regulatory Reform report
Update on TARP assets valuation project
Update on Regulatory Reform Hearing
Approval of Amendment to the Panel's Rules of Procedure

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Hon. John Sununu

Others in attendance included:

Congressional Oversight Panel staff

Representative Hensarling's Office staff

Mr. Neiman's Office staff

David Moss, Harvard Business School

Update on Regulatory Reform report

The Panel expressed support for seeking to move the deadline for the report to January 29, 2009.

Approval of Amendment to the Panel's Rules of Procedure

The Panel considered an amendment to the Panel's Rules of Procedures regarding contracts. The proposed amendment created a threshold of $200,000 and required the contract text be circulated to Panel members at least two business days or three calendar days in advance of a vote on the contract, unless the notice requirement is waived by four Panel members.

Mr. Silvers moved the adoption of the Amendment to Panel's Rules of Procedure

The amendment was adopted.

The following Panel members voted in the affirmative:

Mr. Silvers

Mr. Neiman

Sen. Sununu

Ms. Warren

Rep. Hensarling

Action Items for staff:

--Staff to coordinate a meeting time for the Panel to continue discussion of the Regulatory Reform report outline.

--Ms. Baum to work with Congress to consider moving the deadline for the Regulatory Reform report back to January 29, 2009.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on January 18, 2009.

Agenda:
Update on Regulatory Reform report
Update on TARP assets valuation project
Update on changes to Panel rules of procedure

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Hon. John Sununu

Others in attendance included:

Congressional Oversight Panel staff

David Moss, Harvard Business School

Melanie Wachtell, report editor

Action Items for staff: None.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Meeting of the Congressional Oversight Panel occurred in person on January 28, 2009.

Agenda:
Approval of Regulatory Reform Report

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Approval of Regulatory Reform Report

Mr. Silvers moved the adoption of the Regulatory Reform Report.

The Report was adopted.

The following Panel members voted in the affirmative:

Mr. Silvers

Mr. Neiman

Ms. Warren

The following Panel members voted in the negative:

Rep. Hensarling

Sen. Sununu

Action Items for staff: None.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on February 2, 2009.

Agenda:
Update on February report
Update on the Chair testifying before Congress
Update on March Report
Update on Hearings

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Others in attendance included staff from:

Congressional Oversight Panel

Action Items for staff:

--Staff to examine possibility of moving vote on February report up to Wednesday evening from Thursday. Staff also to coordinate with Panel members in setting vote time.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Meeting of the Congressional Oversight Panel occurred by telephone on February 4, 2009.

Agenda:
Approval of February Report

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Approval of February Report

Mr. Silvers moved the adoption of the Panel's February Report.

The Report was adopted.

The following Panel members voted in the affirmative:

Mr. Silvers

Mr. Neiman

Sen. Sununu

Ms. Warren

Rep. Hensarling

Action Items for staff: None.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on February 9, 2009.

Agenda:
Update on March Report
Update on Hearings
Update on Oversight Plan

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Action Items for staff:

–Ms. Baum to schedule a meeting with Adam Levitin to discuss the March report for Thursday morning, if possible.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on February 17, 2009.

Agenda:
Update on March Report
Update on Hearings
Update on Oversight Plan

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Action Items for staff: None.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on February 23, 2009.

Agenda:
Update on March Report
Update on Hearings
Update on April Report
Update on Oversight Plan

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Others in attendance included staff from:

Congressional Oversight Panel

Action Items for staff: None.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on March 2, 2009.

Agenda:
Update on March Report
Update on April Report
Update on Hearings

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Action Items for staff:

–Staff to update the March report to reflect new responses from Treasury.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Meeting of the Congressional Oversight Panel occurred by telephone on March 5, 2009.

Agenda:
Approval of March Report

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Approval of March Report

Mr. Silvers moved the adoption of the March Report, subject to the addition and approval of certain technical language.

The Report was adopted.

The following Panel members voted in the affirmative:

Mr. Silvers

Mr. Neiman

Sen. Sununu

Ms. Warren

Rep. Hensarling*

*Representative Hensarling subsequently altered his vote to a "no" vote.

Action Items for staff: None.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on March 9, 2009.

Agenda:
Update on Hearings
Update on April Report

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Action Items for staff: None.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on March 16, 2009.

Agenda:
Update on Hearings
Update on April Report

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

Action Items for staff: None.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on March 23, 2009.

Agenda:
Update on April Report
Update on May Report
Update on Hearings
Update on Data Production from Treasury

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

Action Items for staff:

--Ms. Baum to circulate the information protocol with Treasury to the Panel.

--Ms. Baum to circulate minutes of meetings with Treasury staff regarding data production issues.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on March 30, 2009.

Agenda:
Update on April Report
Update on Hearings
Update on Data Production from Treasury
Discussion of Proposed Letter to Banks

The Chair called the meeting to order. The Chair noted that there was not a quorum.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Update on April Report

The Panel discussed moving the vote back several days. The Chair concurred and moved the date of the vote to April 6, 2010.

Action Items for staff:

--Staff to research flights for the Panel from the April field hearing in Milwaukee to Washington DC.

--Ms. Baum to circulate to the Panel the Chair's prepared remarks for her testimony before the Senate Finance Committee.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Meeting of the Congressional Oversight Panel occurred by telephone on April 7, 2009.

Agenda:
Approval of April Report
Update on Hearings

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Approval of April Report

Mr. Silvers moved the adoption of the April Report.

The Report was adopted.

The following Panel members voted in the affirmative:

Mr. Silvers

Mr. Neiman

Ms. Warren

The following Panel members voted in the negative:

Rep. Hensarling

Sen. Sununu

Action Items for staff:

--Staff to prepare a memo giving the latest summary of distribution outlays under the various TARP programs.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on April 13, 2009.

Agenda:
Update on Hearings
Update on May Report
Update on June Report
Approval of Amendment to Panel Rules

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Update on Hearings

With respect to the upcoming hearing with Secretary Geithner, the Panel decided to extend the time for questioning per Panel member per round from five minutes to seven to ten minutes.

Approval of Amendment to Panel Rules

Sen. Sununu moved the adoption of a proposed amendment to the rules to authorize the hiring of designated staff.

Mr. Silvers moved the tabling for a week of the motion to adopt the proposed amendment.

The motion to table was rejected.

The following Panel members voted in the affirmative:

Mr. Silvers

Ms. Warren

The following Panel members voted in the negative:

Mr. Neiman

Rep. Hensarling

Sen. Sununu

The proposed amendment to the rules was adopted.

The following Panel members voted in the affirmative:

Mr. Neiman

Rep. Hensarling

Sen. Sununu

The following Panel members voted in the negative:

Mr. Silvers

Ms. Warren

Action Items for staff: None.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred in person on April 21, 2009.

Agenda:
June Report Topic

Panel Members Present

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

Action Items for staff: None.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on April 27, 2009.

Agenda:
Update on May Report
Update on Communication with Treasury
Update on Hearings
Update on Cuomo Letter
Rejection of Proposed Amendment to Panel Rules

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

Rejection of Proposed Amendment to Panel Rules

Mr. Silvers proposed an amendment to Panel rules to revoke a previously adopted amendment to the rules that authorized the hiring of designated staff.

Mr. Silvers moved the adoption of the proposed amendment.

The proposed amendment to the rules was rejected.

The following Panel members voted in the affirmative:

Mr. Silvers

Ms. Warren

The following Panel members voted in the negative:

Mr. Neiman

Rep. Hensarling

Sen. Sununu

Action Items for staff:

--Staff to prepare and ask a question to the Federal Reserve regarding the macro-economic assumptions of the stress tests.

--Staff to circulate testimony from April field hearing in Milwaukee.

--Staff to prepare and circulate a summary of the April field hearing in Milwaukee.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on May 4, 2009.

Agenda:
Update on Communications with Treasury
Update on May Report
Update on June Report
Update on Hearings
Rejection of Proposed Amendment to Panel Rules

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

Update on May Report

The Chair moved to instruct staff to add a discussion of the pros and cons of linking bank participation in TARP or TALF to meeting minimum standards on consumer and small business lending.

The motion to instruct staff was approved.

The following Panel members voted in the affirmative:

Mr. Silvers

Ms. Warren

Mr. Neiman

The following Panel members voted in the negative:

Rep. Hensarling

Sen. Sununu

Rejection of Proposed Amendment to Panel Rules

Mr. Silvers proposed an amendment to Panel rules to revoke a previously adopted amendment to the rules that authorized the hiring of designated staff.

Mr. Silvers moved the adoption of the proposed amendment.

The proposed amendment to the rules was rejected.

The following Panel members voted in the affirmative:

Mr. Silvers

Ms. Warren

The following Panel members voted in the negative:

Mr. Neiman

Rep. Hensarling

Sen. Sununu

Action Items for staff:

--Staff to circulate development sections of the May report to the Panel.

--Staff to add a discussion to the May report of the pros and cons of linking bank participation in TARP or TALF to meeting minimum standards on consumer and small business lending.

--Staff to research if Roberts Rules of Order allows the Chair to second a motion.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Meeting of the Congressional Oversight Panel occurred by telephone on May 6, 2009.

Agenda:
Approval of May Report

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Approval of May Report

Mr. Silvers moved the adoption of the May Report.

The Report was adopted.

The following Panel members voted in the affirmative:

Mr. Silvers

Mr. Neiman

Sen. Sununu

Ms. Warren

The following Panel member voted in the negative:

Rep. Hensarling

Action Items for staff: None.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on May 11, 2009.

Agenda:
Update on June Report
Update on Hearings
Update on Communication with Treasury
Rejection of Proposed Amendment to Panel Rules

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Rejection of Proposed Amendment to Panel Rules

Mr. Silvers proposed an amendment to Panel rules to revoke a previously adopted amendment to the rules that authorized the hiring of designated staff.

Mr. Silvers moved the adoption of the proposed amendment.

The proposed amendment to the rules was rejected.

The following Panel members voted in the affirmative:

Mr. Silvers

Ms. Warren

The following Panel members voted in the negative:

Mr. Neiman

Sen. Sununu

Action Items for staff:

--Staff to request a briefing from Treasury regarding the events that occurred between when the banks were informed of the results of the stress tests and when the results were released.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on May 18, 2009.

Agenda:
Approval of Proposed Amendment to Panel Rules
Update on June Report
Update on Hearings

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Approval of Proposed Amendment to Panel Rules

The Chair proposed an amendment to Panel rules. The amendment authorized the Panel's executive director to appoint an existing member of staff to serve as a liaison for each Panel member. After discussion, this amendment was altered to clarify that it revoked a previously adopted amendment to the rules that authorized the hiring of designated staff.

The Chair moved the adoption of the proposed amendment.

The proposed amendment to the rules was approved.

The following Panel members voted in the affirmative:

Mr. Silvers

Ms. Warren

Mr. Neiman

The following Panel members voted in the negative:

Rep. Hensarling

Sen. Sununu

Action Items for staff:

--Staff to contact Hart, Schaffner, & Marx regarding the May field hearing in New York.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on May 26, 2009.

Agenda:
Update on June Report
Update on Hearings
Update on Communications with Treasury
Update on Treasury Authority to Recycle TARP Repayments
Update on Coordination with the Special Inspector General of the TARP

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

Action Items for staff:

--Ms. Baum to request from Treasury all communications related to the stress tests in the ten days between the time the banks were informed of the results of the stress tests and the time the results were publically released.

--Ms. Baum to circulate the proposed data protocol with Treasury and Treasury's response to the Panel.

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The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on June 1, 2009.

Agenda:
Update on Hearings
Update on Farm Credit Report
Update on June Report
Update on Communication with Treasury
Update on Communications with the Special Inspector General of the TARP and the GAO

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Action Items for staff: None.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Meeting of the Congressional Oversight Panel occurred by telephone on June 8, 2009.

Agenda:
Approval of June Report
Update on Upcoming Reports
Update on Hearings

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

Approval of June Report

Mr. Silvers moved the adoption of the June Report.

The Report was adopted.

The following Panel members voted in the affirmative:

Mr. Silvers

Mr. Neiman

Rep. Hensarling

Sen. Sununu

Ms. Warren

Action Items for staff:

--Staff to organize a call with the Panel to discuss the July report outline.

--Staff and Ms. Baum to follow up with Mr. Neiman about finalizing a data request to servicers and lenders.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on June 15, 2009.

Agenda:
Update on July Report
Update on Farm Credit Report
Update on Hearings

The Chair called the meeting to order. The Chair noted that there was not a quorum.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Action Items for staff:

--Ms. Baum to confirm the time of a meeting with Herb Allison.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on June 22, 2009, 4:00 pm.

Agenda:
Update on July Report
Update on Hearings
Update on Data Production by Treasury

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

Update on Hearings

Rep. Hensarling moved to move the location of the hearing on the automobile industry from Detroit to Washington DC.

<u>The motion to move the location of the hearing was rejected</u>

The following Panel members voted in the affirmative:

Rep. Hensarling

Sen. Sununu

The following Panel members voted in the negative:

Mr. Silvers

Ms. Warren

Mr. Neiman

<u>Action Items for staff:</u>

--Ms. Baum to confirm the time of a meeting with Herb Allison.

<u>The meeting adjourned.</u>

DRAFT

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on June 29, 2009, 4:00 pm.

Agenda:
Update on July Report
Update on Hearings
Update on Communications with Treasury

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Action Items for staff:

--Staff to provide the Panel with the results of other entities' valuation studies.

--Staff to inform Panel of any invitations sent to witnesses for the automobile industry hearing.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on July 6, 2009.

Agenda:
Consideration of Amendment to Panel Rules
Update on July Report
Update on Farm Credit Report
Update on August Report
Update on Hearings

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Consideration of Amendment to Panel Rules

The Chair proposed an amendment to the Panel's Rules of Procedure. The amendment laid out a procedure for handling transcripts of Panel meetings.

The Chair moved the adoption of the proposed amendment to the Panel Rules of Procedure.

Representative Hensarling offered an amendment by substitution to the Chair's proposed amendment. Rep. Hensarling's amendment by substitution would change the rules to require transcripts of Panel meetings to be posted on the Panel website within 30 days after recording.

Rep. Hensarling moved the adoption of the amendment by substitution.

The amendment by substitution was rejected.

The following Panel members voted in the affirmative:

Rep. Hensarling

Sen. Sununu

The following Panel members voted in the negative:

Mr. Silvers

Ms. Warren

Mr. Neiman

Representative Hensarling offered an amendment to the Chair's proposed amendment. Rep. Hensarling's amendment changed the language of the Chair's proposed amendment to require meeting transcripts be distributed to Panel members no later than two days after recording. After discussion, this amendment was altered to require distribution no later than two days after the recordings are available to the staff.

Rep. Hensarling moved the adoption of the amendment to the Chair's proposed amendment.

Mr. Neiman moved to table the motion to adopt the Chair's amendment to the Panel's Rules of Procedure.

The motion to table was adopted.

The following Panel members voted in the affirmative:

Mr. Silvers

Ms. Warren

Mr. Neiman

The following Panel members voted in the negative:

Rep. Hensarling

Sen. Sununu

Action Items for staff: None.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Meeting of the Congressional Oversight Panel occurred by telephone on July 9, 2009.

Agenda:
Approval of July Report

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

Approval of July Report

The Chair moved the adoption of the July Report.

The Report was adopted.

The following Panel members voted in the affirmative:

Mr. Silvers

Ms. Warren

Mr. Neiman

Rep. Hensarling

Sen. Sununu

Action Items for staff: None.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on July 13, 2009.

Agenda:
Update on Farm Credit Report
Update on August Report
Update on September Report
Update on Hearings
Update on Coordination with the Special Inspector General for the TARP
Discussion of Amending the Panel's Rules of Procedure

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

Update on September Report

The Panel agreed to consider the outline and return comments by the close of business on Wednesday.

Action Items for staff: None.

The meeting adjourned.

DRAFT

Minutes of the Congressional Oversight Panel

Meeting of the Congressional Oversight Panel occurred by telephone on July 20, 2009.

Agenda:
Approval of Farm Credit Report
Update on August Report
Update on September Report
Update on Hearings
Discussion of Amending the Panel's Rules of Procedure
Update on Communications with Treasury

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

Approval of Farm Credit Report

Mr. Silvers moved to instruct the staff to add language to the Farm Credit Report on Treasury's approach to foreclosure prevention in the TARP as it applies to family farms.

The amendment was rejected.

The following Panel members voted in the affirmative:

Mr. Silvers

Ms. Warren

The following Panel members voted in the negative:

Rep. Hensarling

Mr. Neiman

Sen. Sununu

The Chair moved the adoption of the Farm Credit Report.

The Report was adopted.

The following Panel members voted in the affirmative:

Mr. Silvers

Ms. Warren

Mr. Neiman

The following Panel members voted in the negative:

Rep. Hensarling

Sen. Sununu

Discussion of Amending the Panel's Rules of Procedure

Mr. Neiman proposed an amendment to the Panel's Rules of Procedure. Mr. Neiman's amendment mandated the memorialization of Panel meetings with minutes, with meeting transcripts retained for the purpose of preparing the minutes.

Representative Hensarling proposed an amendment by substitution to Mr. Neiman's amendment. Rep. Hensarling's amendment mandated making the transcripts of the Panel's meetings public within 10 days of the meeting. Rep. Hensarling's amendment also proposed allowing the Panel to enter an executive session during its meetings that would be confidential and not included in the transcript.

Rep. Hensarling moved the adoption of the amendment by substitution.

The amendment by substitution was rejected.

The following Panel members voted in the affirmative:

Rep. Hensarling

Sen. Sununu

The following Panel members voted in the negative:

Mr. Silvers

Ms. Warren

Mr. Neiman

Action Items for staff: None.

The meeting adjourned.

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on August 3, 2009, 4:00pm.

Agenda:
Questions for the Record
August Report Update
September Report Update
Transcripts/Minutes

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

The Chair moved that the Panel adopt a new rule of procedure dealing with public access to transcripts of public hearings and public meetings and the maintenance of minutes for internal deliberations of the Panel.

<u>Congressman Hensarling presented the following amendment in the nature of a substitute:</u>

"To make public an official transcript and official minutes of all Meetings of the Congressional Oversight Panel, including those taking place by telephone, within twenty business days of the conclusion of each meeting. At any given time, if certain portions of the meeting are considered to be of a confidential nature, the Panel can move into Executive Session by a simple majority vote, in which case such portions will not be recorded or included in an official transcript or official minutes."

<u>Congressman Hensarling's amendment failed.</u>

The following Panel members voted in the affirmative on the amendment:

Rep. Hensarling

Sen. Sununu

The following Panel members voted in the negative:

Mr. Silvers

Mr. Neiman

Ms. Warren

<u>The Panel then voted on the following proposal from the Chair:</u>

"The Panel shall maintain transcripts of its public hearings and public meetings. All public hearing and public meeting transcripts will be made available to members and the public as soon as practicable.

Non-public Panel meetings constitute internal deliberations of the Panel. Panel staff shall prepare minutes of such deliberations, including those taking place by telephone. Such minutes shall, to the extent practicable, be prepared in accordance with the provisions of Robert's Rules of Order and shall be provided expeditiously to each Panel member. Panel members shall have three calendar days to review the draft minutes and advise the Executive Director of any proposed amendments the member believes are necessary to ensure that the minutes are accurate. If the Executive Director believes that a proposed amendment is inaccurate or for some other reason should not be included in the minutes, the Panel member proposing the amendment shall be notified. Once a final set of draft minutes has been prepared by the Executive Director, it shall be circulated to the Panel members for review. The adoption of the minutes shall be placed on the agenda for a vote at the next appropriate Panel meeting.

For those internal deliberations taking place prior to the adoption of this rule and for which no minutes currently exist, Panel staff, using all sources available, shall prepare minutes which shall be circulated to Panel members. Such minutes shall be reviewed and approved in accordance with the procedure described above.

Where unofficial transcripts of internal Panel deliberations exist, Panel members may review those transcripts at the Panel's offices. If, upon review of the unofficial transcripts, the member believes that some portion thereof is inaccurate, the member should notify the Panel's Executive Director. A Panel member reviewing the unofficial transcripts should take care to ensure that information pertaining to any individual or organization or to the exercise of the Panel's oversight responsibilities not be made public."

<u>The proposal was adopted.</u>

The following Panel members voted in the affirmative:

Mr. Silvers

Mr. Neiman

Ms. Warren

The following Panel members voted in the negative:

Rep. Hensarling

Sen. Sununu

Action Items for staff: None

The meeting adjourned at 4:45 pm.

Minutes approved

EWarren Chair Date 10/8/09

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on August 10, 2009, 12:45 pm.

Agenda:
Approval of August Report
Approval of Minutes of Panel meeting for August 3, 2009

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Hon. John Sununu

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

The Chair moved the adoption of the Panel's August Report.

The Report was adopted.

The following Panel members voted in the affirmative:

Mr. Silvers

Mr. Neiman

Sen. Sununu

Ms. Warren

The following Panel member voted in the negative:

Rep. Hensarling

Action Items for staff: None

The Chair asked for any amendments or objections to the adoption of the minutes of the Panel's meeting of August 3, 2009.

There being no amendments and no objection, the minutes of the Panel's August 3, 2009 meeting were approved.

The meeting adjourned at 12:53 pm.

Minutes approved

Chair Date 10/8/09

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on August 31, 2009, 4:03 pm.

Agenda:

Approval of Minutes for Panel Deliberations of August 10, 2009
September Report Update
Hearings Update
October Report Update

The Chair called the Panel to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Also in Attendance

Paul Atkins, Panel member designate

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

The Chair moved for approval of the minutes of the internal deliberations of August 10, 2009.

Mr. Neiman suggested that the minutes be amended to note that each Panel member thanked Senator Sununu for his service on the Panel. The Chair concurred.

Minutes were approved as amended.

Action Items for staff: None

The deliberations adjourned at 4:16 pm.

Chair Date 10/8/09

Minutes of the Congressional Oversight Panel

Meeting of the Congressional Oversight Panel occurred by telephone on September 8, 2009, 3:00 pm.

Agenda:

Approval of September Report

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Also in attendance:

Paul Atkins, Panel member designate

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

The Chair moved the adoption of the Panel's September Report.

The Report was adopted.

The following Panel members voted in the affirmative:

Mr. Neiman

Ms. Warren

The following Panel member voted in the negative:

Rep. Hensarling

Mr. Silvers did not participate in either the Panel deliberations or vote on the September Report. He asked to be recused from this matter because of his concern that a reasonable person could question his impartiality due to his employer, the AFL-CIO, taking a position with regard to TARP funding and AFL-CIO affiliate union members and retirees at General Motors and Chrysler.

Action Items for staff: Staff to provide information on outstanding data requests for Treasury Department prior to Thursday's hearing with Secretary Geithner.

The meeting adjourned at 3:08 pm.

Minutes approved

Chair   Date 10/8/09

Minutes of the Congressional Oversight Panel

Deliberations of the Congressional Oversight Panel occurred by telephone on September 14, 2009, 4:00 pm.

Agenda:

Approval of Minutes for Panel Deliberations of August 31, 2009 and Panel Meeting of September 8, 2009
October Report Update
November Report Update
Hearings Update

The Chair called the Panel to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Paul Atkins

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

Minutes of Panel deliberations of August 31, 2009 and September 8, 2009 were amended and approved.

Action Items for staff:

1. Staff to prepare "pre-outline" memorandum for member review in connection with November Report.
2. Staff to attempt to arrange for Herb Allison, Assistant Secretary for Financial Stability and Counselor to the Secretary, to appear at Panel's October Hearing and for a Treasury official with specific responsibilities related to home foreclosures to provide testimony at Panel's September Hearing in relation to that topic.

The meeting adjourned at 4:37 pm.

Minutes approved

Chair Date 10-8-09

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on September 21, 2009, 4:00 pm.

Agenda:

Approval of the Minutes of the September 14, 2009 Panel Deliberations

October Report

November Report

Hearings Update

The Chair called the Panel to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Paul Atkins

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

Minutes of the Panel deliberations of September 14, 2009 were approved.

Action Items for staff:

1. Staff to impress on Treasury the need for its witness to follow other Panels.
2. Staff to advise Mr. Neiman's office so he can assist in follow-up to secure witnesses from organizations which have not been willing to provide a representative.

The meeting adjourned at 4:37 pm.

Minutes approved

Chair   Date 10/8/09

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on September 29, 2009, 3:08 pm.

Agenda:

October Report Update

November Report Update

Hearings Update

The Chair called the deliberations to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

Staff Action Items: **Staff to send Panel outline for November Report on Wednesday, September 30.**

The deliberations adjourned at 3:38 pm.

Minutes approved

Chair Date 10/8/09

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on October 19, 2009, 4:05 pm.

Agenda:

Approval of the Minutes Panel Internal Deliberations of October 5, 2009 and Panel Meeting of October 8, 2009

Update on November Report

Update on December Report

Update on Hearings

The Chair called the Panel to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

The Chair moved for approval of the minutes of the internal deliberations of October 5, 2009 and the Panel meeting of October 8, 2009.

Minutes of both sessions were approved.

Action Items for staff:

1. Staff to prepare written questions for financial institutions and regulators to be answered in connection with November Report on government guarantee programs.
2. Staff to prepare and circulate to Panel members request for data and information sought from economists in relation to preparation of December Report.

The deliberations adjourned at 4:25 pm.

Chair   Date 1-13-10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on October 26, 2009, 4:00 pm.

Agenda:

Approval of Minutes for Panel Deliberations of October 19, 2009
Update on November Report
Update on December Report
Hearings Update

The Chair called the deliberations to order.

Panel Members Present

Elizabeth Warren, Chair

Richard Neiman

Paul Atkins

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

The Chair moved approval of the minutes of the internal deliberations of October 19, 2009.

Minutes were approved.

Action Items for staff: None

The deliberations adjourned at 4:20 pm.

[signature] Chair Date 1-13-10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on November 2, 2009, 4:05 pm.

Agenda:

Approval of Minutes for Panel Deliberations of October 26, 2009
Update on November Report
Update on December Report
Hearings Update

The Chair called the deliberations to order.

Panel Members Present

Elizabeth Warren, Chair

Richard Neiman

Paul Atkins

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

The Chair moved approval of the minutes of the internal deliberations of October 26, 2009.

Minutes were approved.

Action Items for staff: None

The deliberations adjourned at 4:22 pm.

________________ Chair   Date 1-13-10

Minutes of the Congressional Oversight Panel

Meeting of the Congressional Oversight Panel occurred by telephone on November 5, 2009, 2:45 pm.

Agenda:

Approval of November Report

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Paul Atkins

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

The Chair moved the adoption of the Panel's November Report.

The Report was adopted unanimously, all Panel members voting in the affirmative.

The meeting adjourned at 2:58 pm.

Minutes approved

Chair Date 1-13-10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on November 9, 2009, 3:00 pm.

Agenda:

Approval of Minutes for Panel Deliberations of November 2, 2009 and Meeting of November 5, 2009
Update on December Report
Hearings Update

The Chair called the deliberations to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Paul Atkins

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

The Chair moved approval of the minutes of the internal deliberations of November 2, 2009 and the meeting of November 5, 2009.

Minutes were approved.

Action Items for staff: None

The deliberations adjourned at 3: 15 pm.

Chair Date 1-13-10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on November 16, 2009, 3:04 pm.

Agenda:

Approval of Minutes for Panel Deliberations of November 9, 2009
Update on December Report
Update on January Report
Hearings Update

The Chair called the deliberations to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

The Chair moved approval of the minutes of the internal deliberations of November 9, 2009.

Minutes were approved.

Action Items for staff: Staff to prepare a brief analysis of which banks have not paid their CPP preferred dividends and reasons for non-payment.

The deliberations adjourned at 3:20 pm.

Chair Date 1-13-10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on November 23, 2009, 3:05 pm.

Agenda:

Approval of Minutes for Panel Deliberations of November 16, 2009
Update on December Report
Update on January Report
Update on Hearings

The Chair called the deliberations to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Paul Atkins

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

The Chair moved approval of the minutes of the internal deliberations of November 16, 2009.

Minutes were approved.

Action Items for staff: None

The deliberations adjourned at 3:23 pm.

______________ Chair   Date 1-13-10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on November 30, 2009, 3:05 pm.

Agenda:

Approval of Minutes for Panel Deliberations of November 23, 2009
Update on December Report
Update on January Report
Update on Hearings

The Chair called the deliberations to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Paul Atkins

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

The Chair moved approval of the minutes of the internal deliberations of November 23, 2009.

Minutes were approved.

Action Items for staff:

1. Staff to send Panel members answers from Treasury to questions for record from prior hearing as well as questions propounded to Treasury which have not yet been answered.

2. Staff to seek information from Treasury pertaining to efforts on mortgage mitigation.

The deliberations adjourned at 3:24 pm.

E Warren Chair Date 1-13-10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on December 7, 2009, 3:07 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of November 30, 2009
Update on December Report
Update on January Report
Update on Hearings

The Chair called the deliberations to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Paul Atkins

Others in attendance included staff from:

Congressional Oversight Panel

Representative Hensarling's Office

Mr. Neiman's Office

The Chair moved approval of the minutes of the internal deliberations of November 30, 2009.

Minutes were approved.

Action Items for staff: None

The deliberations adjourned at 3:36 pm.

Chair Date 1-13-10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on December 8, 2009, 11:36 am.

Agenda:

Approval of December Report

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Hon. Jeb Hensarling

Paul Atkins

The Chair moved the adoption of the Panel's December Report.

The Report was adopted.

The following Panel members voted in the affirmative:

Mr. Silvers

Mr. Neiman

Mr. Atkins

Ms. Warren

The following Panel member voted in the negative:

Rep. Hensarling

The meeting adjourned at 11:40 am.

Minutes approved

______ Chair Date 1-13-10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on December 14, 2009, 3:05 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of December 7, 2009
And Panel Meeting of December 8, 2009
Update on January Report
Update on February Report
Update on Hearings

The Chair called the deliberations to order.

Panel Members Present

Elizabeth Warren, Chair
Richard Neiman
Paul Atkins
Mark Mc Watters

Others in attendance included staff from:

Congressional Oversight Panel
Mr. Neiman's Office

The Chair moved approval of the minutes of the Panel internal deliberations of December 7, 2009 and the Panel meeting of December 8, 2009.

Minutes were approved.

Action Items for staff: None

The deliberations adjourned at 3:32 pm.

_______________ Chair   Date 1-13-10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on December 21, 2009, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of December 14, 2009

Update on January Report

Update on February Report

Update on Hearings

The Chair called the deliberations to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Paul Atkins

Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

Mr. Neiman's Office

The Chair moved approval of the minutes of the Panel internal deliberations of December 14, 2009.

Minutes were approved.

Action Items for staff:

Staff to contact Treasury and confirm details in the January report related to Citigroup.

Staff to prepare a memo detailing strategic options for a hearing with financial institutions.

The deliberations adjourned at 3:35 pm.

__________ Chair Date 1-13-10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on December 28, 2009, 3:05 pm.

Agenda:

Upcoming Hearings

The Chair called the deliberations to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Paul Atkins

Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

Mr. Neiman's Office

Action Items for staff: None.

The deliberations adjourned at 3:38 pm.

Chair Date 1-13-10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on January 4, 2010, 5:34 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of December 21 and December 28, 2009

Update on January Report

Update on February Report

Hearings Update

The Chair called the deliberations to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

Mr. Neiman's Office

The Chair moved to approve the minutes of the Panel internal deliberations of December 21 and December 28, 2009.

Minutes were approved.

Action Items for staff: None.

The deliberations adjourned at 5:50 pm.

Chair Date 1-13-10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on January 11, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of January 4, 2010

Update on January Report

Update on February Report

Update on March Report

Hearings Update

The Chair called the deliberations to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Paul Atkins

Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

Mr. Neiman's Office

The Chair moved to approve the minutes of the Panel internal deliberations of January 4, 2010.

Minutes were approved.

Action Items for staff:

Staff to discuss details for upcoming field hearing with Superintendent Neiman.

The deliberations adjourned at 3:20 pm.

______________ Chair

Date 1/19/10

Minutes of the Congressional Oversight Panel

Meeting of the Congressional Oversight Panel occurred by telephone on January 13, 2010, 10:05 am.

Agenda:

Approval of the January Report

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Paul Atkins

J. Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved the adoption of the Panel's January Report.

The Report was adopted.

The following members voted in the affirmative:

Ms. Warren

Mr. Silvers

Mr. Neiman

Mr. Atkins

Mr. McWatters

The meeting adjourned at 10:15 am.

Chair Date 1/19/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on January 19, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberation of January 11, 2010 and Panel Meeting of January 13, 2010

Update on February Report

Update on March Report

Hearings Update

The Chair called the deliberations to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Paul Atkins

Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

Mr. Neiman's Office

The Chair moved to approve the minutes of the Panel internal deliberations of January 11, 2010 and the Panel meeting of January 13, 2010.

Minutes were approved.

Action Items for staff:

Staff to prepare outline for March report on GMAC.

The deliberations adjourned at 3:20 pm.

[signature] Chair Date 1/25/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on January 25, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberation of January 19, 2010

Update on February Report

Update on March Report

Hearings Update

The Chair called the deliberations to order.

Panel Members Present

Elizabeth Warren, Chair

Richard Neiman

Paul Atkins

Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved to approve the minutes of the Panel internal deliberations of January 19, 2010.

Minutes were approved.

Action Items for staff: None.

The deliberations adjourned at 3:20 pm.

Chair Date 2/1/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on February 1, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberation of January 25, 2010

Update on February Report

Update on March Report

Hearings Update

The Chair called the deliberations to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silver

Richard Neiman

Paul Atkins

Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

Mr. Neiman's Office

The Chair moved to approve the minutes of the Panel internal deliberations of January 25, 2010.

Minutes were approved.

Action Items for staff:

Staff to send Panel members questions for Treasury regarding commercial real estate.

The deliberations adjourned at 3:20 pm.

Chair Date 2/8/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on February 8, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberation of February 1, 2010

Update on February Report

Update on March Report

Hearings Update

The Chair called the deliberations to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silver

Richard Neiman

Paul Atkins

Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

Mr. Neiman's Office

The Chair moved to approve the minutes of the Panel internal deliberations of February 1, 2010.

Minutes were approved.

Action Items for staff: None.

The deliberations adjourned at 3:30 pm.

Chair

Date 2/16/10

Minutes of the Congressional Oversight Panel

Meeting of the Congressional Oversight Panel occurred by telephone on February 10, 2010, 11:35 am.

Agenda:

Approval of the February Report

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Paul Atkins

J. Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved the adoption of the Panel's February Report.

The Report was adopted.

The following members voted in the affirmative:

Ms. Warren

Mr. Silvers

Mr. Neiman

Mr. Atkins

Mr. McWatters

The meeting adjourned at 11:45 am.

Ewan Chair Date 2/16/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on February 16, 2010, 4:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberation of February 8, 2010 and Panel Meeting of February 10, 2010

Update on March Report

Update on April Report

Hearings Update

The Chair called the deliberations to order.

Panel Members Present

Elizabeth Warren, Chair

Richard Neiman

Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

Mr. Neiman's Office

The Chair moved to approve the minutes of the Panel internal deliberations of February 8, 2010 and the Panel meeting of February 10, 2010.

<u>Minutes were approved.</u>

<u>Action Items for staff:</u> None.

<u>The deliberations adjourned at 4:12 pm.</u>

______________ Chair   Date 2/22/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on February 22, 2010, 2:30 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberation of February 16, 2010

Update on March Report

Update on April Report

Update on May Report

Hearings Update

The Chair called the deliberations to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved to approve the minutes of the Panel internal deliberations of February 16.

2010.

Minutes were approved.

Action Items for staff:

Staff to send briefing materials for upcoming hearings to Panel members.

The deliberations adjourned at 2:50 pm.

Eubaru Chair Date 3/1/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on March 1, 2010, 5:30 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberation of February 22, 2010

Update on March Report

Update on April Report

Hearings Update

The Chair called the deliberations to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved to approve the minutes of the Panel internal deliberations of February 22, 2010.

Minutes were approved.

Action Items for staff: None.

The deliberations adjourned at 5:42 pm.

______________ Chair   Date 3/8/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on March 8, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberation of March 1, 2010

Update on March Report

Update on April Report

Update on May Report

Hearings Update

The Chair called the deliberations to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved to approve the minutes of the Panel internal deliberations of March 1, 2010.

Minutes were approved.

Action Items for staff:

Staff and Panel members to collaborate on Questions for the Record for Herbert M. Allison, Jr. and Vikram Pandit.

The deliberations adjourned at 3:25 pm.

Chair Date 3/15/10

Minutes of the Congressional Oversight Panel

Meeting of the Congressional Oversight Panel occurred by telephone on March 10, 2010, 2:30 pm.

Agenda:

Approval of the March Report

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Richard Neiman

Paul Atkins

J. Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

Mr. Neiman's Office

The Chair moved the adoption of the Panel's March Report.

The Report was adopted.

The following members voted in the affirmative:

Ms. Warren

Mr. Neiman

Mr. Atkins

Mr. McWatters

The meeting adjourned at 2:50 pm.

Chair

Date 3/15/10

Minutes of the Congressional Oversight Panel

<u>Internal deliberations of the Congressional Oversight Panel occurred by telephone on March 15, 2010, 3:00 pm.</u>

<u>Agenda:</u>

Approval of Minutes for Panel Internal Deliberation of March 8, 2010 and Panel Meeting of March 10, 2010

Update on April Report

Update on May Report

<u>The Chair called the deliberations to order.</u>

<u>Panel Members Present</u>

Elizabeth Warren, Chair

Richard Neiman

Paul Atkins

J. Mark McWatters

<u>Others in attendance included staff from:</u>

Congressional Oversight Panel

Mr. Neiman's Office

<u>The Chair moved to approve the minutes of the Panel internal deliberations of March 8, 2010 and Panel meeting of March 10, 2010.</u>

Minutes were approved.

Action Items for staff: None.

The deliberations adjourned at 3:15 pm.

Chair Date 3/29/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on March 29, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberation of March 15, 2010

Update on April Report

Update on May Report

Update on June Report

Hearings Update

The Chair called the deliberations to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Paul Atkins

J. Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved to approve the minutes of the Panel internal deliberations of March 15, 2010.

Minutes were approved.

Action Items for staff: None.

The deliberations adjourned at 3:25 pm.

Chair Date 4/5/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on April 5, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberation of March 29, 2010

Update on April Report

Update on May Report

Update on June Report

Hearings Update

The Chair called the deliberations to order.

Panel Members Present

Elizabeth Warren, Chair

Richard Neiman

Paul Atkins

Others in attendance included staff from:

Congressional Oversight Panel

Richard Neiman's Office

The Chair moved to approve the minutes of the Panel internal deliberations of March 29, 2010.

Minutes were approved.

Action Items for staff:

Staff to circulate the SIGTARP report on AIG to Panel members.

Staff to circulate a memo and questions in advance of a meeting with Marshall Huebner on April 12.

The deliberations adjourned at 3:25 pm.

Chair

Date 4/19/10

Minutes of the Congressional Oversight Panel

Meeting of the Congressional Oversight Panel occurred by telephone on April 10, 2010, 11:00 am.

Agenda:

Approval of the April Report

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

J. Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved the adoption of the Panel's April Report.

The Report was adopted.

The following members voted in the affirmative:

Ms. Warren

Mr. Silvers

Mr. Neiman

The following Panel member voted in the negative:

Mr. McWatters

The meeting adjourned at 11:10am.

Chair　　　　Date 4/19/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on April 19, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of April 5, 2010 and Panel Meeting of April 13, 2010

Update on May Report

Update on June Report

Hearings Update

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Paul Atkins

J. Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

Mr. Neiman's Office

The Chair moved to approve the minutes of the Panel internal deliberations of April 5, 2010 and the Panel meeting of April 13, 2010.

Minutes were approved.

Action Items for staff:

Staff to follow up with Panel members on the status of witnesses for an upcoming hearing in Phoenix, Arizona.

The deliberations adjourned at 3:30 pm.

Chair Date 4/26/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on April 26, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of April 19, 2010

Update on May Report

Update on June Report

Hearings Update

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Others in attendance included staff from:

Congressional Oversight Panel

Mr. Neiman's Office

The Chair moved to approve the minutes of the Panel internal deliberations of April 19, 2010.

Minutes were approved.

Action Items for staff: None.

The deliberations adjourned at 3:20 pm.

Chair Date 5/3/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on May 3, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of April 26, 2010

Update on May Report

Update on June Report

Hearings Update

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

Mr. Neiman's Office

The Chair moved to approve the minutes of the Panel internal deliberations of April 26, 2010.

<u>Minutes were approved.</u>

<u>Action Items for staff:</u> None.

<u>The deliberations adjourned at 3:15 pm.</u>

Chair

Date 5/10/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on May 10, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of May 3, 2010

Update on May Report

Update on June Report

Hearings Update

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Richard Neiman

Paul Atkins

Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

Mr. Neiman's Office

The Chair moved to approve the minutes of the Panel internal deliberations of May 3, 2010.

Minutes were approved.

Action Items for staff: None.

The deliberations adjourned at 3:20 pm.

Chair

Date 5/17/10

Minutes of the Congressional Oversight Panel

Meeting of the Congressional Oversight Panel occurred by telephone on May 12, 2010, 11:45 am.

Agenda:

Approval of the May Report

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Paul Atkins

J. Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved the adoption of the Panel's May Report.

The Report was adopted.

The following members voted in the affirmative:

Ms. Warren

Mr. Silvers

Mr. Neiman

Mr. Atkins

Mr. McWatters

<u>The meeting adjourned at 11:55am.</u>

Chair   Date 5/17/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on May 17, 2010, 3:30 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of May 10, 2010 and Panel Meeting of May 12, 2010

Update on June Report

July Report Topic

Hearings Update

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Richard Neiman

Paul Atkins

Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

Mr. Neiman's Office

The Chair moved to approve the minutes of the Panel internal deliberations of May 10, 2010 and

Panel meeting of May 12, 2010.

Minutes were approved.

Action Items for staff:

Panel staff to circulate questions for potential witnesses at the Panel's next hearing.

The deliberations adjourned at 4:05 pm.

Chair

Date 5/24/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on May 24, 2010, 5:30 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of May 17, 2010

Update on June Report

Hearings Update

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Mark McWatters

Ken Troske

Others in attendance included staff from:

Congressional Oversight Panel

Mr. Neiman's Office

The Chair moved to approve the minutes of the Panel internal deliberations of May 17, 2010.

Minutes were approved.

Action Items for staff:

Staff to advise hearing witnesses that outstanding document requests will be raised at the Panel's May 26 hearing.

The deliberations adjourned at 6:15 pm.

Chair   Date 6/1/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on June 1, 2010, 12:30 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of May 24, 2010

Report on staff meeting with Financial Stability Oversight Board staff

Update on July Report

Update on June Report

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Mark McWatters

Ken Troske

Others in attendance included staff from:

Congressional Oversight Panel

Mr. Neiman's Office

The Chair moved to approve the minutes of the Panel internal deliberations of May 24, 2010.

Minutes were approved.

Action Items for staff:

Staff to convey the Panel's view on the importance of data related to business lending, housing, and toxic assets to Financial Stability Oversight Board staff.

The deliberations adjourned at 1:05 pm.

Chair   Date 6/7/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on June 7, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of June 1, 2010

Update on June Report

Update on July Report

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Richard Neiman

Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

Mr. Neiman's Office

The Chair moved to approve the minutes of the Panel internal deliberations of June 1, 2010.

Minutes were approved.

Action Items for staff: None.

The deliberations adjourned at 3:15 pm.

[signature] Chair Date 6/14/10

Minutes of the Congressional Oversight Panel

Meeting of the Congressional Oversight Panel occurred by telephone on June 9, 2010, 2:00 pm.

Agenda:

Approval of the June Report

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

J. Mark McWatters

Ken Troske

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved the adoption of the Panel's June Report.

The Report was adopted.

The following members voted in the affirmative:

Ms. Warren

Mr. Silvers

Mr. McWatters

Mr. Troske

Mr. Neiman did not participate in either the Panel deliberations or the vote on the June report. He asked to be recused from this matter due to his service as New York State's Superintendent of Banks.

<u>The meeting adjourned at 2:15pm.</u>

______________________ Chair Date 6/14/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on June 14, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of June 7, 2010 and Panel Meeting of June 9, 2010

Update on July Report

August Report

Hearing Update

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Mark McWatters

Kenneth Troske

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved to approve the minutes of the Panel internal deliberations of June 7, 2010 and the Panel meeting of June 9, 2010.

Minutes were approved.

Action Items for staff:

Staff to examine Harvard Business School working paper on TARP funding.

The deliberations adjourned at 3:15 pm.

Chair

Date 6/21/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on June 21, 2010, 11:00 am.

Agenda:

Approval of Minutes for Panel Internal Deliberations of June 14, 2010

Update on July Report

Update on August Report

Update on Documents

Hearing Update

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Richard Neiman

Mark McWatters

Kenneth Troske

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved to approve the minutes of the Panel internal deliberations of June 14, 2010.

Minutes were approved.

Action Items for staff: None.

The deliberations adjourned at 11:15 am.

Chair

Date 6/28/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on June 28, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of June 21, 2010

Update on July Report

Update on August Report

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Mark McWatters

Kenneth Troske

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved to approve the minutes of the Panel internal deliberations of June 21, 2010.

Minutes were approved.

<u>Action Items for staff:</u> None.

<u>The deliberations adjourned at 3:15 pm.</u>

Chair

Date 7/6/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on July 6, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of June 28, 2010

Update on July Report

Update on August Report

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Kenneth Troske

Others in attendance included staff from:

Congressional Oversight Panel

Richard Neiman's Office

The Chair moved to approve the minutes of the Panel internal deliberations of June 28, 2010.

Minutes were approved.

<u>Action Items for staff:</u> **None.**

<u>The deliberations adjourned at 3:30 pm.</u>

______________________ Chair Date 7/12/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on July 12, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of July 6, 2010

Update on July Report

Update on August Report

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

Kenneth Troske

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved to approve the minutes of the Panel internal deliberations of July 6, 2010.

Minutes were approved.

Action Items for staff: None.

The deliberations adjourned at 3:15 pm.

Ewban ______ Chair

Date 7/19/10

Minutes of the Congressional Oversight Panel

Meeting of the Congressional Oversight Panel occurred by telephone on July 13, 2010, 11:30 am.

Agenda:

Approval of the July Report

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

J. Mark McWatters

Ken Troske

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved the adoption of the Panel's July Report.

The Report was adopted.

The following members voted in the affirmative:

Ms. Warren

Mr. Silvers

Mr. Neiman

Mr. McWatters

Mr. Troske

The meeting adjourned at 11:40 pm.

Chair Date 7/19/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on July 19, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of July 12, 2010 and Panel Meeting of July 14, 2010

Update on August Report

Update on September Report

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

J. Mark McWatters

Kenneth Troske

Others in attendance included staff from:

Congressional Oversight Panel

Mr. Neiman's Office

The Chair moved to approve the minutes of the Panel internal deliberations of June 12, 2010 and the panel meeting of July 14, 2010.

Minutes were approved.

Action Items for staff: None.

The deliberations adjourned at 3:15 pm.

[signature] Chair Date 7/26/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on July 26, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of July 19, 2010

Update on August Report

Update on September Report

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

J. Mark McWatters

Kenneth Troske

Others in attendance included staff from:

Congressional Oversight Panel

Mr. Neiman's Office

The Chair moved to approve the minutes of the Panel internal deliberations of June 19, 2010.

Minutes were approved.

Action Items for staff: None.

The deliberations adjourned at 3:15 pm.

[signature] Chair

Date 8/2/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on August 2, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of July 26, 2010

Update on August Report

Update on September Report

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

J. Mark McWatters

Kenneth Troske

Others in attendance included staff from:

Congressional Oversight Panel

Mr. Neiman's Office

The Chair moved to approve the minutes of the Panel internal deliberations of June 26, 2010.

Minutes were approved.

Action Items for staff:

Staff to circulate a revised version of the August report appendix and conclusion prior to the release of the final draft.

The deliberations adjourned at 3:05 pm.

Chair

Date 8/10/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on August 10, 2010, 10:30 am.

Agenda:

Approval of Minutes for Panel Internal Deliberations of August 2, 2010

Update on August Report

Update on September Report

Update on Hearings

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

J. Mark McWatters

Kenneth Troske

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved to approve the minutes of the Panel internal deliberations of August 2, 2010.

Minutes were approved.

Action Items for staff: None.

The deliberations adjourned at 11:00 am.

Chair   Date 8/16/10

Minutes of the Congressional Oversight Panel

Meeting of the Congressional Oversight Panel occurred by telephone on August 11, 2010, 12:00 pm.

Agenda:

Approval of the August Report

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

J. Mark McWatters

Ken Troske

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved the adoption of the Panel's August Report.

The Report was adopted.

The following members voted in the affirmative:

Ms. Warren

Mr. Silvers

Mr. Neiman

Mr. McWatters

Mr. Troske

The meeting adjourned at 12:15 pm.

Chair Date 8/16/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on August 16, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of August 10, 2010

Update on September Report

Update on October Report

Update on Hearings

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

J. Mark McWatters

Kenneth Troske

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved to approve the minutes of the Panel internal deliberations of August 10, 2010.

Minutes were approved.

Action Items for staff:

--Begin reaching out to noted economists for the September Report

--Develop and circulate questions to pose to economists for the September Report

The deliberations adjourned at 3:30 pm.

Chair Date 8/23/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on August 23, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of August 16, 2010

Update on September Report

Update on October Report

Update on Hearings

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Richard Neiman

J. Mark McWatters

Kenneth Troske

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved to approve the minutes of the Panel internal deliberations of August 16, 2010.

Minutes were approved.

Action Items for staff:

--Staff to circulate additional section of the September report prior to the final draft

The deliberations adjourned at 3:10 pm.

______________________ **Chair** **Date** 8/31/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on August 31, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of August 23, 2010

Update on September Report

Update on October Report

Update on Hearings

The Chair called the meeting to order.

Panel Members Present

Elizabeth Warren, Chair

Damon Silvers

Richard Neiman

J. Mark McWatters

Kenneth Troske

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved to approve the minutes of the Panel internal deliberations of August 23, 2010.

<u>Minutes were approved.</u>

<u>Action Items for staff:</u> None.

<u>The deliberations adjourned at 3:40 pm.</u>

______________ Chair   Date 3/23/11

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on September 7, 2010, 3:30 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of August 31, 2010

Update on September Report

Update on October Report

Update on Hearings

Mr. Silvers called the meeting to order.

Panel Members Present

Damon Silvers

Richard Neiman

J. Mark McWatters

Kenneth Troske

Others in attendance included staff from:

Congressional Oversight Panel

Mr. Silvers moved to approve the minutes of the Panel internal deliberations of August 31, 2010.

Minutes were approved.

<u>Action Items for staff:</u> None.

<u>The deliberations adjourned at 3:45 pm.</u>

______________ <u>Chair</u>   <u>Date</u> 3/23/11

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on September 13, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of September 7, 2010

Update on September Report

Update on October Report

Update on Hearings

Mr. Silvers called the meeting to order.

Panel Members Present

Damon Silvers

J. Mark McWatters

Kenneth Troske

Others in attendance included staff from:

Congressional Oversight Panel

Mr. Neiman's Office

Mr. Silvers moved to approve the minutes of the Panel internal deliberations of September 7, 2010.

Minutes were approved.

Action Items for staff:

Staff to provide Panel members with written questions prior to September 22 hearing.

The deliberations adjourned at 3:25 pm.

Chair Date 3/23/11

Minutes of the Congressional Oversight Panel

Meeting of the Congressional Oversight Panel occurred by telephone on September 15, 2010, 12:00 pm.

Agenda:

Approval of the September Report

Mr. Silvers called the meeting to order.

Panel Members Present

Damon Silvers

Richard Neiman

J. Mark McWatters

Ken Troske

Others in attendance included staff from:

Congressional Oversight Panel

Mr. Silvers moved the adoption of the Panel's September Report.

The Report was adopted.

The following members voted in the affirmative:

Mr. Silvers

Mr. Neiman

Mr. McWatters

Mr. Troske

<u>The meeting adjourned at 12:20 pm.</u>

______________________ Chair   Date 3/28/11

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on September 20, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of September 13, 2010 and Panel Meeting of September 15, 2010.

Update on October Report

Update on November Report

Update on Hearings

Mr. Silvers called the meeting to order.

Panel Members Present

Damon Silvers

J. Mark McWatters

Kenneth Troske

Others in attendance included staff from:

Congressional Oversight Panel

Mr. Neiman's Office

Mr. Silvers moved to approve the minutes of the Panel internal deliberations of September 13, 2010 and the Panel meeting of September 15, 2010.

Minutes were approved.

Action Items for staff: None.

The deliberations adjourned at 3:25 pm.

Chair Date 3/23/11

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on September 27, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of September 20, 2010

Update on the October Report

Update on the November Report

Update on Hearings

Mr. Silvers called the meeting to order.

Panel Members Present

Damon Silvers

Richard Neiman

J. Mark McWatters

Kenneth Troske

Others in attendance included staff from:

Congressional Oversight Panel

Mr. Neiman's Office

Mr. Silvers moved to approve the minutes of the Panel internal deliberations of September 20, 2010.

Minutes were approved.

Action Items for staff:

Staff to circulate background on potential witnesses prior to the next Panel deliberation.

The deliberations adjourned at 3:20 pm.

Chair Date 3/23/11

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on October 4 2010, 10:30 am.

Agenda:

Approval of Minutes for Panel Internal Deliberations of September 27, 2010

Election of Chair

Update on the October Report

Update on the November Report

Hearings Update

Mr. Silvers called the meeting to order.

Panel Members Present

Ted Kaufman

Damon Silvers

Richard Neiman

J. Mark McWatters

Kenneth Troske

Others in attendance included staff from:

Congressional Oversight Panel

Mr. Neiman's Office

Mr. Silvers moved to approve the minutes of the Panel internal deliberations of September 27, 2010.

Minutes were approved.

Mr. Silvers nominated Senator Kaufman to serve as chair of the Panel.

The nomination was agreed to unanimously.

Action Items for staff: None.

The deliberations adjourned at 10:50 am.

Chair Date 3/23/11

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on October 12 2010, 2:30 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of October 4, 2010

Update on the October Report

Update on the November Report

Update of Staff Call with SIGTARP and GAO

Hearings Update

The Chair called the meeting to order.

Panel Members Present

Ted Kaufman

Damon Silvers

Richard Neiman

J. Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

Mr. Neiman's Office

The Chair moved to approve the minutes of the Panel internal deliberations of October 4, 2010.

<u>Minutes were approved.</u>

<u>Action Items for staff:</u> None.

<u>The deliberations adjourned at 3:00pm.</u>

Ted Kempner
______________________ Chair   Date 10/18/10

Minutes of the Congressional Oversight Panel

Meeting of the Congressional Oversight Panel occurred by telephone on October 13, 2010, 11:45 am.

Agenda:

Approval of the October Report

The Chair called the meeting to order.

Panel Members Present

Ted Kaufman

Damon Silvers

Richard Neiman

J. Mark McWatters

Ken Troske

Others in attendance included staff from:

Congressional Oversight Panel

Mr. Kaufman's office

The Chair moved the adoption of the Panel's October Report.

The Report was adopted.

The following members voted in the affirmative:

Mr. Kaufman

Mr. Silvers

Mr. Neiman

Mr. McWatters

Mr. Troske

The meeting adjourned at 12:00 pm.

Ted Kaufman **Chair** **Date** 10/18/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on October 18 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of October 12, 2010 and Panel Meeting of October 13, 2010

Update on the November Report

Update on the December Report

Hearings Update

The Chair called the meeting to order.

Panel Members Present

Ted Kaufman

Damon Silvers

Richard Neiman

Ken Troske

J. Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

Senator Kaufman's Office

The Chair moved to approve the minutes of the Panel internal deliberations of October 12, 2010 and the Panel meeting of October 13, 2010.

Minutes were approved.

Action Items for staff:

Staff to circulate reference material regarding best practices for executive compensation prior to the Panel's hearing.

The deliberations adjourned at 3:30pm.

Ted Kaufman Chair Date 10/25/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on October 25 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of October 18, 2010

Update on the November Report

Update on the December Report

Update on the January Report

Hearings Update

The Chair called the meeting to order.

Panel Members Present

Ted Kaufman

Damon Silvers

Richard Neiman

Ken Troske

J. Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

Senator Kaufman's Office

Richard Neiman's Office

<u>The Chair moved to approve the minutes of the Panel internal deliberations of October 18, 2010.</u>

<u>Minutes were approved.</u>

<u>Action Items for staff:</u> None.

<u>The deliberations adjourned at 3:20pm.</u>

Ted Kempner Chair   Date 11/1/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on November 1 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of October 25, 2010

Update on the November Report

Update on the December Report

The Chair called the meeting to order.

Panel Members Present

Ted Kaufman

Damon Silvers

Richard Neiman

Ken Troske

J. Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

Senator Kaufman's Office

Richard Neiman's Office

The Chair moved to approve the minutes of the Panel internal deliberations of October 25, 2010.

Minutes were approved.

Action Items for staff:

Staff to arrange a Panel meeting with Treasury officials to discuss foreclosure irregularities and financial stability.

The deliberations adjourned at 3:30pm.

Ted Kaufman Chair Date 11/8/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on November 8, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of November 1, 2010

Update on the November Report

Update on the December Report

Update on Meeting Request with Treasury

The Chair called the meeting to order.

Panel Members Present

Ted Kaufman

Richard Neiman

Ken Troske

J. Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

Richard Neiman's Office

The Chair moved to approve the minutes of the Panel internal deliberations of November 1, 2010.

Minutes were approved.

Action Items for staff: None.

The deliberations adjourned at 3:25pm.

Ted Kempton Chair

Date 11/15/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on November 15, 2010, 10:15 am.

Agenda:

Approval of the November Report

Approval of Minutes for Panel Internal Deliberations of November 8, 2010

Update on the December Report

Update on the January Report

The Chair called the meeting to order.

Panel Members Present

Ted Kaufman

Damon Silvers

Richard Neiman

Ken Troske

J. Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved the adoption of the Panel's November Report.

The Report was adopted.

The following members voted in the affirmative:

Mr. Kaufman

Mr. Silvers

Mr. Neiman

Mr. McWatters

Mr. Troske

The Chair moved to approve the minutes of the Panel internal deliberations of November 8, 2010.

Minutes were approved.

Action Items for staff: None.

The deliberations adjourned at 10:30am.

Ted Kaufman Chair Date 11/29/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on November 29, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of November 15, 2010

Update on the December Report

Update on the January Report

The Chair called the meeting to order.

Panel Members Present

Ted Kaufman

Damon Silvers

Richard Neiman

Ken Troske

J. Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved to approve the minutes of the Panel internal deliberations of November 15, 2010.

Minutes were approved.

Action Items for staff: None.

The deliberations adjourned at 3:15 pm.

Ted Kempner Chair Date 12/6/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on December 6, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of November 29, 2010

Update on the December Report

Update on the January Report

Hearings Update

The Chair called the meeting to order.

Panel Members Present

Ted Kaufman

Damon Silvers

Richard Neiman

Ken Troske

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved to approve the minutes of the Panel internal deliberations of November 29, 2010.

Minutes were approved.

Action Items for staff: None.

The deliberations adjourned at 3:10 pm.

Ted Kempton Chair Date 12/13/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on December 13, 2010, 10:45 am.

Agenda:

Approval of the December Report

Approval of Minutes for Panel Internal Deliberations of December 6, 2010

Update on the December Report

Update on the January Report

Hearings Update

The Chair called the meeting to order.

Panel Members Present

Ted Kaufman

Damon Silvers

Richard Neiman

Ken Troske

J. Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved the adoption of the Panel's December Report.

The Report was adopted.

The following members voted in the affirmative:

Mr. Kaufman

Mr. Silvers

Mr. Neiman

Mr. Troske

Mr. McWatters

The Chair moved to approve the minutes of the Panel internal deliberations of December 6, 2010.

Minutes were approved.

Action Items for staff: None.

The deliberations adjourned at 11:00 am.

Ted Kaufman Chair

Date 12/13/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on December 13, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of December 13, 2010

Update on the December Report

Update on the January Report

Hearings Update

The Chair called the meeting to order.

Panel Members Present

Ted Kaufman

Damon Silvers

Richard Neiman

Ken Troske

J. Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved to approve the minutes of the Panel internal deliberations of December 13, 2010.

Minutes were approved.

Action Items for staff: None.

The deliberations adjourned at 3:15 pm.

Ted Kempton Chair   Date 12/20/10

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on December 20, 2010, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of December 13, 2010

Update on the January Report

Hearings Update

The Chair called the meeting to order.

Panel Members Present

Ted Kaufman

Damon Silvers

Richard Neiman

Ken Troske

J. Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved to approve the minutes of the Panel internal deliberations of December 13, 2010.

<u>Minutes were approved.</u>

<u>Action Items for staff:</u> None.

<u>The deliberations adjourned at 3:15 pm.</u>

Ted Kempner Chair

Date 1/3/11

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on January 3, 2011, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of December 20, 2010

Update on the January Report

Update on the February Report

Hearings Update

The Chair called the meeting to order.

Panel Members Present

Ted Kaufman

Damon Silvers

Richard Neiman

Ken Troske

J. Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved to approve the minutes of the Panel internal deliberations of December 20, 2010.

Minutes were approved.

Action Items for staff: None.

The deliberations adjourned at 3:15 pm.

Ted Kempner Chair   Date 1/10/11

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on January 10, 2011, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of January 3, 2011

Update on the January Report

Update on the February Report

Update on the March Report

Hearings Update

The Chair called the meeting to order.

Panel Members Present

Ted Kaufman

Richard Neiman

Ken Troske

J. Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved to approve the minutes of the Panel internal deliberations of January 3, 2011.

Minutes were approved.

Action Items for staff:

Panel staff to discuss the use of protected information with Treasury staff.

The deliberations adjourned at 3:15 pm.

Ted Kaufman Chair Date 1/18/11

Minutes of the Congressional Oversight Panel

Meeting of the Congressional Oversight Panel occurred by telephone on January 12, 2011, 11:00 am.

Agenda:

Approval of the January Report

The Chair called the meeting to order.

Panel Members Present

Ted Kaufman

Richard Neiman

J. Mark McWatters

Ken Troske

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved the adoption of the Panel's January Report.

The Report was adopted.

The following members voted in the affirmative:

Mr. Kaufman

Mr. Neiman

Mr. McWatters

Mr. Troske

The meeting adjourned at 11:05 am.

Ted Kaufman Chair

Date 1/18/11

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on January 18, 2011, 5:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of January 10, 2011 and Panel Meeting of January 12, 2011

Update on the February Report

Update on the March Report

Hearings Update

The Chair called the meeting to order.

Panel Members Present

Ted Kaufman

Richard Neiman

Ken Troske

J. Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved to approve the minutes of the Panel internal deliberations of January 10, 2011 and the Panel meeting of January 12, 2011.

Minutes were approved.

Action Items for staff: None.

The deliberations adjourned at 5:15 pm.

Ted Kempner ______________ Chair   Date · 1/31/11 ______________

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on January 31, 2011, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of January 18, 2011

Update on the February Report

Update on the March Report

Hearings Update

The Chair called the meeting to order.

Panel Members Present

Ted Kaufman

Richard Neiman

Damon Silvers

Ken Troske

J. Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved to approve the minutes of the Panel internal deliberations of January 18, 2011.

Minutes were approved.

Action Items for staff: None.

The deliberations adjourned at 3:15 pm.

Ted Kempner Chair Date 2/7/11

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on February 7, 2011, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of January 31, 2011

Update on the February Report

Update on the March Report

Hearings Update

The Chair called the meeting to order.

Panel Members Present

Ted Kaufman

Richard Neiman

Damon Silvers

Ken Troske

J. Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved to approve the minutes of the Panel internal deliberations of January 31, 2011.

Minutes were approved.

<u>Action Items for staff:</u>

Set up separate meetings with SIGTARP and GAO for Panel members on March 17th.

<u>The deliberations adjourned at 3:15 pm.</u>

Ted Kaufman Chair

Date 2/14/11

Minutes of the Congressional Oversight Panel

Meeting of the Congressional Oversight Panel occurred by telephone on February 9, 2011, 9:15 am.

Agenda:

Approval of the February Report

The Chair called the meeting to order.

Panel Members Present

Ted Kaufman

Richard Neiman

J. Mark McWatters

Damon Silvers

Ken Troske

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved the adoption of the Panel's February Report.

The Report was adopted.

The following members voted in the affirmative:

Mr. Kaufman

Mr. Neiman

Mr. McWatters

Mr. Silvers

Mr. Troske

The meeting adjourned at 9:18 am.

Ted Kaufman **Chair** **Date** 2/14/11

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on February 14, 2011, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of February 7, 2011 and Panel Meeting of February 9, 2011.

Update on the March Report

Hearings Update

Treasury Website Changes

The Chair called the meeting to order.

Panel Members Present

Ted Kaufman

Richard Neiman

Damon Silvers

J. Mark McWatters

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved to approve the minutes of the Panel internal deliberations of February 7, 2011 and the Panel meeting of February 9, 2011.

Minutes were approved.

Action Items for staff: Draft letter regarding Treasury website changes.

The deliberations adjourned at 3:15 pm.

Ted Kaufman Chair Date 2/22/11

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on February 22, 2011, 5:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of February 14, 2011.

Update on the March Report

Hearings Update

The Chair called the meeting to order.

Panel Members Present

Ted Kaufman

Richard Neiman

Damon Silvers

J. Mark McWatters

Kenneth Troske

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved to approve the minutes of the Panel internal deliberations of February 14, 2011.

Minutes were approved.

Action Items for staff: none

The deliberations adjourned at 5:05 pm.

Ted Kempner Chair Date 2/28/11

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on February 28, 2011, 5:15 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of February 22, 2011.

Update on the March Report

Hearings Update

Panel Archiving

The Chair called the meeting to order.

Panel Members Present

Ted Kaufman

Richard Neiman

Damon Silvers

J. Mark McWatters

Kenneth Troske

Others in attendance included staff from:

Congressional Oversight Panel

Mr. Neiman's office

The Chair moved to approve the minutes of the Panel internal deliberations of February 22, 2011.

Minutes were approved.

The Chair moved to adopt the Panel's archiving plan.

The plan was adopted. .

The following members voted in the affirmative:

Mr. Kaufman

Mr. Neiman

Mr. McWatters

Mr. Silvers

Mr. Troske

Action Items for staff: none

The deliberations adjourned at 5:25 pm.

Ted Kaufman Chair   Date 3/7/11

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on March 7, 2011, 3:00 pm.

Agenda:

Approval of Minutes for Panel Internal Deliberations of February 28, 2011.

Update on the March Report

The Chair called the meeting to order.

Panel Members Present

Ted Kaufman

Richard Neiman

Damon Silvers

J. Mark McWatters

Kenneth Troske

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved to approve the minutes of the Panel internal deliberations of February 28, 2011.

Minutes were approved.

Action Items for staff: none

The deliberations adjourned at 3:15 pm.

Ted Kempner Chair Date 3/15/11

Minutes of the Congressional Oversight Panel

Meeting of the Congressional Oversight Panel occurred by telephone on March 15, 2011, 9:45 am.

Agenda:

Approval of the minutes

Approval of the March Report

Compilations

The Chair called the meeting to order.

Panel Members Present

Ted Kaufman

Richard Neiman

J. Mark McWatters

Damon Silvers

Ken Troske

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved to approve the minutes of the Panel internal deliberations of March 7, 2011.

Minutes were approved.

The Chair moved the adoption of the Panel's March Report.

The Report was adopted.

The following members voted in the affirmative:

Mr. Kaufman

Mr. Neiman

Mr. McWatters

Mr. Silvers

Mr. Troske

Action Items for staff: none

The meeting adjourned at 9:55 am.

Ted Kaufman Chair Date 3/30/11

Minutes of the Congressional Oversight Panel

Internal deliberations of the Congressional Oversight Panel occurred by telephone on March 30, 2011, 10:00 am.

Agenda:

Approval of Minutes for Panel meeting of March 15, 2011.

SIGTARP Request for Warrant Valuation Model

Update on Archiving

Website Update

Compilations Update

Letter to Senate Banking Committee and House Financial Services Committee

The Chair called the meeting to order.

Panel Members Present

Ted Kaufman

Richard Neiman

Damon Silvers

J. Mark McWatters

Kenneth Troske

Others in attendance included staff from:

Congressional Oversight Panel

The Chair moved to approve the minutes of the Panel meeting of March 15, 2011.

Minutes were approved.

Action Items for staff: Incorporate edits from Panel members for letter to Senate Banking and House Financial Services and then re-circulate letter to Panel members.

The deliberations adjourned at 10:15 am.

Ted Kaufman Chair

Date 4/1/11

RESPONSE TO WRITTEN QUESTIONS OF SENATOR SHELBY FROM TIMOTHY MASSAD

Q.1. How many mortgages do you expect to be successfully modified under TARP mortgage modification programs?

A.1. Your question asks about all TARP mortgage modification programs. As you know, Treasury has implemented a variety of different housing programs to help responsible homeowners avoid foreclosure and keep their homes. These programs are affected by many factors outside of Treasury's control, and some were launched only recently. As a result, we do not believe it is possible to provide a meaningful estimate of the total number of mortgages that will be modified under all of Treasury's housing programs. Nonetheless, I am happy to describe the various programs and the status of our respective efforts.

As an initial matter, the Making Home Affordable Program ("MHA") includes Treasury's most well-known program, the Home Affordable Modification Program ("HAMP"). As of the end of February 2011, over 630,000 permanent HAMP mortgage modifications had been completed; and, for the past 6 months, approximately 28,000 new permanent modifications were completed each month.

It is difficult to predict whether the general "run rate" for HAMP will continue, because it will depend upon numerous variables, including the overall state of the economy and the housing market, the performance of participating mortgage servicers, and the impact of any future changes to program terms and procedures. For example, if the economy continues to improve, we expect that the number of homeowners delinquent on their mortgages will decline. This in turn will decrease the pool of eligible homeowners, which may result in a lower number of additional permanent modifications. On the other hand, if servicers improve their performance—particularly in soliciting and promptly evaluating homeowners—the overall number of permanent HAMP modifications could increase. Treasury is trying to encourage such improvements by making certain changes to the program, such as mandating that all HAMP servicers adopt a single point of contact model.

Despite these uncertainties, if one assumes that the recent HAMP "run rate" continues until the end of the program in 2012, the total number of additional permanent modifications using simple math would equal about 500,000, resulting in approximately 1 million permanent modifications for the program. Again, this is not a prediction or an official Treasury estimate, because we cannot predict whether the run rate will continue for the reasons noted above.

MHA includes not only HAMP, but also the Second Lien Modification Program, the Home Affordable Foreclosures Alternative Program, and the Home Affordable Unemployment Program. These programs provide additional assistance to homeowners and should be included in any overall measurement of how many homeowners are assisted by TARP housing programs. However, these programs were implemented more recently, and we do not have sufficient data to estimate their future run rates.

In addition to MHA, Treasury's TARP housing programs also include the Hardest Hit Fund and the Federal Housing Administration ("FHA") Short Refinance Program. The Hardest Hit Fund provides assistance to 18 States and the District of Columbia to support programs designed to help homeowners in the States hit hardest by the housing crisis. State housing finance agencies administer these programs, and each agency has estimated the maximum number of people that could receive assistance under that State's Hardest Hit Fund programs. Treasury has published these plans on *FinancialStability.gov.* The FHA Short Refinance Program is administered by the FHA and provides incentives to refinance underwater mortgages. As with some of the MHA programs, however, it is still in the early stages of implementation and it is difficult to estimate how many homeowners it ultimately will help. Our goal for all these program has been—and continues to be—to help as many struggling, responsible homeowners as possible.

In evaluating Treasury's housing programs, it is important to emphasize two final points. First, taxpayer dollars are spent only for success—*i.e.,* for permanent modifications, as long as homeowners continue to make their monthly payments, and for other successful forms of homeowner assistance. Treasury provides cost data on all of its TARP housing programs in a monthly report to Congress, which is available on *FinancialStability.gov.* Second, Treasury's housing programs have helped to create new industry-wide standards for how mortgage servicers evaluate and assist struggling homeowners. These new standards have led the industry to modify the mortgages of about two million additional homeowners, at no cost to taxpayers.

Q.2. The SIGTARP's most recent quarterly report discussed how Treasury may attempt to move some of these banks off the TARP books and into the Small Business Lending Fund. Will Treasury follow all of the SIGTARP's recommendations with respect to moving financial institutions out of TARP and into the Small Business Lending Fund? If not, why not?

A.2. As you know, Treasury's Small Business Lending Fund ("SBLF") is not a TARP program, and the Office of Financial Stability is not responsible for standing up or implementing the SBLF. Nonetheless, I am generally familiar with the program, especially as it relates to institutions that received TARP funding.

The SBLF is a $30 billion fund created by Congress that encourages lending to small businesses by providing capital to qualified community banks with assets of less than $10 billion. The Small Business Jobs Act of 2010, which created the SBLF, expressly directs Treasury to allow TARP recipients to participate:

> The Secretary shall . . . issue regulations and other guidance to permit eligible institutions to refinance securities issued to Treasury under [TARP programs] for securities to be issued under the Program.

To receive SBLF funds, TARP recipients must satisfy all of the eligibility criteria that apply to non-TARP recipients. Moreover, Treasury has established various additional requirements that apply only to TARP recipients. For example, TARP recipients will be eligible for SBLF only if they have satisfied their existing TARP obligations, and they will be subject to a special "lending incentive fee" if they fail to increase their small business lending. Treasury will break out and report separately any TARP investments repaid using SBLF funds.

In response to your specific question, SIGTARP made one new recommendation regarding SBLF in its January 2011 *Quarterly Report*. Treasury has agreed to adopt this recommendation and already has begun providing SIGTARP with the names of institutions that participated in TARP programs and have applied for SBLF funding. SIGTARP previously made three other recommendations regarding SBLF. Treasury responded to these recommendations in a detailed letter dated January 18, 2011, which is included in SIGTARP's January 2011 *Quarterly Report*.

RESPONSE TO WRITTEN QUESTION OF SENATOR SHELBY FROM NEIL BAROFSKY

Q.1. Did you ask the Treasury Department to submit a comprehensive analysis of its legal authority to bail out automobile companies with TARP funds? If so, please provide any analysis you received.

A.1. We have not requested a comprehensive analysis of the Treasury Department's legal authority to use TARP funds to bail out automobile companies. SIGTARP's audit on Factors Affecting the Decisions of GM and Chrysler to Reduce Their Dealership Networks focused on the Treasury Auto Task Force's view about the need for GM and Chrysler to reduce their dealership networks rapidly, but did not focus on the Treasury Department's use of TARP funds for the auto manufacturers.

RESPONSE TO WRITTEN QUESTIONS OF SENATOR WICKER FROM NEIL BAROFSKY

Q.1. Last year, Speaker Boehner and I initiated an ongoing GAO audit into the treatment of Delphi employees. In specific, we asked GAO to investigate whether Delphi union members received preferential pension treatment over their non-union counterparts with TARP funds. I understand that the GAO is coordinating parts of their investigation with your office. Can you please tell me the status of the investigation and what you have learned thus far?

A.1. Under the Emergency Economic Stabilization Act of 2008 ("EESA"), SIGTARP is responsible for coordinating audits and oversight with other oversight entities to ensure that there is not a duplication of effort and that the full playing field is covered. Pursuant to that coordination, the oversight entities agreed that the Government Accountability Office ("GAO") would take the lead on pension issues, given its historical expertise. SIGTARP agreed, in coordination with GAO, to examine issues related to the "topping up" of the Delphi hourly retiree pension plans and announced the commencement of the audit in November 2010. Specifically, we are reviewing:

(1) Treasury's role in General Motors' ("GM") decision to top up the pension plan for hourly workers, and

(2) Whether the Administration or the Automotive Task Force pressured GM to provide additional funding for the plan.

We are still in the stages of collecting information and conducting interviews with various stakeholders, including the Treasury Department, the Pension Benefit Guaranty Corporation, GM, Delphi, the United Auto Workers ("UAW"), and other unions. We are not in a position currently to offer conclusions or findings at this time. We will be in a far better position to respond to your questions once the audit is further underway and will work with GAO in developing a coordinated response.

Q.2.–1. I understand that some unions had preexisting pension agreements with General Motors in the event of a Delphi bankruptcy. In essence, the agreements said that if the Delphi Corporation failed, GM would take over the pension obligations under certain conditions.

Would you agree that one of the largest expenses for GM is their pension obligations?

Q.2.–2. Would it make sense for a company restructuring itself through the bankruptcy process to restructure its pension obligations?

Q.3.–3. Are preexisting pension agreements routinely altered during bankruptcies?

A.2.1.–3. Pension obligations represent a large financial obligation for GM. In its most recent annual report, filed with the SEC on March 1, 2011, GM made cash contributions of $4.0 billion in December 2010 to its U.S. hourly and salaried pension plans, consisting of a $2.7 billion contribution to the hourly plan and a $1.3 billion contribution to the salaried plan. In January 2011, GM also contributed 61 million shares of its common stock to the U.S. hourly and salaried pension plans valued at $2.2 billion for funding purposes. (GM 10–K, p. 30). Overall, GM reported liabilities and equity from pensions and post-retirement benefits of $36.6 billion in 2009 and $31.8 billion in 2010. (GM 10–K, p. 80). GM's total liabilities in 2009 and 2010 were $107.3 billion and $101.7 billion, respectively. We are not in a position to offer conclusions or findings related to the structuring of pension obligations or pension agreements in bankruptcy generally. However, as we collect information from various stakeholders, we will be better able to answer these questions as they relate to GM's decision to "top up" the Delphi hourly retiree pension plan.

Q.3. Are there any indications that political considerations played a role in the Government protecting Delphi union pensions while their non-union counterparts lost nearly everything?

A.3. As part of our audit, we will review whether the Administration or the Automotive Task Force pressured GM to provide additional funding for the hourly workers' pension plan. However, we are not in a position currently to comment or to offer conclusions or findings on this objective. We will be in a better position to respond to your question once the audit is further underway.

RESPONSE TO WRITTEN QUESTIONS OF SENATOR SHELBY FROM THOMAS J. McCOOL

Q.1. Did you ask the Treasury Department to submit a comprehensive analysis of its legal authority to bail out automobile companies with TARP funds? If so, please provide any analysis you received.

A.1. The Treasury Department has in several instances provided a detailed analysis of its legal authority under the Emergency Economic Stabilization Act of 2008 (EESA) to use TARP funds to support the Automotive Industry Financing Program (AIFP), and GAO has obtained and examined these analyses as part of our continuing oversight responsibilities. In general, Treasury concluded that the loans provided to the automakers were authorized by EESA because they consisted of the "purchase" of "troubled assets from any financial institution." 12 U.S.C.§ 5211(a)(1). EESA broadly defines the term "troubled assets"[1] and the term includes any financial instrument whose purchase the Secretary of the Treasury, after consultation with the Chairman of the Federal Reserve Board, determines is "necessary to promote financial market stability," provided that the Secretary first transmits his determination in writing to appropriate congressional committees. 12 U.S.C. § 5202(9)(B). Treasury has noted its compliance with this consultation and reporting requirement; Former Treasury Secretary Paulson made such a determination for GM and Chrysler in December 2008 and transmitted his determination to Congress later that month. Treasury Secretary Geithner issued a second determination in April 2009. EESA also broadly defines "financial institution"[2] and lists traditional institutions such as banks and insurance companies as examples, but the term is expressly not limited to those examples: it also includes "any institution" established and regulated under Federal or State law that has "significant operations in the United States." Finally, Treasury has noted that its guidelines for the AIFP are consistent with the purposes of EESA: to "restore liquidity and stability to the financial system of the United States," and to ensure that the expenditure of taxpayer funds "protects home values, college funds, retirement accounts and life savings." 12 U.S.C. § 5201. *See, e.g.,* Statement of the United States of America Upon the Commencement of General Motors Corporation Chapter 11 Case, at 9–12 (December 19, 2008); *In re Chrysler LLC, 576 F. 3d 108, 121–22 (2d Cir. 2009), judgment vacated on other grounds as moot,* 130 S. Ct. 1015 (2009); Guidelines for Automotive Industry Financing Program (copies enclosed).

Q.2. Has Treasury prepared and provided to GAO internal metrics, benchmarks, or projections by which Treasury, GAO, and other outside observers can assess the HAMP program's effectiveness? What types of metrics, benchmarks, and projections would be useful for an objective assessment of HAMP's effectiveness?

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[1] ***"Troubled assets"*** is defined as "(A) residential or commercial mortgages or any securities, obligations, or other instruments that are based on or related to such mortgages, that in each case was originated or issued on or before March 14, 2008, the purchase of which the Secretary determines promotes financial market stability; and (B) ***any other financial instrument that the Secretary, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, determines the purchase of which is necessary to promote financial market stability, but only upon transmittal of such determination, in writing, to the appropriate committees of Congress." 12 U.S.C.*** § ***5202(9).***

[2] ***"Financial institution"*** is 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).

A.2. Treasury's lack of performance measures that can be used to assess HAMP's program effectiveness has been an issue that GAO has raised in our July 2009, June 2010, and March 2011 reports. Treasury reports some aspects of HAMP performance in its public monthly servicer performance reports, such as numbers of trial and permanent numbers made, redefaults of permanent modifications, and the median amount of payment reduction borrowers have received. However, Treasury has not provided GAO with benchmarks, or goals for these measures, nor has it provided performance measures or benchmarks for the more recently announced Making Home Affordable Programs such as the Second-Lien Modification Program, Home Affordable Foreclosure Alternatives, and the Principal Reduction Alternative. For example, Treasury has not established a goal for the total number of permanent HAMP first-lien modifications that it expects to be successfully completed under the program or the rate of redefault for loans that have been permanently modified that it would not find acceptable on a program or servicer-specific basis. According to Treasury, measures such as redefault rates for those with second-lien modifications would be evaluated once data are available, but Treasury has not provided GAO with goals for these measures. Treasury noted that the programs were launched under challenging circumstances, making it extremely difficult to predict how many homeowners will respond to servicer solicitations, provide requisition documentation, or accept the modification when offered. In addition, Treasury noted that if it focused only on numbers of borrowers in programs, there may be a misdirected incentive to get borrowers into programs at the expense of ensuring sustainable results for those borrowers. However, as we, the Congressional Oversight Panel, and Special Inspector General for the Troubled Assets Relief Program have previously noted, establishing key performance metrics and reporting on individual servicers' performance with respect to those metrics are critical to the transparency and accountability of HAMP. While we have not specified the measures and benchmarks Treasury should use to assess the effectiveness of HAMP, we noted in July 2009 that annual performance goals are the major means for gauging progress toward accomplishment of longer-term goals. We further noted that in developing performance measures, it will be important for Treasury to be able to evaluate HAMP's progress toward its goals, including preserving homeownership, and to define outcome measures that are objective, measurable, and reflective of the goals and mission of HAMP. In particular, it is important that Treasury establish performance measures that have numerical targets to allow for easier comparison with actual performance. As we noted in our June 2010 and March 2011 reports, without pre-established performance measures and goals, Treasury will not be able to effectively assess the outcomes of its Making Home Affordable programs or hold servicers accountable for their performance.

Guidelines
for
Automotive Industry Financing Program

Justification

The objective of this program is to prevent a significant disruption of the American automotive industry that poses a systemic risk to financial market stability and will have a negative effect on the real economy of the United States. The program will require steps be taken by participating firms to implement plans that achieve long-term viability.

Eligibility Considerations

The United States Department of the Treasury will determine eligibility of participants and allocation of resources under the Emergency Economic Stabilization Act (EESA) pursuant to the Program. Institutions will be considered for participation in the Automotive Industry Financing Program on a case-by-case basis. In determining whether an institution is eligible for participation, Treasury may consider, among other things:

1. The importance of the institution to production by, or financing of, the American automotive industry;
2. Whether a major disruption of the institution's operations would likely have a materially adverse effect on employment and thereby produce negative spillover effects on overall economic performance;
3. Whether the institution is sufficiently important to the nation's financial and economic system that a major disruption of its operations would, with a high probability, cause major disruptions to credit markets and significantly increase uncertainty or losses of confidence, thereby materially weakening overall economic performance; and
4. The extent and probability of the institution's ability to access alternative sources of capital and liquidity, whether from the private sector or other sources of U.S. government funds.

In making these judgments, Treasury will obtain and consider information from a variety of sources and will take into account recommendations received from regulatory bodies, as applicable, that could provide insight into the potential consequences of the failure of a particular institution.

Form, Terms, and Conditions of Treasury Investment

Treasury will determine the form, terms, and conditions of any investment made pursuant to this program on a case-by-case basis in accordance with the considerations mandated in EESA. Treasury may invest in any financial instrument, including debt, equity, or warrants, that the Secretary of the Treasury determines to be a troubled asset, after consultation with the Chairman of the Board of Governors of the Federal Reserve System and notice to Congress. Treasury will require any institution participating in this program to provide Treasury with warrants or alternative consideration, as necessary, to minimize the long-term costs and maximize the benefits to the taxpayers in accordance with EESA. Treasury will also require any institution participating in the program to adhere to rigorous executive compensation standards. In addition, Treasury will consider other measures, including limitations on the institution's expenditures, or other corporate governance requirements, to protect the taxpayers' interests.

These program guidelines are being published in accordance with the requirements of Section 101(d) of EESA.

576 F.3d 108, 62 Collier Bankr.Cas.2d 183, 51 Bankr.Ct.Dec. 254, 47 Employee Benefits Cas. 1513
(Cite as: 576 F.3d 108)

United States Court of Appeals,
Second Circuit.
IN RE CHRYSLER LLC, Debtor.
Indiana State Police Pension Trust, Indiana State Teachers Retirement Fund, and Indiana Major Moves Construction Fund, Objectors-Appellants,
The Ad Hoc Committee of Consumer-Victims of Chrysler LLC, Objector-Appellant,
William Lovitz, Farbod Nourian, Brian Catalon, Center for Auto Safety, Consumer Action, Consumers for Auto Reliability and Safety, National Association of Consumer Advocates, and Public Citizen, Objectors-Appellants,
Patricia Pascale, Objector-Appellant,
Chrysler LLC, aka Chrysler Aspen, aka Chrysler Town & Country, aka Chrysler 300, aka Chrysler Sebring, aka Chrysler PT Cruiser, aka Dodge, aka Dodge Avenger, aka Dodge Caliber, aka Dodge Challenger, aka Dodge Dakota, aka Dodge Durango, aka Dodge Grand Caravan, aka Dodge Journey, aka Dodge Nitro, aka Dodge Ram, aka Dodge Sprinter, aka Dodge Viper, aka Jeep, aka Jeep Commander, aka Jeep Compass, aka Jeep Grand Cherokee, aka Jeep Liberty, aka Jeep Patriot, aka Jeep Wrangler, aka Moper, aka Plymouth, aka Dodge Charger, Debtors-Appellees,
International Union, United Automobile, Aerospace, and Agricultural Implement Workers Union of America, AFL-CIO ("UAW"), Appellee,
Fiat S.P.A. and New Carco Acquisition LLC, Appellees,
Chrysler Financial Services Americas LLC, Appellee,
The Official Committee of Unsecured Creditors, Appellee,
United States of America, Appellee,
Export Development Canada, Appellee.[FN*]

FN* The Clerk of the Court is directed to amend the official caption as set forth above.

Docket No. 09-2311-bk.
Argued: June 5, 2009.
Decided: June 5, 2009.
Opinion filed: Aug. 5, 2009.

Background: Pension funds along with various tort claimants appealed from an order of the United States Bankruptcy Court for the Southern District of New York, Gonzalez, J., 405 B.R. 84, authorizing the sale of substantially all of debtor's auto-manufacturing assets to a newly created automobile manufacturer.

Holdings: The Court of Appeals, Dennis Jacobs, Chief Judge, held that:
(1) court's approval of sale was not an abuse of discretion;
(2) release of all liens on debtor's assets was not improper; and
(3) creditors lacked standing to challenge sale on ground that Secretary of the Treasury exceeded his statutory authority and violated the Constitution by using Troubled Asset Relief Program (TARP) money to finance the sale.

Affirmed.

West Headnotes

[1] Bankruptcy 51 3069

51 Bankruptcy
51IX Administration
51IX(B) Possession, Use, Sale, or Lease of Assets
51k3067 Sale or Assignment of Property
51k3069 k. Time for Sale; Emergency and Sale Outside Course of Business. Most Cited Cases

Sale of an asset of the debtor's estate outside the ordinary course of business is permissible if the judge determining the application expressly finds from the evidence that there is a good business reason to grant such an application. 11 U.S.C.A. § 363(b).

[2] Bankruptcy 51 3069

51 Bankruptcy
51IX Administration
51IX(B) Possession, Use, Sale, or Lease of Assets
51k3067 Sale or Assignment of Property
51k3069 k. Time for Sale; Emergency and Sale Outside Course of Business. Most Cited Cases

Bankruptcy court's approval of sale of substantially all of Chapter 11 debtor's auto-manufacturing assets to a newly created automobile manufacturer was not an abuse of discretion; the only possible alternative to the sale was an immediate liquidation that would yield far less for the estate and for the objectors, and it prevented further, unnecessary losses. 11 U.S.C.A. § 363(b).

[3] Bankruptcy 51 ⚷3073

51 Bankruptcy
51IX Administration
51IX(B) Possession, Use, Sale, or Lease of Assets
51k3067 Sale or Assignment of Property
51k3073 k. Adequate Protection; Sale Free of Liens. Most Cited Cases

Release of all liens on Chapter 11 debtor's assets pursuant to sale of substantially all of debtor's auto-manufacturing assets to a newly created automobile manufacturer was not improper since consent was validly provided by the collateral trustee, who had authority to act on behalf of all first-lien credit holders. 11 U.S.C.A. § 363(f)(2).

[4] Bankruptcy 51 ⚷3771

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3771 k. Right of Review and Persons Entitled; Parties; Waiver or Estoppel. Most Cited Cases

Creditors of Chapter 11 debtor lacked standing to challenge sale of substantially all of Chapter 11 debtor's auto-manufacturing assets to a newly created automobile manufacturer on ground that Secretary of the Treasury exceeded his statutory authority and violated the Constitution by using Troubled Asset Relief Program (TARP) money to finance the sale; release of collateral for fair, but less-than-hoped-for, value was not injury in fact sufficient to support standing, and trustee's consent to the sale on behalf of lenders could, in effect, bind all of the first-lien creditors. U.S.C.A. Const. Art. 3, § 2, cl. 1; Emergency Economic Stabilization Act of 2008, § 101(a)(1), 12 U.S.C.A. § 5211(a)(1).

[5] Bankruptcy 51 ⚷3073

51 Bankruptcy
51IX Administration
51IX(B) Possession, Use, Sale, or Lease of Assets
51k3067 Sale or Assignment of Property
51k3073 k. Adequate Protection; Sale Free of Liens. Most Cited Cases

Because product liability claims arose from Chapter 11 debtor's property, bankruptcy court was permitted to authorize the sale of substantially all of debtor's auto-manufacturing assets free and clear of claimants' interest in the property. 11 U.S.C.A. §§ 363(f), 1141(c).

[6] Bankruptcy 51 ⚷3070

51 Bankruptcy
51IX Administration
51IX(B) Possession, Use, Sale, or Lease of Assets
51k3067 Sale or Assignment of Property
51k3070 k. Order of Court and Proceedings Therefor in General. Most Cited Cases

Order approving sale of substantially all of Chapter 11 debtor's auto-manufacturing assets to a newly created automobile manufacturer did not violate Bankruptcy Code section providing a unique form of supplemental injunctive relief for an insolvent debtor confronting the particularized problems and complexities associated with asbestos liability; there was no plan of reorganization, bankruptcy court did not issue an injunction, and the debtor did not establish a trust subsuming its asbestos liability. 11 U.S.C.A. § 524(g).

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Before: JACOBS, Chief Judge, KEARSE and SACK, Circuit Judges.

DENNIS JACOBS, Chief Judge:

The Indiana State Police Pension Trust, the Indiana State Teachers Retirement Fund, and the Indiana Major Moves Construction Fund (collectively, the "Indiana Pensioners" or "Pensioners"), along with various tort claimants and others, appeal from an order entered in the United States Bankruptcy Court for the Southern District of New York, Arthur J. Gonzalez, *Bankruptcy Judge,* dated June 1, 2009 (the "Sale Order"), authorizing the sale of substantially all of the debtor's assets to New CarCo Acquisition LLC ("New Chrysler"). On June 2, 2009 we granted the Indiana Pensioners' motion for a stay and for expedited appeal directly to this Court, pursuant to 28 U.S.C. § 158(d)(2). On June 5, 2009 we heard oral argument, and ruled from the bench and by written order, affirming the Sale Order "for the reasons stated in the opinions of Bankruptcy Judge Gonzalez," stating that an opinion or opinions would follow. This is the opinion.

In a nutshell, Chrysler LLC and its related companies (hereinafter "Chrysler" or "debtor" or "Old Chrysler") filed a pre-packaged bankruptcy petition under Chapter 11 on April 30, 2009. The filing followed months in which Chrysler experienced deepening losses, received billions in bailout funds from the Federal Government, searched for a merger partner, unsuccessfully sought additional government bailout funds for a stand-alone restructuring, and ultimately settled on an asset-sale transaction pursuant to 11

U.S.C. § 363 (the "Sale"), which was approved by the Sale Order. The key elements of the Sale were set forth in a Master Transaction Agreement dated as of April 30, 2009: substantially all of Chrysler's operating assets (including manufacturing plants, ***112** brand names, certain dealer and supplier relationships, and much else) would be transferred to New Chrysler in exchange for New Chrysler's assumption of certain liabilities and $2 billion in cash. Fiat S.p.A agreed to provide New Chrysler with certain fuel-efficient vehicle platforms, access to its worldwide distribution system, and new management that is experienced in turning around a failing auto company. Financing for the sale transaction-$6 billion in senior secured financing, and debtor-in-possession financing for 60 days in the amount of $4.96 billion-would come from the United States Treasury and from Export Development Canada. The agreement describing the United States Treasury's commitment does not specify the source of the funds, but it is undisputed that prior funding came from the Troubled Asset Relief Program ("TARP"), 12 U.S.C. § 5211(a)(1), and that the parties expected the Sale to be financed through the use of TARP funds. Ownership of New Chrysler was to be distributed by membership interests, 55% of which go to an employee benefit entity created by the United Auto Workers union, 8% to the United States Treasury and 2% to Export Development Canada. Fiat, for its contributions, would immediately own 20% of the equity with rights to acquire more (up to 51%), contingent on payment in full of the debts owed to the United States Treasury and Export Development Canada.

At a hearing on May 5, 2009, the bankruptcy court approved the debtor's proposed bidding procedures. No other bids were forthcoming. From May 27 to May 29, the bankruptcy court held hearings on whether to approve the Sale. [FN1] Upon extensive findings of fact and conclusions of law, the bankruptcy court approved the Sale by order dated June 1, 2009.

> FN1. Twelve witnesses testified (either live or through depositions), and 48 exhibits were introduced.

After briefing and oral argument, we affirmed the bankruptcy court's order on June 5, but we entered a short stay pending Supreme Court review. The Supreme Court, after an extension of the stay, declined a further extension. The Sale closed on June 10, 2009.

The factual and procedural background is set out in useful detail in the opinions of Bankruptcy Judge Gonzalez. This opinion is confined to a discussion of the arguments made for vacatur or reversal. The Sale Order is challenged essentially on four grounds. First, it is contended that the sale of Chrysler's auto-manufacturing assets, considered together with the associated intellectual property and (selected) dealership contractual rights, so closely approximates a final plan of reorganization that it constitutes an impermissible "*sub rosa* plan," and therefore cannot be accomplished under § 363(b). We consider this question first, because a determination adverse to Chrysler would have required reversal. Second, we consider the argument by the Indiana Pensioners that the Sale impermissibly subordinates their interests as secured lenders and allows assets on which they have a lien to pass free of liens to other creditors and parties, in violation of § 363(f). We reject this argument on the ground that the secured lenders have consented to the Sale, as per § 363(f)(2). Third, the Indiana Pensioners challenge the constitutionality of the use of TARP funds to finance the Sale on a number of grounds, chiefly that the Secretary of the Treasury is using funds appropriated for relief of "financial institutions" to effect a bailout of an auto-manufacturer, and that this causes a constitutional injury to the ***113** Indiana Pensioners because the loss of their priorities in bankruptcy amounts to an economic injury that was caused or underwritten by TARP money. We conclude that the Indiana Pensioners lack standing to raise this challenge. Finally, we consider and reject the arguments advanced by present and future tort claimants.

DISCUSSION

We review a bankruptcy court's conclusions of law *de novo,* and its findings of fact under the clearly erroneous standard. *See Babitt v. Vebeliunas (In re Vebeliunas),* 332 F.3d 85, 90 (2d Cir.2003).

I

The Indiana Pensioners characterize the Sale as an impermissible, *sub rosa* plan of reorganization. *See Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (In re Braniff Airways, Inc.),* 700 F.2d 935, 940 (5th Cir.1983) (denying approval of an asset sale because the debtor "should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with a sale of assets"). As the Indiana Pensioners characterize it, the Sale transaction "is a 'Sale' in name only; upon consummation, new Chrysler will be old Chrysler in essentially every respect. It will be called 'Chrysler.' ... Its employees, including most management, will be retained.... It will manufacture and sell Chrysler and Dodge cars and minivans, Jeeps and Dodge Trucks.... The real substance of the transaction is the underlying reorganization it implements." Indiana Pensioners' Br. at 46 (citation omitted).

Section 363(b) of the Bankruptcy Code authorizes a Chapter 11 debtor-in-possession to use, sell, or lease estate property outside the ordinary course of business, requiring in most circumstances only that a movant provide notice and a hearing. 11 U.S.C. § 363(b).[FN2] We have identified an "apparent conflict" between the expedient of a § 363(b) sale and the otherwise applicable features and safeguards of Chapter 11.[FN3] *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2d Cir.1983); *cf. Braniff*, 700 F.2d at 940.

FN2. The section provides: "The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate ...." 11 U.S.C. § 363(b)(1).

FN3. Section 363(b) may apply to cases arising under Chapters 7, 11, 12, and 13 of the Bankruptcy Code. In this case, as in *Lionel*, we consider only its applicability in the context of Chapter 11 cases.

In *Lionel*, we consulted the history and purpose of § 363(b) to situate § 363(b) transactions within the overall structure of Chapter 11. The origin of § 363(b) is the Bankruptcy Act of 1867, which permitted a sale of a debtor's assets when the estate or any part thereof was "of a perishable nature or liable to deteriorate in value." *Lionel*, 722 F.2d at 1066 (citing Section 25 of the Bankruptcy Act of 1867, Act of March 2, 1867, 14 Stat. 517) (emphasis omitted). Typically, courts have approved § 363(b) sales to preserve " 'wasting asset[s].' " *Id.* at 1068 (quoting *Mintzer v. Joseph (In re Sire Plan, Inc.)*, 332 F.2d 497, 499 (2d Cir.1964)). Most early transactions concerned perishable commodities; but the same practical necessity has been recognized in contexts other than fruits and vegetables. "[T]here are times when it is more advantageous for the debtor to begin to sell as many assets as quickly as possible in order to insure that the assets do not lose value." ***114***Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, --- U.S. ----, 128 S.Ct. 2326, 2342, 171 L.Ed.2d 203 (2008) (Breyer, J., dissenting) (internal quotation marks omitted); *see also In re Pedlow*, 209 F. 841, 842 (2d Cir.1913) (upholding sale of a bankrupt's stock of handkerchiefs because the sale price was above the appraised value and "Christmas sales had commenced and ... the sale of handkerchiefs depreciates greatly after the holidays"). Thus, an automobile manufacturing business can be within the ambit of the "melting ice cube" theory of § 363(b). As *Lionel* recognized, the text of § 363(b) requires no "emergency" to justify approval. *Lionel*, 722 F.2d at 1069. For example, if "a good business opportunity [is] presently available," *id.*, which might soon disappear, quick action may be justified in order to increase (or maintain) the value of an asset to the estate, by means of a lease or sale of the assets. Accordingly, *Lionel* "reject[ed] the requirement that only an emergency permits the use of § 363(b)." *Id.* "[I]f a bankruptcy judge is to administer a business reorganization successfully under the Code, then ... some play for the operation of both § 363(b) and Chapter 11 must be allowed for." *Id.* at 1071.

At the same time, *Lionel* "reject[ed] the view that § 363(b) grants the bankruptcy judge *carte blanche*." *Id.* at 1069.[FN4] The concern was that a quick, plenary sale of assets outside the ordinary course of business risked circumventing key features of the Chapter 11 process, which afford debt and equity holders the opportunity to vote on a proposed plan of reorganization after receiving meaningful information. *See id.* at 1069-70. Pushed by a bullying creditor, a § 363(b) sale might evade such requirements as disclosure, solicitation, acceptance, and confirmation of a plan. *See* 11 U.S.C. §§ 1122-29. "[T]he natural tendency of a debtor in distress," as a Senate Judiciary Committee Report observed, is "to pacify large creditors with whom the debtor would expect to do business, at the expense of small and scattered public investors." *Lionel*, 722 F.2d at 1070 (quoting S.Rep. No. 95-989, 2d Sess., at 10 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5796 (internal quotation marks omitted)).

FN4. If unfettered use of § 363(b) had been intended, there would have been no need for the requirement of notice and hearing prior to approval.

To balance the competing concerns of efficiency against the safeguards of the Chapter 11 process, *Lionel* required a "good business reason" for a § 363(b) transaction [FN5]:

FN5. The *Lionel* standard has subsequently been adopted in sister Circuits. *See, e.g., Stephens Indus. v. McClung,* 789 F.2d 386, 389-90 (6th Cir.1986); *Inst. Creditors of Continental Air Lines, Inc. v. Continental Air Lines, Inc. (In re Continental Air Lines, Inc.),* 780 F.2d 1223, 1226 (5th Cir.1986).

> [A bankruptcy judge] should consider all salient factors pertaining to the proceeding and, accordingly, act to further the diverse interests of the debtor, creditors and equity holders, alike. [A bankruptcy judge] might, for example, look to such relevant factors as the proportionate value of the asset to the estate as a whole, the amount of elapsed time since the filing, the likelihood that a plan of reorganization will be proposed and confirmed in the near future, the effect of the proposed disposition on future plans of reorganization, the proceeds to be obtained from the disposition vis-a-vis any appraisals of the property, which of the alternatives of use, sale or lease the proposal envisions and, most importantly perhaps, whether the asset is increasing or decreasing in value. This list is not intended to be exclusive, but merely ***115** to provide guidance to the bankruptcy judge.

722 F.2d at 1071.

After weighing these considerations, the Court in *Lionel* reversed a bankruptcy court's approval of the sale of Lionel Corporation's equity stake in another corporation, Dale Electronics, Inc. ("Dale"). The Court relied heavily on testimony from Lionel's Chief Executive Officer, who conceded that it was "only at the insistence of the Creditors' Committee that Dale stock was being sold and that Lionel 'would very much like to retain its interest in Dale,' " *id.* at 1072, as well as on a financial expert's acknowledgment that the value of the Dale stock was not decreasing, *see id.* at 1071-72. Since the Dale stock was not a wasting asset, and the proffered justification for selling the stock was the desire of creditors, no sufficient business reasons existed for approving the sale.

In the twenty-five years since *Lionel,* § 363(b) asset sales have become common practice in large-scale corporate bankruptcies. *See, e.g.,* Robert E. Steinberg, *The Seven Deadly Sins in § 363 Sales,* Am. Bankr.Inst. J., June 2005, at 22, 22 ("Asset sales under § 363 of the Bankruptcy Code have become the preferred method of monetizing the assets of a debtor company."); Harvey R. Miller & Shai Y. Waisman, *Does Chapter 11 Reorganization Remain A Viable Option for Distressed Businesses for the Twenty-First Century?,* 78 Am. Bankr.L.J. 153, 194-96 (2004). A law review article recounts the phenomenon:

> Corporate reorganizations have all but disappeared.... TWA filed only to consummate the sale of its planes and landing gates to American Airlines. Enron's principal assets, including its trading operation and its most valuable pipelines, were sold within a few months of its bankruptcy petition. Within weeks of filing for Chapter 11, Budget sold most of its assets to the parent company of Avis. Similarly, Polaroid entered Chapter 11 and sold most of its assets to the private equity group at BankOne. Even when a large firm uses Chapter 11 as something other than a convenient auction block, its principal lenders are usually already in control and Chapter 11 merely puts in place a preexisting deal.

Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy,* 55 Stan. L.Rev. 751, 751-52 (2002) (internal footnotes omitted). In the current economic crisis of 2008-09, § 363(b) sales have become even more useful and customary.[FN6] The "side door" of § 363(b) may well "replace the main route of Chapter 11 reorganization plans." Jason Brege, Note, *An Efficiency Model of Section 363(b) Sales,* 92 Va. L.Rev. 1639, 1640 (2006).

FN6. For instance, Lehman Brothers sold substantially all its assets to Barclays Capital within five days of filing for bankruptcy. Lehman Brothers filed for bankruptcy in the early morning hours of September 15, 2008. On September 20, 2008, the bankruptcy court approved the sale to Barclays of Lehman's investment banking and capital markets operations, as well as supporting infra-

> structure including the Lehman headquarters in midtown Manhattan for $1.7 billion. *See Bay Harbour Mgmt., L.C v. Lehman Bros. Holdings Inc. (In re Lehman Bros. Holdings Inc.),* No. 08-cv-8869(DLC), 2009 WL 667301, at *8 (2009) (affirming the § 363(b) sale order).

Resort to § 363(b) has been driven by efficiency, from the perspectives of sellers and buyers alike. The speed of the process can maximize asset value by sale of the debtor's business as a going concern. Moreover, the assets are typically burnished (or "cleansed") because (with certain limited exceptions) they are sold free and clear of liens, claims and liabilities. *See infra* (discussing § 363(f) and tort issues).***116** A § 363 sale can often yield the highest price for the assets because the buyer can select the liabilities it will assume and purchase a business with cash flow (or the near prospect of it). Often, a secured creditor can "credit bid," or take an ownership interest in the company by bidding a reduction in the debt the company owes. *See* 11 U.S.C. § 363(k) (allowing a secured creditor to credit bid at a § 363(b) sale).

This tendency has its critics. *See, e.g.,* James H.M. Sprayregen et al., *Chapter 11: Not Perfect, but Better than the Alternative,* Am. Bankr. Inst. J., Oct. 2005, at 1, 60 (referencing those who "decr[y] the increasing frequency and rise in importance of § 363 sales"). The objections are not to the quantity or percentage of assets being sold: it has long been understood (by the drafters of the Code,[FN7] and the Supreme Court [FN8]) that § 363(b) sales may encompass all or substantially all of a debtor's assets. Rather, the thrust of criticism remains what it was in *Lionel:* fear that one class of creditors may strong-arm the debtor-in-possession, and bypass the requirements of Chapter 11 to cash out quickly at the expense of other stakeholders, in a proceeding that amounts to a reorganization in all but name, achieved by stealth and momentum. *See, e.g., Motorola, Inc. v. Official Comm. of Unsecured Creditors and JPMorgan Chase Bank, N.A. (In re Iridium Operating LLC),* 478 F.3d 452, 466 (2d Cir.2007) ("The reason *sub rosa* plans are prohibited is based on a fear that a debtor-in-possession will enter into transactions that will, in effect, short circuit the requirements of Chapter 11 for confirmation of a reorganization plan." (internal quotation marks and alteration omitted)); Brege, *An Efficiency Model of Section 363(b) Sales,* 92 Va. L.Rev. at 1643 ("The cynical perspective is that [§ 363(b)] serves as a loophole to the otherwise tightly arranged and efficient Chapter 11, through which agents of the debtor-in-possession can shirk responsibility and improperly dispose of assets."); *see also* Steinberg, *The Seven Deadly Sins in § 363 Sales,* Am. Bankr.Inst. J., at 22 ("Frequently, ... the § 363 sale process fails to maximize value....").

> FN7. As stated in *Lionel,* "[t]he Commission on the Bankruptcy Laws of the United States submitted a draft provision that would have permitted resort to section 363(b) in the absence of an emergency, even in the case of 'all or substantially all the property of the estate.' *See* Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, 93rd Cong., 1st Sess. (1973) at 239 (proposed § 7-205 and accompanying explanatory note). Congress eventually deleted this provision without explanation...." *Lionel,* 722 F.2d at 1069-70 n. 3.

> FN8. The Supreme Court has noted that § 363(b) is sometimes used to sell all or substantially all of a debtor's assets. In a footnote in *Florida Department of Revenue v. Piccadilly Cafeterias,* the Court wrote:
>
> > Chapter 11 bankruptcy proceedings ordinarily culminate in the confirmation of a reorganization plan. But in some cases, as here, a debtor sells all or substantially all its assets under § 363(b)(1) (2000 ed., Supp. V) before seeking or receiving plan confirmation. In this scenario, the debtor typically submits for confirmation a plan of liquidation (rather than a traditional plan of reorganization) providing for the distribution of the proceeds resulting from the sale.
>
> 128 S.Ct. at 2330 n. 2.

As § 363(b) sales proliferate, the competing concerns identified in *Lionel* have become harder to manage. Debtors need flexibility and speed to preserve going concern value; yet one or more classes of creditors should not be able to nullify Chapter 11's requirements. A balance is not easy to achieve, and is not aided by rigid rules and prescriptions. *Lionel's* multi-factor analysis remains the proper, ***117** most comprehensive framework for judging the validity of § 363(b) transactions.

Adopting the Fifth Circuit's wording in *Braniff*, 700 F.2d at 940, commentators and courts-including ours-have sometimes referred to improper § 363(b) transactions as "*sub rosa* plans of reorganization." *See, e.g., In re Iridium,* 478 F.3d at 466 ("The trustee is prohibited from such use, sale or lease if it would amount to a *sub rosa* plan of reorganization."). *Braniff* rejected a proposed transfer agreement in large part because the terms of the agreement specifically attempted to "dictat[e] some of the terms of any future reorganization plan. The [subsequent] reorganization plan would have to allocate the [proceeds of the sale] according to the terms of the [transfer] agreement or forfeit a valuable asset." 700 F.2d at 940. As the Fifth Circuit concluded, "[t]he debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with a sale of assets." *Id.*

The term "*sub rosa* " is something of a misnomer. It bespeaks a covert or secret activity, whereas secrecy has nothing to do with a § 363 transaction. Transactions blessed by the bankruptcy courts are openly presented, considered, approved, and implemented. *Braniff* seems to have used "*sub rosa* " to describe transactions that treat the requirements of the Bankruptcy Code as something to be evaded or subverted. But even in that sense, the term is unhelpful. The sale of assets is permissible under § 363(b); and it is elementary that the more assets sold that way, the less will be left for a plan of reorganization, or for liquidation. But the size of the transaction, and the residuum of corporate assets, is, under our precedent, just one consideration for the exercise of discretion by the bankruptcy judge(s), along with an open-ended list of other salient factors. *See Lionel,* 722 F.2d at 1071 (a bankruptcy judge should consider "such relevant factors as the proportionate value of the asset to the estate as a whole").

[1] *Braniff's* holding did not support the argument that a § 363(b) asset sale must be rejected simply because it is a sale of all or substantially all of a debtor's assets. Thus a § 363(b) sale may well be a reorganization in effect without being the kind of plan rejected in *Braniff*.[FN9] *See, e.g., Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.,* 128 S.Ct. at 2330 n. 2. Although *Lionel* did not involve a contention that the proposed sale was a *sub rosa* or *de facto* reorganization, a bankruptcy court confronted with that allegation may approve or disapprove a § 363(b) transfer that is a sale of all or substantially all of a debtor's assets, using the analysis set forth in *Lionel* in order to determine whether there was a good business reason for the sale. *See In re Iridium,* 478 F.3d at 466 & n. 21 ("The trustee is prohibited from such use, sale or lease if it would amount to a *sub rosa* plan of reorganization. In this Circuit, the sale of an asset of the estate under § 363(b) is permissible if the 'judge determining [the] § 363(b) application expressly find[s] from the evidence ***118** presented before [him or her] at the hearing [that there is] a good business reason to grant such an application.' " (citing *Lionel,* 722 F.2d at 1071)).

FN9. The transaction at hand is as good an illustration as any. "Old Chrysler" will simply transfer the $2 billion in proceeds to the first lien lenders, and then liquidate. The first lien lenders themselves will suffer a deficiency of some $4.9 billion, and everyone else will likely receive nothing from the liquidation. Thus the Sale has inevitable and enormous influence on any eventual plan of reorganization or liquidation. But it is not a "*sub rosa* plan" in the *Braniff* sense because it does not specifically "dictate," or "arrange" *ex ante,* by contract, the terms of any subsequent plan.

The Indiana Pensioners argue that the Sale is a *sub rosa* plan chiefly because it gives value to unsecured creditors (*i.e.,* in the form of the ownership interest in New Chrysler provided to the union benefit funds) without paying off secured debt in full, and without complying with the procedural requirements of Chapter 11. However, Bankruptcy Judge Gonzalez demonstrated proper solicitude for the priority between creditors and deemed it essential that the Sale in no way upset that priority. The lien holders' security interests would attach to all proceeds of the Sale: "Not one penny of value of the Debtors' assets is going to anyone other than the First-Lien Lenders." Opinion Granting Debtor's Motion Seeking Authority to Sell, May 31, 2009, ("Sale Opinion") at 18. As

Bankruptcy Judge Gonzalez found, all the equity stakes in New Chrysler were entirely attributable to *new* value-including governmental loans, new technology, and new management-which were not assets of the debtor's estate. *See, e.g., id.* at 22-23.

[2] The Indiana Pensioners' arguments boil down to the complaint that the Sale does not pass the discretionary, multifarious *Lionel* test. The bankruptcy court's findings constitute an adequate rebuttal. Applying the *Lionel* factors, Bankruptcy Judge Gonzalez found good business reasons for the Sale. The linchpin of his analysis was that the only possible alternative to the Sale was an immediate liquidation that would yield far less for the estate-and for the objectors. The court found that, notwithstanding Chrysler's prolonged and well-publicized efforts to find a strategic partner or buyer, no other proposals were forthcoming. In the months leading up to Chrysler's bankruptcy filing, and during the bankruptcy process itself, Chrysler executives circled the globe in search of a deal. But the Fiat transaction was the *only* offer available. Sale Opinion at 6; *see id.* at 16-17 ("Notwithstanding the highly publicized and extensive efforts that have been expended in the last two years to seek various alliances for Chrysler, the Fiat Transaction is the only option that is currently viable. The only other alternative is the immediate liquidation of the company.").[FN10]

FN10. The bankruptcy court noted that Chrysler had discussed potential alliances with General Motors, Fiat, Nissan, Hyundai-Kia, Toyota, Volkswagen, Tata Motors, GAZ Group, Magna International, Mitsubishi Motors, Honda, Beijing Automotive, Tempo International Group, Hawtai Automobiles, and Chery Automobile Co. Sale Opinion at 6.

The Sale would yield $2 billion. According to expert testimony [FN11]-not refuted by the objectors-an immediate liquidation of Chrysler as of May 20, 2009 would yield in the range of nothing to $800 million.[FN12] *Id.* ***119** at 19. Crucially, Fiat had conditioned its commitment on the Sale being completed by June 15, 2009. While this deadline was tight and seemingly arbitrary, there was little leverage to force an extension. To preserve resources, Chrysler factories had been shuttered, and the business was hemorrhaging cash. According to the bankruptcy court, Chrysler was losing going concern value of nearly $100 million each day. Sale Order at 7.

FN11. The Indiana Pensioners moved to strike the testimony of Chrysler's valuation witness because he has a financial interest in the outcome of the case: his firm would receive a transaction fee when the Sale was consummated. The bankruptcy court denied the motion on the grounds that such arrangements are typical; that the Indiana Pensioners did not object to the retention of the witness's firm; and that the witness's interest goes to weight of the evidence, not admissibility. Sale Opinion at 19 n. 17. The Indiana Pensioners have not persuaded us that the bankruptcy court abused its discretion. *See generally Gen. Elec. Co. v. Joiner,* 522 U.S. 136, 138-39, 141-43, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997); *Ball v. A.O. Smith Corp.,* 451 F.3d 66, 69 (2d Cir.2006) ("We review the bankruptcy court's evidentiary decisions for abuse of discretion.").

FN12. The expert's earlier estimates of liquidation value had been higher. For example, in early May 2009, the same expert opined that a liquidation might yield between nothing and $1.2 billion. But, from the beginning of May until the end, Chrysler expended $400 million in cash collateral. Sale Opinion at 19.

On this record, and in light of the arguments made by the parties, the bankruptcy court's approval of the Sale was no abuse of discretion. With its revenues sinking, its factories dark, and its massive debts growing, Chrysler fit the paradigm of the melting ice cube. Going concern value was being reduced each passing day that it produced no cars, yet was obliged to pay rents, overhead, and salaries. Consistent with an underlying purpose of the Bankruptcy Code-maximizing the value of the bankrupt estate-it was no abuse of discretion to determine that the Sale prevented further, unnecessary losses. *See Toibb v. Radloff,* 501 U.S. 157, 163, 111 S.Ct. 2197, 115 L.Ed.2d 145 (1991) (Chapter 11 "embodies the general [Bankruptcy] Code policy of maximizing the value of the bankruptcy estate.").

The Indiana Pensioners exaggerate the extent to which New Chrysler will emerge from the Sale as the twin of Old Chrysler. New Chrysler may manufacture the same lines of cars but it will also make newer, smaller vehicles using Fiat technology that will become available as a result of the Sale-moreover, at the time of the proceedings, Old Chrysler was manufacturing no cars at all. New Chrysler will be run by a new Chief Executive Officer, who has experience in turning around failing auto companies. It may retain many of the same employees, but they will be working under new union contracts that contain a six-year no-strike provision. New Chrysler will still sell cars in some of its old dealerships in the United States, but it will also have new access to Fiat dealerships in the European market. Such transformative use of old and new assets is precisely what one would expect from the § 363(b) sale of a going concern.

II

[3] The Indiana Pensioners next challenge the Sale Order's release of all liens on Chrysler's assets. In general, under § 363(f), assets sold pursuant to § 363(b) may be sold "free and clear of any interest" in the assets when, *inter alia,* the entity holding the interest consents to the sale. 11 U.S.C. § 363(f)(2). The bankruptcy court ruled that, although the Indiana Pensioners did not themselves consent to the release, consent was validly provided by the collateral trustee, who had authority to act on behalf of all first-lien credit holders.

We agree. Through a series of agreements, the Pensioners effectively ceded to an agent the power to consent to such a sale; the agent gave consent; and the Pensioners are bound. Accordingly, questions as to the status or preference of Chrysler's secured debt are simply not presented in this case.

The first-lien holders-among them, the Indiana Pensioners-arranged their investment in Chrysler by means of three related agreements: a First Lien Credit Agreement, a Collateral Trust Agreement, and a Form of Security Agreement. Together, these agreements create a framework for the control of collateral property. The collateral is held by a designated trustee***120** for the benefit of the various lenders (including the Indiana Pensioners). In the event of a bankruptcy, the trustee is empowered to take any action deemed necessary to protect, preserve, or realize upon the collateral. The trustee may only exercise this power at the direction of the lenders' agent; but the lenders are required to authorize the agent to act on their behalf, and any action the agent takes at the request of lenders holding a majority of Chrysler's debt is binding on all lenders, those who agree and those who do not.

When Chrysler went into bankruptcy, the trustee had power to take any action necessary to realize upon the collateral-including giving consent to the sale of the collateral free and clear of all interests under § 363. The trustee could take such action only at the direction of the lenders' agent, and the agent could only direct the trustee at the request of lenders holding a majority of Chrysler's debt. But if those conditions were met-as they were here-then under the terms of the various agreements, the minority lenders could not object to the trustee's actions since they had given their authorization in the first place.

The Indiana Pensioners argue that, by virtue of a subclause in one of the loan agreements, Chrysler required the Pensioners' written consent before selling the collateral assets. The clause in question provides that the loan documents themselves could not be amended without the written consent of *all* lenders if the amendment would result in the release of all, or substantially all, of the collateral property. This clause is no help to the Indiana Pensioners. The § 363(b) Sale did not entail amendment of any loan document. To the contrary, the § 363(b) sale was effected by implementing the clear terms of the loan agreements-specifically, the terms by which (1) the lenders assigned an agent to act on their behalf, (2) the agent was empowered, upon request from the majority lenders, to direct the trustee to act, and (3) the trustee was empowered, at the direction of the agent, to sell the collateral in the event of a bankruptcy. Because the Sale required no amendment to the loan documents, Chrysler was not required to seek, let alone receive, the Pensioners' written consent.

Anticipating the consequence of this contractual framework, the Indiana Pensioners argue as a last resort that the majority lenders were intimidated or bullied into approving the Sale in order to preserve or enhance relations with the government, or other players in the transaction. Absent this bullying, the Pensioners suggest, the majority lenders would not have requested the agent to direct the sale of the collateral, and the Sale would not have gone through. The Pensioners argue that this renders the lenders' consent ineffective or infirm.

The record before the bankruptcy court, and the record before this Court, does not support a finding that the majority lenders were coerced into agreeing to the Sale. On the whole, the record (and findings) support the view that they acted prudently to preserve substantial value rather than risk a liquidation that might have yielded nothing at all. Moreover, it is not at all clear what impact a finding of coerced consent would have on the validity of the consent given, or whether the bankruptcy court would have jurisdiction-or occasion-to adjudicate the Indiana Pensioners' allegation. Because the facts alleged by the Indiana Pensioners are not substantiated in this record, their arguments based on those allegations provide no ground for relief in this proceeding, and we decline to consider whether the allegations might give rise to some independent cause of action.

***121 III**

[4] The Indiana Pensioners argue that the Secretary of the Treasury ("Secretary") exceeded his statutory authority and violated the Constitution by using TARP money to finance the sale of Chrysler's assets. Pensioners raise interesting and unresolved constitutional issues concerning the scope of the Secretary's authority under TARP and the use of TARP money to bail out an automobile manufacturer. However, federal courts are constrained by our own constitutional limitations, including the non-waivable Article III requirement that we have jurisdiction over the case or controversy before us. *See, e.g., United States v. Hays,* 515 U.S. 737, 742, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *United States v. City of New York* 972 F.2d 464, 469-70 (2d Cir.1992). We do not decide whether the Secretary's actions were constitutional or permitted by statute, because we conclude that the Indiana Pensioners lack standing to raise the TARP issue, and that we lack jurisdiction in this case to entertain that challenge.

Congress enacted the Emergency Economic Stabilization Act ("EESA") on October 3, 2008 in order "to immediately provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the Unites States...." 12 U.S.C. § 5201(1). Title I of EESA authorizes the Treasury Secretary "to establish the Troubled Asset Relief Program (or 'TARP') to purchase, and to make and fund commitments to purchase, troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary." *Id.* § 5211(a)(1). Financial institutions include, but are not limited to, "any bank, savings association, credit union, security broker or dealer, or insurance company." *Id.* § 5202(5).

The statute details procedures for judicial review of the Secretary's decisions, limitations on available relief for TARP violations, and a host of legislative oversight mechanisms. *See, e.g., id.* §§ 5214-15, 5229(a), 5233. For example, courts review the Secretary's TARP decisions in accordance with standards set forth in the Administrative Procedure Act, 5 U.S.C. § 701 *et. seq.,* and the Secretary's actions "shall be held unlawful and set aside if found to be arbitrary, capricious, an abuse of discretion, or not in accordance with law." 12 U.S.C. § 5229(a)(1). Injunctions are available only to remedy constitutional violations and must be "considered and granted or denied by the court on an expedited basis," *id.* § 5229(a)(2)(A), (C), (D); likewise, requests for temporary restraining orders must be considered and decided by the court "within 3 days of the date of the request," *id.* § 5229(a)(2)(B). As for legislative oversight, the statute calls for (among other things) the creation of the Financial Stability Oversight Board, which reviews the exercise of the Secretary's authority (§ 5214), the submission of periodic reports from the Secretary to Congress (§ 5215), the creation of a Congressional Oversight Panel to provide periodic updates to Congress (§ 5233), and the appointment of a special TARP Inspector General (§ 5214(a)(3)). In short, the statute provides swift, narrow, and deferential judicial review of the Secretary's TARP decisions, limits judicial relief, and relies instead on multi-faceted legislative oversight.

The Indiana Pensioners contend that the Secretary exceeded his statutory authority and violated the Constitution by using TARP money to fund the Sale because, *inter alia:* auto companies are not "financial***122** institutions" under TARP; TARP does not authorize the Secretary to arrange and finance the reorganization of a private company; and the Sale effects an unconstitutional taking. In sum, they contend that the Secretary-and by extension, the Executive branch-violated the Constitution by dispensing federal money in excess of the statutory authority awarded by Congress under TARP.[FN13]

> FN13. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 585, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Executive power "must stem either from an act of Congress or from the Constitution itself.").

It is clear that TARP gives the Secretary broad discretion to apply financial aid when and where he decides it will best promote the stated goal of restoring stability to the financial markets. But, as detailed above, TARP also contains explicit limitations on the Secretary's authority, and provides for review and oversight, so that TARP is not all-purpose. At oral argument, the government suggested that any industry so "inter-related" with banks that its dealings could adversely impact the national banking system is, for TARP purposes, a financial institution.[FN14] This is surely an expansive definition of "financial institution," albeit broadly protective of the nation's financial structures and arguably related to TARP's mandate of "restor[ing] liquidity and stability" to our markets. The scope of TARP is a consequential and vexed issue that may inevitably require resolution in some later case; but this Court lacks power to resolve it in the present dispute.

> FN14. The government asserted at oral argument that:
>
> > [T]he Secretary of the Treasury, in determining what is a financial institution, looks at the interrelatedness [of the company and its financing arm].
> >
> > ....
> >
> > Chrysler Financial can't survive without Chrysler.... Without [Chrysler], the financial institution goes down.... [Chrysler Financial] is the financial institution and the relationship [with Chrysler is the one] that the Secretary of the Treasury based his determination on, and that determination is entitled to deference by this court under administrative law principles.
>
> Transcript of Oral Argument at 52.

Article III of the Constitution limits the judicial power of the United States to the resolution of "cases" and "controversies." U.S. Const. art. III, § 2. This limitation is effectuated in part through the requirement of standing. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.,* 454 U.S. 464, 471-72, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). The doctrine of standing separates "those disputes which are appropriately resolved through the judicial process," *Whitmore v. Arkansas,* 495 U.S. 149, 155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990), from those "generalized grievances" which are reserved for other branches of government, *Valley Forge,* 454 U.S. at 475, 102 S.Ct. 752 (internal quotation marks omitted). The requirement of standing would be unnecessary if the "federal courts [were] merely publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding." *Id.* at 473, 102 S.Ct. 752.

At an "irreducible constitutional minimum," Article III standing requires that: (1) the plaintiff suffer an injury in fact; (2) the injury be fairly traceable to the challenged conduct; and (3) the injury will likely be redressed by a favorable decision from the court. *Lujan,* 504 U.S. at 560-61, 112 S.Ct. 2130. "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* at 561, 112 S.Ct. 2130. We conclude that the Indiana Pensioners lack standing because ***123** they cannot demonstrate they have suffered an injury in fact.

An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.' " *Lujan,* 504 U.S. at 560, 112 S.Ct. 2130 (internal citations, quotation marks and footnote omitted). The Indiana Pensioners contend primarily that their injury in fact arises from the release of the collateral supporting their secured loans. But that collateral was released in exchange for a $2 billion cash payment and a residual deficiency claim. At oral argument, the Pensioners touted the value of the collateral at "around $25 billion" and complained that the value received pursuant to the Sale was a tithe of the actual asset value and an inadequate return on their investment. However, the Indiana Pensioners' argument ignores the bankruptcy court's *finding* that, in the absence of another buyer, the only viable alternative-liquidation-would yield an even *lower* return than the one achieved through the sale funded by

TARP money. Judge Gonzalez found, as a fact, that the liquidation value of the collateral "was no greater than $2 billion, *i.e.,* the same amount the first lien secured lenders are receiving under the transaction." Opinion and Order Regarding Emergency Economic Stabilization Act of 2008 and Troubled Asset Relief Program, May 31, 2009, at 5. Since "the Indiana [Pensioners] will receive [their] pro-rata distribution of the value of the collateral," they simply "cannot allege injury in fact." *Id.* The release of collateral for fair (but less-than-hoped-for) value is not injury in fact sufficient to support standing.

Furthermore, even if the Indiana Pensioners could demonstrate injury in fact, there would still be a question as to whether they have standing to challenge the use of TARP funds here. Under the terms of the various agreements (as outlined in Section II), the lenders had authorized the trustee to consent to the Sale on their behalf. Under those circumstances (and well-established agency principles), such consent may bar the Pensioners from challenging the trustee's actions and litigating a claim that would in effect bind all of the first-lien creditors.

IV

Finally, several objectors appeal from that portion of the Sale Order extinguishing all existing and future claims against New Chrysler, that "(a) arose prior to the Closing Date, (b) relate[ ] to the production of vehicles prior to the Closing Date or (c) otherwise [are] assertable against the Debtors or [are] related to the Purchased Assets prior to the closing date." Sale Order at 40. The objectors can be divided into three groups: (1) plaintiffs with existing product liability claims against Chrysler; (2) plaintiffs with existing asbestos-related claims against Chrysler; and (3) lawyers undertaking to act on behalf of claimants who, although presently unknown and unidentified, might have claims in the future arising from Old Chrysler's production of vehicles. We consider each group's arguments in turn.

A. Existing Product Liability Claims

[5] The Ad Hoc Committee of Consumer-Victims of Chrysler LLC and William Lovitz et al. challenge the foreclosing of New Chrysler's liability for product defects in vehicles produced by Old Chrysler.[FN15] Section 363(f) provides, in relevant ***124** part, that a "trustee may sell property ... free and clear of *any interest in such property,*" under certain circumstances. 11 U.S.C. § 363(f) (emphasis added). The objectors argue that personal injury claims are not "interests in property," and that the district court's reliance on *In re Trans World Airlines, Inc.,* 322 F.3d 283 (3d Cir.2003) (" *TWA* "), which advances a broad reading of "interests in property," was misplaced.

> FN15. The Sale Order does not limit the right of tort plaintiffs to pursue existing claims against Old Chrysler. However, it is undisputed that little or no money will be available for damages even if suits against Old Chrysler succeed.

We have never addressed the scope of the language "any interest in such property," and the statute does not define the term. *See, e.g., Precision Indus., Inc. v. Qualitech Steel SBQ, LLC,* 327 F.3d 537, 545 (7th Cir.2003) ("The Bankruptcy Code does not define 'any interest,' and in the course of applying section 363(f) to a wide variety of rights and obligations related to estate property, courts have been unable to formulate a precise definition.").

In *TWA,* the Third Circuit considered whether (1) employment discrimination claims and (2) a voucher program awarded to flight attendants in settlement of a class action constituted "interests" in property for purposes of § 363(f). *See* 322 F.3d at 285. The Third Circuit began its analysis by noting that bankruptcy courts around the country have disagreed about whether "any interest" should be defined broadly or narrowly.[FN16] *Id.* at 288-89. The Third Circuit observed, however, that "the trend seems to be toward a more expansive reading of 'interests in property' which 'encompasses other obligations that may flow from ownership of the property.' " *Id.* at 289 (quoting 3 Collier on Bankruptcy ¶ 363.06[1]); *see also* George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process,* 76 Am. Bankr.L.J. 235, 267 (2002) ("[T]he dominant interpretation is that § 363(f) can be used to sell property free and clear of claims that could otherwise be assertable against the buyer of the assets under the common law doctrine of successor liability.").

> FN16. For examples of bankruptcy courts' divergent rulings on this issue, *compare, e.g., P.K.R. Convalescent Ctrs., Inc. v.*

> *Commonwealth of Va., Dept of Med. Assistance Serv. (In re P K.R. Convalescent Ctrs., Inc.)*, 189 B.R. 90, 94 (Bankr.E.D.Va.1995) (holding that Virginia's depreciation-recoupment interest in the debtor's property was an "interest in property," even though the interest was not a lien), and *Am. Living Sys. v. Bonapfel (In re All Am. of Ashburn, Inc.)*, 56 B.R. 186, 189-90 (Bankr.N.D.Ga.1986) (holding that § 363(f) permitted the sale of assets free and clear and precluded successor liability in product liability suit against purchaser for cause of action that arose prior to date of sale), *with Schwinn Cycling and Fitness, Inc. v. Benonis (In re Schwinn Bicycle Co.)*, 210 B.R. 747, 761 (Bankr.N.D.Ill.1997) (holding that § 363(f) "in no way protects the buyer from current or future product liability; it only protects the purchased assets from lien claims against those assets"), and *Volvo White Truck Corp. v. Chambersburg Beverage, Inc. (In re White Motor Credit Corp.)*, 75 B.R. 944, 948 (Bankr.N.D.Ohio 1987) (stating that "[g]eneral unsecured claimants including tort claimants, have no specific interest in a debtor's property" for purposes of § 363(f)).

The Third Circuit reasoned that "to equate interests in property with only *in rem* interests such as liens would be inconsistent with section 363(f)(3), which contemplates that a lien is but one type of interest." 322 F.3d at 290. After surveying its owns precedents and the Fourth Circuit's decision in *United Mine Workers of Am.1992 Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.)*, 99 F.3d 573 (4th Cir.1996), [FN17] the *TWA* ***125** court held that "[w]hile the interests of the [plaintiffs] in the assets of TWA's bankruptcy estate are not interests in property in the sense that they are not *in rem* interests, ... they are interests in property within the meaning of section 363(f) in the sense that they *arise from the property* being sold." 322 F.3d at 290 (emphasis added).

> FN17. In *Leckie*, the Fourth Circuit held that Coal Act premium payment obligations owed to employer-sponsored benefit plans were interests in property under § 363(f). 99 F.3d at 582. The Fourth Circuit explained "while the plain meaning of the phrase 'interest in such property' suggests that not all general rights to payment are encompassed by the statute, Congress did not expressly indicate that, by employing such language, it intended to limit the scope of section 363(f) to *in rem* interests, strictly defined, and [it would] decline to adopt such a restricted reading of the statute...." *Id.*

Shortly after *TWA* was decided, the Southern District of California concluded that *TWA* applied to tort claimants asserting personal injury claims. *See Myers v. United States*, 297 B.R. 774, 781-82 (S.D.Cal.2003). *Myers* involved claims arising from the negligent handling of toxic materials transported pursuant to a government contract. *Id.* at 781. Applying *TWA*, the *Myers* court ruled that the plaintiff's "claim for personal injury does arise from the property being sold, i.e. the contracts to transport toxic materials." *Id.*; *see also Faulkner v. Bethlehem Steel/Int'l Steel Group*, No. 2:04-CV-34 PS, 2005 WL 1172748, at *3 (N.D.Ind. April 27, 2005) (applying *TWA* to bar successor liability for racial discrimination claim).

Appellants argue that these decisions broadly construing the phrase "any interest in such property" fail to account for the language of 11 U.S.C. § 1141(c), a provision involving confirmed plans of reorganization. Section 1141(c) provides that "except as otherwise provided in the [reorganization] plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of *all claims and interests* of creditors, equity security holders, and of general partners in the debtor." 11 U.S.C. § 1141(c) (emphasis added). Appellants argue that Congress must have intentionally included the word "claims" [FN18] in § 1141(c), and omitted the word from § 363(f), because it was willing to extinguish tort claims in the reorganization context, but unwilling to do so in the § 363 sale context. Appellants account for this discrepancy on the basis that reorganization provides unsecured creditors procedural rights that are not assured in a § 363(b) sale.

> FN18. The Bankruptcy Code defines "claim" as:
>
> (A) right to payment, whether or not such

> right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.
>
> 11 U.S.C. § 101(5).

We do not place such weight on the absence of the word "claims" in § 363(f). The language and structure of § 1141(c) and § 363(f) differ in many respects. Section 1141(c), for example, applies to all reorganization plans; § 363(f), in contrast, applies only to classes of property that satisfy one of five criteria. *See* 11 U.S.C. § 363(f)(1)-(5). Thus, while § 363 sales do not afford many of the procedural safeguards of a reorganization, § 363(f) is limited to specific classes of property.

Given the expanded role of § 363 in bankruptcy proceedings, it makes sense to harmonize the application of § 1141(c) and § 363(f) to the extent permitted by the statutory language. *See* ***126***In re Golf, L.L.C.,* 322 B.R. 874, 877 (Bankr.D.Neb.2004) (noting that, while § 363(f) requires less notice and provides for less opportunity for a hearing than in the reorganization process, "as a practical matter, current practice seems to have expanded § 363(f)'s use from its original intent"). Courts have already done this in other contexts. For example, § 1141(c) does not explicitly reference the extinguishment of liens, while § 363(f) does. Notwithstanding this distinction, courts have uniformly held that confirmation of a reorganization can act to extinguish liens. *See, e.g., JCB, Inc. v. Union Planters Bank, NA,* 539 F.3d 862, 870 (8th Cir.2008) ("Confirmation of the reorganization plan replaces prior obligations, and a lien not preserved by the plan may be extinguished." (internal citation omitted)); *Elixir Indus., Inc. v. City Bank & Trust Co. (In re Ahern Enters., Inc.),* 507 F.3d 817, 820-22 (5th Cir.2007) (holding that § 1141(c) extinguishes liens that are not specifically preserved in a reorganization plan, and citing cases from the Fourth, Seventh, Eighth and Tenth Circuits reaching the same conclusion).

We agree with *TWA* and *Leckie* that the term "any interest in property" encompasses those claims that "arise from the property being sold." *See TWA,* 322 F.3d at 290. By analogy to *Leckie* (in which the relevant business was coal mining), "[appellants'] rights are grounded, at least in part, in the fact that [Old Chrysler's] very assets have been employed for [automobile production] purposes: if Appellees had never elected to put their assets to use in the [automobile] industry, and had taken up business in an altogether different area, [appellants] would have no right to seek [damages]." *Leckie,* 99 F.3d at 582.

"To allow the claimants to assert successor liability claims against [the purchaser] while limiting other creditors' recourse to the proceeds of the asset sale would be inconsistent with the Bankruptcy Code's priority scheme." *TWA,* 322 F.3d at 292. Appellants ignore this overarching principle and assume that tort claimants faced a choice between the Sale and an alternative arrangement that would have assured funding for their claims. But had appellants successfully blocked the Sale, they would have been unsecured creditors fighting for a share of extremely limited liquidation proceeds. Given the billions of dollars of outstanding secured claims against Old Chrysler, appellants would have fared no better had they prevailed.

The possibility of transferring assets free and clear of existing tort liability was a critical inducement to the Sale. As in *TWA,* "a sale of the assets of [Old Chrysler] at the expense of preserving successor liability claims was necessary in order to preserve some [55],000 jobs, ... and to provide funding for employee-related liabilities, including retirement benefits [for more than 106,000 retirees]." *TWA,* 322 F.3d at 293; *see also* Sale Opinion at 3.

It is the transfer of Old Chrysler's tangible and intellectual property to New Chrysler that could lead to successor liability (where applicable under state law) in the absence of the Sale Order's liability provisions. Because appellants' claims arose from Old Chrysler's property, § 363(f) permitted the bankruptcy court to authorize the Sale free and clear of appellants' interest in the property.

B. Asbestos Claims

[6] On behalf of herself and others with outstanding or potential claims against Old Chrysler resulting from exposure to asbestos, Patricia Pascale argues that the Sale Order improperly grants New Chrysler immunity without assuring compliance with 11 U.S.C. § 524(g).

Section 524(g) "provides a unique form of supplemental injunctive relief for an ***127** insolvent debtor confronting the particularized problems and complexities associated with asbestos liability." *Johns-Manville Corp. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.),* 517 F.3d 52, 67 (2d Cir.2008), *overruled on other grounds by Travelers Indem. Co. v. Bailey,* ---U.S. ----, 129 S.Ct. 2195, 174 L.Ed.2d 99 (2009). The statute authorizes the court "to enjoin entities from taking legal action for the purpose of directly or indirectly collecting, recovering, or receiving payment or recovery with respect to any [asbestos-related] claim or demand." 11 U.S.C. § 524(g)(1)(B). To obtain relief under § 524(g), a debtor must "[c]hannel [ ] asbestos-related claims to a personal injury trust [to] relieve[ ] the debtor of the uncertainty of future asbestos liabilities." *In re Combustion Eng'g, Inc.,* 391 F.3d 190, 234 (3d Cir.2004). Injunctions granting relief under this provision are subject to numerous requirements and conditions. *See* 11 U.S.C. § 524(g)(2)(B); *Combustion Eng'g,* 391 F.3d at 234 & n. 45.

By its terms, however, § 524(g) applies only to "a court that enters an order confirming a plan of reorganization under chapter 11." 11 U.S.C. § 524(g)(1)(A); *see also Combustion Eng'g,* 391 F.3d at 234 n. 46. Sections I and II of this opinion conclude that the Sale was proper under § 363. That determination forecloses the application of § 524(g) because there is no plan of reorganization as yet. Moreover, the bankruptcy court in this case did not issue an injunction, as is permitted by § 524(g)(1)(B), and the debtor did not establish a trust subsuming its asbestos liability. Accordingly, there is no merit to Pascale's argument that the Sale Order violates § 524(g).

C. Future Claims

The Sale Order extinguished the right to pursue claims "on any theory of successor or transferee liability, whether known or unknown as of the Closing, now existing or hereafter arising, asserted or unasserted, fixed or contingent, liquidated or unliquidated." Sale Order at 40-41. This provision is challenged on the grounds that: (1) the Sale Order violates the due process rights of future claimants by extinguishing claims without providing notice; (2) a bankruptcy court is not empowered to trump state successor liability law; (3) future, unidentified claimants with unquantifiable interests could not be compelled "to accept a money satisfaction," 11 U.S.C. § 363(f)(5); and (4) future causes of action by unidentified plaintiffs based on unknown events cannot be classified as "claims" under the Bankruptcy Code.

We affirm this aspect of the bankruptcy court's decision insofar as it constituted a valid exercise of authority under the Bankruptcy Code. However, we decline to delineate the scope of the bankruptcy court's authority to extinguish future claims, until such time as we are presented with an actual claim for an injury that is caused by Old Chrysler, that occurs after the Sale, and that is cognizable under state successor liability law.

CONCLUSION

We have considered all of the objectors-appellants' contentions on these appeals and have found them to be without merit. For the foregoing reasons, we affirm the June 1, 2009 order of the bankruptcy court authorizing the Sale.

C.A.2 (N.Y.),2009.
In re Chrysler LLC
576 F.3d 108, 62 Collier Bankr.Cas.2d 183, 51 Bankr.Ct.Dec. 254, 47 Employee Benefits Cas. 1513

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
GENERAL MOTORS CORP., *et al.*,	Case No. 09-50026 (REG)
Debtors.	(Jointly Administered)

STATEMENT OF THE UNITED STATES OF AMERICA UPON THE COMMENCEMENT OF GENERAL MOTORS CORPORATION'S CHAPTER 11 CASE

TO THE HONORABLE ROBERT E. GERBER,
UNITED STATES BANKRUPTCY JUDGE:

The United States of America, on behalf of the United States Department of the Treasury ("Treasury" or the "Government"), by its attorney Lev L. Dassin, Acting United States Attorney, respectfully submits this statement (i) in support of the above-captioned cases (collectively, the "Cases") commenced under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") by General Motors Corporation ("GM") and certain of its affiliates (collectively, the "Debtors"); (ii) to articulate for the Court and all parties in interest the Government's role in these Cases as existing senior secured lender, proposed debtor-in-possession lender, and as de facto sponsor of the "363 Transaction" that the Debtors have determined to pursue in these Cases; and (iii) to set out the statutory authority pursuant to which Treasury has acted and intends to act.

INTRODUCTION

1. GM's bankruptcy is an extraordinary and momentous event, signifying that GM – an icon of American ingenuity, productivity and capitalism – has reached a crossroads. For more than a century, GM has pioneered the development and manufacture of American automobiles, provided employment to hundreds of thousands of people, indelibly marked the lives and communities that form the infrastructure of America's automotive industry, and forged a vast network of global relationships and synergies.

2. GM has weathered many storms over the course of its existence, often during difficult economic climates. But the current global economic downturn and its widespread negative impact on the automotive industry have forced GM to the precipice of liquidation. The gravity of this threat cannot be overstated; it extends well beyond the traceable boundaries of GM's business enterprise. Not only is the fate of GM at stake, but so are the livelihoods of innumerable American workers, suppliers, and dealers – and indeed the American economy as a whole.

3. The Government is committed to working with GM to ensure that GM can develop an effective long-term plan to restore the company to its place at the forefront of American industry. Today, GM has decided that the best way to effectuate that vision is to enter bankruptcy, for the purpose of quickly consummating the 363 Transaction so that a new, leaner

and more competitive GM can emerge, while achieving the best possible recovery for the GM estates and their stakeholders. The Government fully supports GM in its decision, and is willing to provide the billions of dollars of funding necessary to help GM create a new force in the automotive industry.

THE GOVERNMENT'S ROLE IN THESE CASES

4. In response to the troubles plaguing the American automotive industry, the United States of America, through Treasury and the Presidential Task Force on the Auto Industry (the "Auto Task Force"),[1] has implemented various programs to support and stabilize the domestic automotive industry. Those programs have included, among other things, providing credit support for receivables issued by certain domestic automobile manufacturers,[2] and support for consumer warranties.[3]

5. Treasury has also provided direct loans to automobile manufacturers. Specifically, at GM's request in late 2008 and following arm's length negotiations, Treasury determined to make available to GM billions of dollars in emergency secured financing (the "Prepetition Loan") in order to sustain GM's operations while it developed a new business plan.

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[1] The Auto Task Force is a cabinet-level group led by Treasury Secretary Timothy F. Geithner and National Economic Council Director Laurence H. Summers. It includes the Secretaries of Transportation, Commerce, Labor, and Energy, as well as the Chair of the President's Council of Economic Advisors, the Director of the Office of Management and Budget, the Environmental Protection Agency Administrator, and the Director of the White House Office of Energy and Climate Change. The members of the Auto Task Force, along with their official designees and the Auto Task Force's advisors, are charged with advising the President of the United States on the state of, and support for, the domestic auto industry. See Press Release, The White House Office of the Press Secretary, Geithner, Summers Convene Official Designees to Presidential Task Force on Auto Industry (Feb. 20, 2009), http://www.whitehouse.gov/the_press_office/Geithner-Summers-Convene-Official-Designees-to-Presidential-Task-Force-on-the-Auto/.

[2] See Auto Supplier Support Program: Stabilizing the Auto Industry at a Time of Crisis, http://www.treas.gov/press/releases/docs/supplier_support_program_3_18.pdf.

[3] See Obama Administration's New Warrantee Commitment Program, http://www.treas.gov/initiatives/eesa/AIFP/WarranteeCommitmentProgram.pdf.

At the time that Treasury first extended credit to GM under the Prepetition Loan, there was absolutely no other source of financing available: no party other than Treasury conveyed its willingness to loan funds to GM and thereby enable it to continue operating.

6. The first loan came in December 2008, after GM submitted its proposed viability plan to Congress. That plan contemplated GM's shift to smaller, more fuel-efficient cars, a reduction in the number of GM brand names and dealerships, and a renegotiation of GM's agreement with its labor union, among other things. As part of its proposed plan, GM sought emergency funding in the form of an $18 billion federal loan.

7. After negotiations, Treasury and GM entered into a loan agreement on December 31, 2008, that provided GM up to $13.4 billion in financing on a senior secured basis. Under that term loan facility, GM immediately borrowed $4 billion, followed by $5.4 billion less than a month later, and the remaining $4 billion on February 17, 2009. The GM-Treasury loan agreement required GM to submit a proposed business plan to demonstrate its future competitiveness that went significantly farther than the one GM had submitted to Congress. Among other conditions on Treasury's willingness to provide financing, GM was to demonstrate its long-term viability by reducing its outstanding public debt (approximately $27 billion) by two-thirds, and converting from cash to common stock at least half of the value of its $20 billion contribution to a union health care trust.

8. Treasury and GM subsequently entered into amended credit agreements to provide for an additional $2 billion in financing that GM borrowed on April 24, 2009, and another $4 billion that GM borrowed on May 20, 2009. The funds advanced to GM under the Prepetition Loan – as of the petition date, approximately $19.4 billion in total (all on a senior

secured basis) – therefore were critical to GM's survival during the past several months. They are equally critical to GM's survival today.

9. Although the Government's decision to provide financing is intended to avoid the drastic and systemic consequences that would result from a GM liquidation, Treasury – as the steward of taxpayer dollars – has insisted from the start as a condition of its financial support that GM take the steps necessary to transform itself into a competitive, and successful, player in the global automotive market. Indeed, the threat of liquidation is not the only impetus for the Government's decision to loan substantial additional taxpayer funds to GM in the form of the proposed approximately $33.3 billion debtor-in-possession facility, which will provide critical funding to GM pending the expeditious approval and consummation of the 363 Transaction (the "DIP Loan").[4] To be clear, Treasury has loaned, and proposes to loan, GM billions of dollars not just to spare the economy the consequences of GM's liquidation, but also because the Government has concluded – as a result of an exhaustive analysis conducted by Treasury and the Auto Task Force – that a new, vastly improved, and competitive "New GM" is an attainable prospect worthy of fervent pursuit, and warranting decisive action.

10. Accordingly, from the moment that it put the very first dollar of emergency financing into GM, Treasury has acted as a prudent lender seeking to protect its investment, and thus expressly conditioned its financial commitment upon GM's meaningful progress towards long-term viability. Following President Obama's March 30, 2009, announcement that GM's efforts to develop a long-term viability plan had fallen short – and that the advancement of any additional federal loans to GM beyond the subsequent sixty-day period

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[4] In addition, both the government of Canada and the government of Ontario, through Export Development Canada (collectively, "Canada"), propose to provide $9.1 billion in debtor-in-possession and other financing to support GM's North American operations.

would require a more aggressive effort to map out a clear path to long-term viability – efforts to arrive at a solution intensified. Indeed, President Obama's remarks of March 30th left no doubt that exhaustive effort would be required over the ensuing sixty days if GM was to have access to additional federal funding after June 1st:

> [W]hat we're asking for is difficult. It will require hard choices by companies. It will require unions and workers who have already made extraordinarily painful concessions to do more. It'll require creditors to recognize that they can't hold out for the prospect of endless government bailouts. . . . It will require efforts from a whole host of other stakeholders, including dealers and suppliers. Only then can we ask American taxpayers who have already put up so much of their hard-earned money to once more invest in a revitalized auto industry. But I'm confident that if each are willing to do their part, if all of us are willing to do our part, then this restructuring, as painful as it will be in the short term, will mark not an end, but a new beginning for a great American industry . . . .

Barack H. Obama, President of the United States, Remarks by the President of the United States on the American Automotive Industry (Mar. 30, 2009), available at http://www.whitehouse.gov.

11. In connection with the effort that followed, Treasury and the Auto Task Force, together with their advisors, continued their already-extensive due diligence and analysis of all material aspects of a successful New GM. GM and other stakeholders conducted their own analyses, as well. Ultimately, all agreed that the only viable course is for GM to pursue – with the support of Treasury, Canada, and other constituents – a transaction under section 363(b) of the Bankruptcy Code (the "363 Transaction"). The transaction ultimately agreed upon contemplates the formation of a new Treasury-sponsored entity that, assuming GM receives no better offer, will acquire certain substantial assets of GM.[5] As part of the 363 Transaction, (i)

[5] This summary of the 363 Transaction and the transactions contemplated to occur subsequently (but substantially contemporaneously) is qualified by reference to the documentation associated with those transactions.

that newly-formed acquisition vehicle ("New GM"), as assignee of Treasury's rights and claims under the Prepetition Loan and the DIP Loan, will credit bid substantially all of GM's indebtedness under those loans against certain assets of GM, and (ii) New GM will contribute 10% of its common equity to GM (plus two tranches of warrants at various strike prices, each for an additional 7.5% equity stake), for distribution under this Court's supervision in these Cases.[6] Subsequently (but substantially simultaneously with the closing of the 363 Transaction), New GM will allocate 17.5% of its common equity on an undiluted basis to a new Voluntary Employee Beneficiary Association formed pursuant to an agreement between New GM and its unionized work force (the "New VEBA"), and 11.7% of its common equity (pre-dilution) to Canada. As a result, upon the full consummation of the 363 Transaction and subsequent allocations of New GM equity, Treasury ultimately is contemplated to hold an undiluted 60.8% stake in New GM.

12. The 363 Transaction and allocations of certain agreed-upon value from New GM to the New VEBA, Canada, and to existing GM for disposition in these Cases, have garnered support from a broad spectrum of constituents. GM, GM's work force, Treasury, Canada, GM's other secured lenders, and more than 54% of GM's approximately $27 billion of unsecured bondholders (collectively, the "Supporting Bondholders") all support the consummation of the 363 Transaction and the related allocations of value from New GM. This transformation, however, must be completed quickly. Prompt approval and consummation of the 363 Transaction is essential to avoid any further erosion of consumer confidence or disturbance to GM's supply chain. Moreover, as stated, Treasury contemplates providing GM with the

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[6] Under certain circumstances, a post-closing purchase price adjustment could result in 2% more of common equity being paid to GM.

approximately $33.3 billion DIP Loan so that GM can maintain its operations pending the close of the 363 Transaction, and fund the wind-down of these estates. The continued availability of such financing is expressly conditioned upon, among other things, the decisively swift approval and closing of the 363 Transaction. Absent such financing, GM faces immediate liquidation.

13. If the Court approves the 363 Transaction and New GM is as successful as Treasury expects it to be based upon its extensive due diligence and analysis, New GM will save hundreds of thousands of jobs, protect important healthcare, pension, and other benefits for its employees and retirees, and benefit the dealers, suppliers, and other businesses that depend upon New GM for their own existence. But time is of the essence. Any delay risks permanent, and possibly fatal, harm to the viability of New GM. Treasury therefore is strictly conditioning its willingness to provide financing on prompt completion of the 363 Transaction. In turn, because Treasury's financing unquestionably maximizes value to the estates, timely approval of the proposed DIP Loan and the 363 Transaction is essential.

THE GOVERNMENT'S AUTHORITY TO EXTEND THE PREPETITION LOAN AND THE DIP LOAN, AND TO SPONSOR THE 363 TRANSACTION

14. Treasury is participating in these Cases as an existing senior secured lender to GM under the Prepetition Loan, and as proposed senior secured lender to GM under the contemplated DIP Loan. The Government is well aware that GM's bankruptcy comes quickly on the heels of Chrysler's. Although the two companies and their cases are different in many important respects, both involve iconic American automotive manufacturers seeking swift approval of transactions under section 363 of the Bankruptcy Code, with significant financing provided by the United States Government. As was well-publicized, certain disaffected creditors sought to hold up Chrysler's restructuring, arguing both that its 363 transaction ran afoul of the Bankruptcy Code, and that the Government was somehow unauthorized to make the payments

necessary to fund the transaction. Although the Government is hopeful that those arguments ran their course in the Chrysler case, we here briefly set forth the legal authority that supports the Government's participation in these Cases.

A. Treasury Is Authorized to Provide Funding to GM Under the Troubled Asset Relief Program

15. Treasury proposes to commit in excess of $52 billion to GM as an existing senior secured lender under the Prepetition Loan, and as a proposed senior secured lender under the contemplated DIP Loan. Treasury also proposes to acquire ultimately a majority stake in New GM, which will acquire significant assets from the Debtors pursuant to the 363 Transaction. That stake flows from Treasury's exercise of remedial measures as secured lender (i.e., credit bidding), upon terms and conditions exhaustively and in good faith negotiated among Treasury, GM, GM's workers, the Supporting Bondholders, Canada, and certain other parties in interest up until the very last moment prior to the commencement of these Cases.

16. As the Chrysler objectors noted, Treasury's authority to take any of these actions – to enter into the Prepetition Loan or make the DIP Loan – turns on its ability to make payments to an automotive company. In fact and in law, however, there is no legitimate question about Treasury's authority to take these actions.

17. The Emergency Economic Stabilization Act of 2008 ("EESA"), Pub. L. No. 110-343, 122 Stat. 3765 (2008), created the Troubled Asset Relief Program ("TARP"), which generally authorizes the purchase by the United States of "troubled assets from any financial institution." 12 U.S.C. § 5211. "Troubled assets" are defined to include, among other things, "any . . . financial instrument that the Secretary [of the Treasury], after consultation with the Chairman of the Board of Governors of the Federal Reserve System, determines the purchase of which is necessary to promote financial market stability, but only upon transmittal of such

determination, in writing, to the appropriate committees of Congress." 12 U.S.C. § 5202(9)(B). "Financial institution" is broadly defined to include "any institution . . . established and regulated under the laws of the United States or any State, territory, or possession of the United States . . . and having significant operations in the United States . . . ." 12 U.S.C. § 5202(5).

18. The express purposes of EESA are, among other things, to "restore liquidity and stability to the financial system of the United States," and to ensure that expenditure of taxpayer funds "protects home values, college funds, retirement accounts, and life savings," "preserves homeownership and promotes jobs and economic growth," and "maximizes overall returns to the taxpayers of the United States." 12 U.S.C. § 5201.

19. Consistent with these purposes, and pursuant to section 101(d) of EESA, 12 U.S.C. § 5211(d), the Secretary of the Treasury has promulgated guidelines for allocating resources under TARP to "prevent a significant disruption of the American automotive industry that poses a systemic risk to financial market stability and will have a negative effect on the real economy of the United States." See Guidelines for Automotive Industry Financing Program, http://www.financialstability.gov/docs/AIFP/AIFP_guidelines.pdf.

20. Furthermore, on December 19, 2008, the Secretary of the Treasury issued a written determination, in consultation with the Chairman of the Board of Governors of the Federal Reserve System, that certain holding companies engaged in the manufacturing of automotive vehicles are eligible for funding under the TARP Significant Failing Institutions Program. See Determination of the Secretary of the Treasury, Dec. 19, 2008. By letters dated December 23, 2008, to "the appropriate committees of Congress" – the Senate Committees on Finance; the Budget; Banking, Housing and Urban Affairs; and Appropriations; and the House Committees on Appropriations; the Budget; Financial Services; and Ways and Means – then-

Secretary of the Treasury Henry M. Paulson, Jr. delivered a written notification of that determination pursuant to section 3(9)(B) of EESA, 12 U.S.C. § 5202(9)(B). True and correct copies of the Secretary's determination and letters to Congress are attached as Exhibit A.

21. On April 29, 2009, the Secretary of the Treasury issued a written determination reaffirming that automotive manufacturers are eligible for TARP funding under Treasury's Automotive Industry Financing Program. See Determination of the Secretary of the Treasury, Apr. 29, 2009 (attached hereto as Exhibit B). The April 29th determination has the effect of providing notice that the postpetition financing to be provided by Treasury to GM satisfies the requirements of EESA for use of TARP funds.

22. There is therefore no legitimate question that Treasury had, and has, ample statutory authority to use TARP funds to provide financial assistance to GM – funds which, as noted above, have already saved GM from an all but certain and calamitous liquidation, and which will facilitate the creation of a new entity that will carry a revitalized, transformed, competitive, and viable enterprise into the automotive business of the 21st century and beyond. See 12 U.S.C. § 5211(c)(4) (authorizing Treasury Secretary to "establish[] vehicles . . . to purchase, hold, and sell troubled assets and issue obligations"); id. §§ 5216(a)-(c) (authorizing Treasury Secretary to "exercise any rights received in connection with," "manage," and "sell, or enter into securities loans, repurchase transactions, or other financial transactions in regard to, any troubled asset purchased under this chapter").

23. The only argument to the contrary – advanced by the dissident secured debtholders in Chrysler[7] – questions whether an automotive manufacturer can be a "financial

[7] Ultimately, Judge Gonzalez concluded that Chrysler's creditors lacked standing to assert any arguments about the authority for the Government's loans, because they had no injury in fact traceable to

institution" within the meaning of EESA. Putting aside the determinations made by two Treasury Secretaries that they are (which determinations are entitled to significant judicial deference), GM plainly fits within the statutory language because it is an "institution . . . established and regulated under the laws of the United States or any State, territory, or possession of the United States . . . and having significant operations in the United States." 12 U.S.C. § 5202(5). GM is established under Delaware law, is "regulated" by the United States and by numerous states, and has "significant operations in the United States." It is therefore a "financial institution" within the meaning of EESA.[8]

B. GM, Treasury, and Others Negotiated the Terms of the 363 Transaction in Good Faith, and at Arm's Length

24. The other principal argument relating to the Government's role in the Chrysler bankruptcy was the baseless insinuation that the Government somehow dominated the negotiations of Chrysler's section 363 transaction to such an extent that the transaction was not made in good faith. As in Chrysler, any such suggestion about the negotiation of the 363 Transaction involving GM lacks merit.[9]

25. While the Bankruptcy Code does not define the "good faith" that protects transactions pursuant to section 363(m), the Second Circuit has explained that the "[g]ood faith

the source of the funding. See Opinion and Order Regarding Emergency Economic Stabilization Act of 2008 and Troubled Asset Relief Program, In re Chrysler LLC, No. 09-50002 (AJG) (Bankr. S.D.N.Y. May 31, 2009).

[8] There is also no colorable argument that the Prepetition Loan and the DIP Loan do not involve Treasury's acquisition of a "troubled asset," defined to include, in addition to certain instruments pertaining to mortgage-backed securities, "any other financial instrument." 12 U.S.C. § 5202(9). EESA's broad definition plainly reaches the types of debt instruments acquired by Treasury through its provision of approximately $19.4 billion of secured financing to GM under the Prepetition Loan and approximately $33.3 billion of secured financing under the DIP Loan.

[9] See Opinion Granting Debtors' Motion Seeking Authority to Sell, Pursuant to 11 U.S.C. § 363, Substantially All of the Debtors' Assets, In re Chrysler LLC, No. 09-50002 (AJG) (Bankr. S.D.N.Y. May 31, 2009) (holding that "the consummation of the Sale Transaction was conducted in good faith and at arms' length and is in the best interest of the Debtors' estates").

of a purchaser is shown by the integrity of his conduct during the course of the sale proceedings; where there is a lack of such integrity, a good faith finding may not be made. A purchaser's good faith is lost by 'fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.'" In re Gucci, 126 F.3d 380, 390 (2d Cir. 1997) (quoting In re Rock Indus. Mach. Corp., 572 F.2d 1195, 1198 (7th Cir. 1978)).

26. As set forth above, the 363 Transaction was the product of intense arm's length negotiations over the course of several months. The Government's conduct in these negotiations epitomizes good faith: the Government has provided and will provide billions of dollars in financing that no other lender would provide, on below-market terms, in order to avoid GM's liquidation, preserve the Government's existing investment in GM, and enable an outcome that serves both the broad spectrum of economic stakeholders in these Cases and the public at large.

CONCLUSION

27. The bankruptcy of one of America's automotive giants is undoubtedly historic. But while the commencement of GM's bankruptcy is an extraordinary event, ultimately the course of action outlined by GM is necessary, and the relief GM asks for lies comfortably within the experience of this Court. Today, GM has chosen to pursue its path to long-term viability through these Cases and the expedited 363 Transaction, a decision the Government fully supports. Indeed, Treasury, as senior secured prepetition lender and proposed DIP lender, has made clear that its financial support for GM is predicated entirely upon the prompt approval of the 363 Transaction – the only alternative to GM's immediate liquidation and the disastrous consequences that would come with it.

Dated: June 1, 2009
New York, New York

LEV L. DASSIN
Acting United States Attorney for the
Southern District of New York,
Attorney for the United States of America

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DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

SECRETARY OF THE TREASURY

DETERMINATION

WHEREAS, section 101 of the Emergency Economic Stabilization Act of 2008 (the "Act") authorizes the Secretary of the Treasury (the "Secretary") to establish the Troubled Asset Relief Program (the "TARP") to purchase, and to make and fund commitments to purchase, troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary, and in accordance with the Act and the policies and procedures developed and published by the Secretary;

WHEREAS, section 3(5) of the Act defines the term "financial institution" to mean 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, the District of Columbia, Commonwealth of Puerto Rico, Commonwealth of Northern Mariana Islands, and having significant operations in the United States, but excluding any central bank of, or institution owned by, a foreign government.

WHEREAS, section 3(9)(A) of the Act defines the term "troubled assets" to mean residential or commercial mortgages and any securities, obligations, or other instruments that are based on or related to such mortgages, that in each case was originated or issued on or before March 14, 2008, the purchase of which the Secretary determines promotes financial market stability;

WHEREAS, section 3(9) (B) of the Act further defines the term "troubled assets" to mean any other financial instrument that the Secretary, after consultation with the Chairman of the Board of Governors of the Federal Reserve System (the "Chairman"), determines the purchase of which is necessary to promote financial market stability, but only upon transmittal of such determination, in writing, to the appropriate committees of Congress;

WHEREAS, section 3(1) of the Act defines the term "appropriate committees of Congress" to mean the Committee on Banking, Housing, and Urban Affairs, the Committee on Finance, the Committee on the Budget, and the Committee on Appropriations of the Senate; and the Committee on Financial Services, the Committee on Ways and Means, the Committee on the Budget, and the Committee on Appropriations of the House of Representatives;

WHEREAS, certain thrift and other holding companies which are engaged in the manufacturing of automotive vehicles and the provision of credit and financing in connection with the manufacturing and purchase of such vehicles have applied under the TARP Systemically Significant Failing Institutions Program (the "SSFI") requesting that the Department of the Treasury purchase obligations of such companies consistent with the SSFI;

WHEREAS, such thrift and other holding companies engaged in the manufacturing of automotive vehicles and the provision of credit and financing in connection with the manufacturing and purchase of such vehicles are "financial institutions" for purposes of section 3(5) of the Act as they are "institution[s]" established and regulated under the laws of the United States and have significant operations in the United States; and,

WHEREAS, as Secretary, I have consulted with the Chairman, and we have jointly concluded that the TARP's purchase of the obligations is necessary to promote stability to the financial system of the United States.

NOW, THEREFORE, I HEREBY DETERMINE that the obligations of such financial institutions are financial instruments the purchase of which is necessary to promote stability to the financial system of the United States, and, as such, are "troubled assets," as that term is defined in section 3(9)(B) of the Act, and eligible to be purchased under the TARP; and

I HEREBY direct that this determination be transmitted to the appropriate committees of Congress.

Henry M. Paulson, Jr.

December 19, 2008

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

SECRETARY OF THE TREASURY

December 23, 2008

The Honorable Richard Shelby
Ranking Member
Committee on Banking, Housing, and Urban Affairs
United States Senate
Washington, DC 20510

Dear Senator Shelby:

The Emergency Economic Stabilization Act of 2008 authorizes the Treasury Department to purchase troubled assets from any financial institution as part of the Troubled Assets Relief Program (TARP). Under Section 3(9)(B) of the Act, the Secretary of the Treasury may designate as a troubled asset any financial instrument that he determines, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, the purchase of which is necessary to promote financial market stability.

After consulting with the Chairman of the Board of Governors of the Federal Reserve System, I have determined that the purchase of obligations of certain thrift and other holding companies which are engaged in the manufacturing of automotive vehicles and the provision of credit and financing in connection with the manufacturing and purchase of such vehicles is necessary to promote financial market stability.

In accordance with Section 3(9)(B) of the Act, I am enclosing my determination and informing you that this purchase will be made under the TARP Systemically Significant Failing Institution Program.

Sincerely,

Henry M. Paulson, Jr.

Henry M. Paulson, Jr.

Enclosure

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

SECRETARY OF THE TREASURY

December 23, 2008

The Honorable Paul Ryan
Ranking Member
Committee on the Budget
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Ryan:

The Emergency Economic Stabilization Act of 2008 authorizes the Treasury Department to purchase troubled assets from any financial institution as part of the Troubled Assets Relief Program (TARP). Under Section 3(9)(B) of the Act, the Secretary of the Treasury may designate as a troubled asset any financial instrument that he determines, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, the purchase of which is necessary to promote financial market stability.

After consulting with the Chairman of the Board of Governors of the Federal Reserve System, I have determined that the purchase of obligations of certain thrift and other holding companies which are engaged in the manufacturing of automotive vehicles and the provision of credit and financing in connection with the manufacturing and purchase of such vehicles is necessary to promote financial market stability.

In accordance with Section 3(9)(B) of the Act, I am enclosing my determination and informing you that this purchase will be made under the TARP Systemically Significant Failing Institution Program.

Sincerely,

Henry M. Paulson, Jr.

Enclosure

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

SECRETARY OF THE TREASURY

December 23, 2008

The Honorable Charles Rangel
Chairman
Committee on Ways and Means
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

The Emergency Economic Stabilization Act of 2008 authorizes the Treasury Department to purchase troubled assets from any financial institution as part of the Troubled Assets Relief Program (TARP). Under Section 3(9)(B) of the Act, the Secretary of the Treasury may designate as a troubled asset any financial instrument that he determines, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, the purchase of which is necessary to promote financial market stability.

After consulting with the Chairman of the Board of Governors of the Federal Reserve System, I have determined that the purchase of obligations of certain thrift and other holding companies which are engaged in the manufacturing of automotive vehicles and the provision of credit and financing in connection with the manufacturing and purchase of such vehicles is necessary to promote financial market stability.

In accordance with Section 3(9)(B) of the Act, I am enclosing my determination and informing you that this purchase will be made under the TARP Systemically Significant Failing Institution Program.

Sincerely,

Henry M. Paulson, Jr.

Henry M. Paulson, Jr.

Enclosure

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

SECRETARY OF THE TREASURY

December 23, 2008

The Honorable David Obey
Chairman
Committee on Appropriations
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

The Emergency Economic Stabilization Act of 2008 authorizes the Treasury Department to purchase troubled assets from any financial institution as part of the Troubled Assets Relief Program (TARP). Under Section 3(9)(B) of the Act, the Secretary of the Treasury may designate as a troubled asset any financial instrument that he determines, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, the purchase of which is necessary to promote financial market stability.

After consulting with the Chairman of the Board of Governors of the Federal Reserve System, I have determined that the purchase of obligations of certain thrift and other holding companies which are engaged in the manufacturing of automotive vehicles and the provision of credit and financing in connection with the manufacturing and purchase of such vehicles is necessary to promote financial market stability.

In accordance with Section 3(9)(B) of the Act, I am enclosing my determination and informing you that this purchase will be made under the TARP Systemically Significant Failing Institution Program.

Sincerely,

Henry M. Paulson, Jr.

Henry M. Paulson, Jr.

Enclosure

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

SECRETARY OF THE TREASURY

December 23, 2008

The Honorable Jim McCrery
Ranking Member
The Committee on Ways and Means
U.S. House of Representatives
Washington, DC 20515

Dear Mr. McCrery:

The Emergency Economic Stabilization Act of 2008 authorizes the Treasury Department to purchase troubled assets from any financial institution as part of the Troubled Assets Relief Program (TARP). Under Section 3(9)(B) of the Act, the Secretary of the Treasury may designate as a troubled asset any financial instrument that he determines, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, the purchase of which is necessary to promote financial market stability.

After consulting with the Chairman of the Board of Governors of the Federal Reserve System, I have determined that the purchase of obligations of certain thrift and other holding companies which are engaged in the manufacturing of automotive vehicles and the provision of credit and financing in connection with the manufacturing and purchase of such vehicles is necessary to promote financial market stability.

In accordance with Section 3(9)(B) of the Act, I am enclosing my determination and informing you that this purchase will be made under the TARP Systemically Significant Failing Institution Program.

Sincerely,

Henry M. Paulson, Jr.

Henry M. Paulson, Jr.

Enclosure

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

SECRETARY OF THE TREASURY

December 23, 2008

The Honorable Jerry Lewis
Ranking Member
The Committee on Appropriations
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Lewis:

The Emergency Economic Stabilization Act of 2008 authorizes the Treasury Department to purchase troubled assets from any financial institution as part of the Troubled Assets Relief Program (TARP). Under Section 3(9)(B) of the Act, the Secretary of the Treasury may designate as a troubled asset any financial instrument that he determines, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, the purchase of which is necessary to promote financial market stability.

After consulting with the Chairman of the Board of Governors of the Federal Reserve System, I have determined that the purchase of obligations of certain thrift and other holding companies which are engaged in the manufacturing of automotive vehicles and the provision of credit and financing in connection with the manufacturing and purchase of such vehicles is necessary to promote financial market stability.

In accordance with Section 3(9)(B) of the Act, I am enclosing my determination and informing you that this purchase will be made under the TARP Systemically Significant Failing Institution Program.

Sincerely,

Henry M. Paulson, Jr.

Henry M. Paulson, Jr.

Enclosure

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

SECRETARY OF THE TREASURY

December 23, 2008

The Honorable Judd Gregg
Ranking Member
The Committee on the Budget
United States Senate
Washington, DC 20510

Dear Senator Gregg:

The Emergency Economic Stabilization Act of 2008 authorizes the Treasury Department to purchase troubled assets from any financial institution as part of the Troubled Assets Relief Program (TARP). Under Section 3(9)(B) of the Act, the Secretary of the Treasury may designate as a troubled asset any financial instrument that he determines, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, the purchase of which is necessary to promote financial market stability.

After consulting with the Chairman of the Board of Governors of the Federal Reserve System, I have determined that the purchase of obligations of certain thrift and other holding companies which are engaged in the manufacturing of automotive vehicles and the provision of credit and financing in connection with the manufacturing and purchase of such vehicles is necessary to promote financial market stability.

In accordance with Section 3(9)(B) of the Act, I am enclosing my determination and informing you that this purchase will be made under the TARP Systemically Significant Failing Institution Program.

Sincerely,

Henry M. Paulson, Jr.

Enclosure

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

SECRETARY OF THE TREASURY

December 23, 2008

The Honorable Charles Grassley
Ranking Member
Committee on Finance
United States Senate
Washington, DC 20510

Dear Senator Grassley:

The Emergency Economic Stabilization Act of 2008 authorizes the Treasury Department to purchase troubled assets from any financial institution as part of the Troubled Assets Relief Program (TARP). Under Section 3(9)(B) of the Act, the Secretary of the Treasury may designate as a troubled asset any financial instrument that he determines, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, the purchase of which is necessary to promote financial market stability.

After consulting with the Chairman of the Board of Governors of the Federal Reserve System, I have determined that the purchase of obligations of certain thrift and other holding companies which are engaged in the manufacturing of automotive vehicles and the provision of credit and financing in connection with the manufacturing and purchase of such vehicles is necessary to promote financial market stability.

In accordance with Section 3(9)(B) of the Act, I am enclosing my determination and informing you that this purchase will be made under the TARP Systemically Significant Failing Institution Program.

Sincerely,

Henry M. Paulson, Jr.

Henry M. Paulson, Jr.

Enclosure

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

SECRETARY OF THE TREASURY

December 23, 2008

The Honorable Barney Frank
Chairman
Committee on Financial Services
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

The Emergency Economic Stabilization Act of 2008 authorizes the Treasury Department to purchase troubled assets from any financial institution as part of the Troubled Assets Relief Program (TARP). Under Section 3(9)(B) of the Act, the Secretary of the Treasury may designate as a troubled asset any financial instrument that he determines, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, the purchase of which is necessary to promote financial market stability.

After consulting with the Chairman of the Board of Governors of the Federal Reserve System, I have determined that the purchase of obligations of certain thrift and other holding companies which are engaged in the manufacturing of automotive vehicles and the provision of credit and financing in connection with the manufacturing and purchase of such vehicles is necessary to promote financial market stability.

In accordance with Section 3(9)(B) of the Act, I am enclosing my determination and informing you that this purchase will be made under the TARP Systemically Significant Failing Institution Program.

Sincerely,

Henry M. Paulson, Jr

Henry M. Paulson, Jr

Enclosure

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

SECRETARY OF THE TREASURY

December 23, 2008

The Honorable Kent Conrad
Chairman
Committee on the Budget
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

The Emergency Economic Stabilization Act of 2008 authorizes the Treasury Department to purchase troubled assets from any financial institution as part of the Troubled Assets Relief Program (TARP). Under Section 3(9)(B) of the Act, the Secretary of the Treasury may designate as a troubled asset any financial instrument that he determines, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, the purchase of which is necessary to promote financial market stability.

After consulting with the Chairman of the Board of Governors of the Federal Reserve System, I have determined that the purchase of obligations of certain thrift and other holding companies which are engaged in the manufacturing of automotive vehicles and the provision of credit and financing in connection with the manufacturing and purchase of such vehicles is necessary to promote financial market stability.

In accordance with Section 3(9)(B) of the Act, I am enclosing my determination and informing you that this purchase will be made under the TARP Systemically Significant Failing Institution Program.

Sincerely,

Henry M. Paulson, Jr.

Henry M. Paulson, Jr.

Enclosure

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

SECRETARY OF THE TREASURY

December 23, 2008

The Honorable Christopher Dodd
Chairman
Committee on Banking, Housing, and Urban Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

The Emergency Economic Stabilization Act of 2008 authorizes the Treasury Department to purchase troubled assets from any financial institution as part of the Troubled Assets Relief Program (TARP). Under Section 3(9)(B) of the Act, the Secretary of the Treasury may designate as a troubled asset any financial instrument that he determines, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, the purchase of which is necessary to promote financial market stability.

After consulting with the Chairman of the Board of Governors of the Federal Reserve System, I have determined that the purchase of obligations of certain thrift and other holding companies which are engaged in the manufacturing of automotive vehicles and the provision of credit and financing in connection with the manufacturing and purchase of such vehicles is necessary to promote financial market stability.

In accordance with Section 3(9)(B) of the Act, I am enclosing my determination and informing you that this purchase will be made under the TARP Systemically Significant Failing Institution Program.

Sincerely,

Henry M. Paulson Jr.

Henry M. Paulson, Jr.

Enclosure

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

SECRETARY OF THE TREASURY

December 23, 2008

The Honorable Thad Cochran
Ranking Member
Committee on Appropriations
United States Senate
Washington, DC 20510

Dear Senator Cochran:

The Emergency Economic Stabilization Act of 2008 authorizes the Treasury Department to purchase troubled assets from any financial institution as part of the Troubled Assets Relief Program (TARP). Under Section 3(9)(B) of the Act, the Secretary of the Treasury may designate as a troubled asset any financial instrument that he determines, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, the purchase of which is necessary to promote financial market stability.

After consulting with the Chairman of the Board of Governors of the Federal Reserve System, I have determined that the purchase of obligations of certain thrift and other holding companies which are engaged in the manufacturing of automotive vehicles and the provision of credit and financing in connection with the manufacturing and purchase of such vehicles is necessary to promote financial market stability.

In accordance with Section 3(9)(B) of the Act, I am enclosing my determination and informing you that this purchase will be made under the TARP Systemically Significant Failing Institution Program.

Sincerely,

Henry M. Paulson, Jr.

Henry M. Paulson, Jr.

Enclosure

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

SECRETARY OF THE TREASURY

December 23, 2008

The Honorable Robert Byrd
Chairman
Committee on Appropriations
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

The Emergency Economic Stabilization Act of 2008 authorizes the Treasury Department to purchase troubled assets from any financial institution as part of the Troubled Assets Relief Program (TARP). Under Section 3(9)(B) of the Act, the Secretary of the Treasury may designate as a troubled asset any financial instrument that he determines, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, the purchase of which is necessary to promote financial market stability.

After consulting with the Chairman of the Board of Governors of the Federal Reserve System, I have determined that the purchase of obligations of certain thrift and other holding companies which are engaged in the manufacturing of automotive vehicles and the provision of credit and financing in connection with the manufacturing and purchase of such vehicles is necessary to promote financial market stability.

In accordance with Section 3(9)(B) of the Act, I am enclosing my determination and informing you that this purchase will be made under the TARP Systemically Significant Failing Institution Program.

Sincerely,

Henry M. Paulson, Jr.

Henry M. Paulson, Jr.

Enclosure

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

SECRETARY OF THE TREASURY

December 23, 2008

The Honorable Max Baucus
Chairman
Committee on Finance
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

The Emergency Economic Stabilization Act of 2008 authorizes the Treasury Department to purchase troubled assets from any financial institution as part of the Troubled Assets Relief Program (TARP). Under Section 3(9)(B) of the Act, the Secretary of the Treasury may designate as a troubled asset any financial instrument that he determines, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, the purchase of which is necessary to promote financial market stability.

After consulting with the Chairman of the Board of Governors of the Federal Reserve System, I have determined that the purchase of obligations of certain thrift and other holding companies which are engaged in the manufacturing of automotive vehicles and the provision of credit and financing in connection with the manufacturing and purchase of such vehicles is necessary to promote financial market stability.

In accordance with Section 3(9)(B) of the Act, I am enclosing my determination and informing you that this purchase will be made under the TARP Systemically Significant Failing Institution Program.

Sincerely,

Henry M. Paulson, Jr.

Henry M. Paulson, Jr.

Enclosure

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

SECRETARY OF THE TREASURY

December 23, 2008

The Honorable Spencer Bachus
Ranking Member
Committee on Financial Services
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Bachus:

The Emergency Economic Stabilization Act of 2008 authorizes the Treasury Department to purchase troubled assets from any financial institution as part of the Troubled Assets Relief Program (TARP). Under Section 3(9)(B) of the Act, the Secretary of the Treasury may designate as a troubled asset any financial instrument that he determines, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, the purchase of which is necessary to promote financial market stability.

After consulting with the Chairman of the Board of Governors of the Federal Reserve System, I have determined that the purchase of obligations of certain thrift and other holding companies which are engaged in the manufacturing of automotive vehicles and the provision of credit and financing in connection with the manufacturing and purchase of such vehicles is necessary to promote financial market stability.

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Enclosure

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

SECRETARY OF THE TREASURY

December 23, 2008

The Honorable John Spratt
Chairman
Committee on the Budget
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

The Emergency Economic Stabilization Act of 2008 authorizes the Treasury Department to purchase troubled assets from any financial institution as part of the Troubled Assets Relief Program (TARP). Under Section 3(9)(B) of the Act, the Secretary of the Treasury may designate as a troubled asset any financial instrument that he determines, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, the purchase of which is necessary to promote financial market stability.

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In accordance with Section 3(9)(B) of the Act, I am enclosing my determination and informing you that this purchase will be made under the TARP Systemically Significant Failing Institution Program.

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DEPARTMENT OF THE TREASURY
WASHINGTON, D.C.

SECRETARY OF THE TREASURY

DETERMINATION

WHEREAS, section 101 of the Emergency Economic Stabilization Act of 2008 (the "Act") authorizes the Secretary of the Treasury (the "Secretary") to establish the Troubled Assets Relief Program (the "TARP") to purchase, and to make and fund commitments to purchase, troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary, and in accordance with the Act and the policies and procedures developed and published by the Secretary;

WHEREAS, section 3(5) of the Act defines the term "financial institution" to mean 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;

WHEREAS, section 3(9)(A) of the Act defines the term "troubled assets" to mean residential or commercial mortgages and any securities, obligations, or other instruments that are based on or related to such mortgages, that in each case was originated or issued on or before March 14, 2008, the purchase of which the Secretary determines promotes financial market stability;

WHEREAS, section 3(9)(B) of the Act further defines the term "troubled assets" to mean any other financial instrument that the Secretary, after consultation with the Chairman of the Board of Governors of the Federal Reserve System (the "Chairman"), determines the purchase of which is necessary to promote financial market stability, but only upon transmittal of such determination, in writing, to the appropriate committees of Congress;

WHEREAS, section 3(1) of the Act defines the term "appropriate committees of Congress" to mean the Committee on Banking, Housing, and Urban Affairs, the Committee on Finance, the Committee on the Budget, and the Committee on Appropriations of the Senate; and the Committee on Financial Services, the Committee on Ways and Means, the Committee on the Budget, and the Committee on Appropriations of the House of Representatives;

WHEREAS, the TARP has established the Automotive Industry Financing Program ("AIFP") to purchase and fund commitments to purchase troubled assets from holding companies and other companies engaged in the manufacturing of automotive vehicles in order to prevent a significant disruption of the American automotive industry, a risk to financial market stability and a negative effect on the real economy of the United States;

WHEREAS, certain companies engaged in the manufacturing of automotive vehicles have applied under the TARP AIFP requesting that the Department of the Treasury purchase debt obligations or equity of such holding companies and other companies consistent with the AIFP;

WHEREAS, such holding companies and other companies are "financial institutions" for purposes of section 3(5) of the Act as they are "institutions" established and regulated under the laws of the United States and have significant operations in the United States; and

WHEREAS, as Secretary, I have consulted with the Chairman, and we have jointly concluded that the TARP's purchase of the debt obligations or equity is necessary to promote financial market stability.

NOW, THEREFORE, I HEREBY DETERMINE that the debt obligations or equity of such institutions are financial instruments the purchase of which is necessary to promote financial market stability, and, as such, are "troubled assets," as that term is defined in section 3(9)(B) of the Act, and eligible to be purchased under the TARP; and

I HEREBY direct that this determination be transmitted to the appropriate committees of Congress.

Timothy F. Geithner

April 29, 2009

ADDITIONAL MATERIAL SUPPLIED FOR THE RECORD

Evaluating the TARP

Written Testimony for the
Committee on Banking, Housing, and Urban Affairs
United States Senate

John B. Taylor[1]
Stanford University

March 17, 2011

Chairman Johnson and other members of the Committee, I thank you for the opportunity to provide written testimony for the hearing on the evaluation of the effectiveness of the Troubled Asset Relief Program in stabilizing the financial system and the U.S. economy. You requested that I consider empirical evidence regarding the rollout and the implementation of TARP. I begin with a summary of that evidence.

Rollout and Implementation

My empirical research on the rollout and implementation of TARP goes back to its very early days. Conducted in real time, the research results were first presented[2] in November 2008, prior to the first hearings or reports of the Congressional Oversight Panel or the Special Inspector General for the TARP. As part of an ongoing research project I had been following several measures of stress in the financial markets. I became concerned when these measures started showing that the rollout of the TARP was actually worsening the crisis. So I began to study the issue further.

The chart below summarizes some of the evidence. It is reproduced from my November 2008 study and shows the Libor–OIS spread during the period when TARP was being rolled out. The Libor-OIS spread is a well-known measure of stress in the financial markets. It is the difference between the interest rate on longer term interbank loans (Libor) and an expectation of what the overnight interest rate (federal funds rate) would be over the maturity of the loan (OIS). Higher values of the spread indicate greater stress in the markets.

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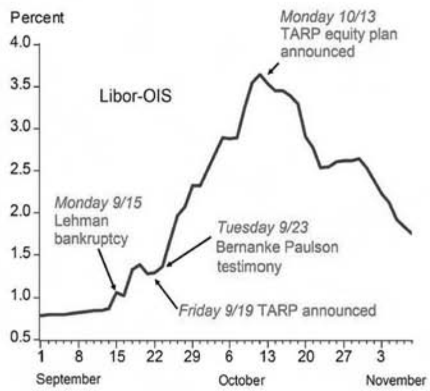
[1] Mary and Robert Raymond Professor of Economics at Stanford University and George P. Shultz Senior Fellow in Economics at Stanford University's Hoover Institution.

[2] John B. Taylor "The Financial Crisis and the Policy Responses: An Empirical Analysis of What Went Wrong," *A Festschrift in Honour of David Dodge's Contributions to Canadian Public Policy*, Bank of Canada, November 2008, pp. 1-18



The chart highlights several key events in September and October 2008: the bankruptcy of Lehman brothers, the announcement of TARP, the first congressional testimony about the TARP at this Committee, and a major change in the design of program as it was implemented. Note that the spread started rising sharply in late September and kept rising until mid-October when it started to move down. The sharply worsening conditions in the markets are thus quite evident in the chart. Never before had I seen this spread rise so sharply. The question I addressed then—and am again addressing now—was what caused the worsening conditions.

Many rightly argue that when evaluating policy decisions it is important to try to place oneself close to the time of the events. So let me quote from my November 2008 paper:

"It is evident that the spread moved a bit on 15 September, which is the Monday after the weekend decision not to intervene in Lehman Brothers. It then bounced back down a little bit on 16 September, around the time of the AIG (American International Group) intervention. While the spread did rise during the week following the Lehman Brothers decision, it was not far out of line with the events of the previous year."

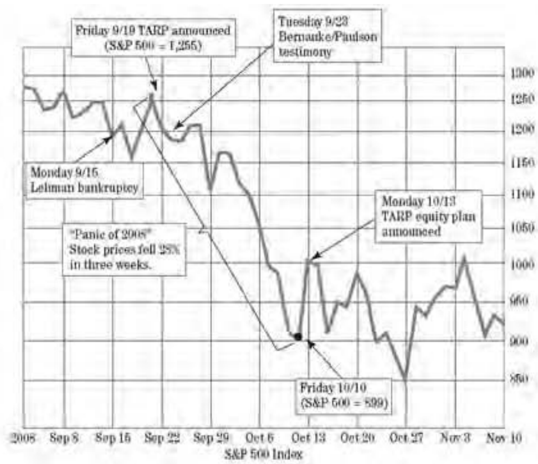
"On Friday of that week, the Treasury announced that it was going to propose a large rescue package, though the size and details hadn't yet been determined. Over the weekend, the package was put together and on Tuesday, 23 September, Federal Reserve Board Chairman Ben Bernanke and Treasury Secretary Henry Paulson testified at the Senate Banking Committee about the TARP, saying that it would be $700 billion in size. They provided a 2½-page draft of legislation with no mention of oversight and few restrictions on the use. They were questioned intensely in this testimony and the reaction was quite negative, judging by the large volume of critical mail received by many members of the United States Congress….it was following this testimony that one really begins to see the crisis deepening, as measured by the relentless upward movement in the LIBOR-OIS spread for the next three weeks. The situation steadily deteriorated, and the spread went through the roof to 3.5 per cent."

"… it is plausible that events around 23 September actually drove the market, including the realization by the public that the intervention plan had not been fully thought through and that conditions were much worse than many had been led to believe. At a minimum, a great deal of uncertainty about what the government would do to aid financial institutions, and under what circumstances, was revealed and thereby added to business and investment decisions at that time. Such uncertainty would have driven up risk spreads in the interbank market and elsewhere. Some evidence of the uncertainty is found in a survey taken later (5 November) by the Securities Industry and Financial Markets Association (SIFMA); it showed that 94 per cent of securities firms and banks found that the TARP lacked clarity about its operations."

"The problem of uncertainty about the procedures or criteria for government intervention to prevent financial institutions from failing had existed since the time of the Bear Stearns intervention in March. The implication of that decision for future interventions was not made clear by policy-makers. This lack of predictability about Treasury-Fed intervention policy and recognition of the harm it could do to markets likely increased in autumn 2008 when the underlying uncertainty was revealed for all to see."

Further examination of the empirical evidence confirms the view expressed at that time. Note that the Libor-OIS spread ended its upward climb at the same time that a major source of uncertainty about the TARP was removed. Recall that the original idea of TARP, upon which the TARP was sold, was to relieve certain financial institutions of their troubled assets by buying the assets from the institutions. Few understood how this idea would work—how the price would be determined for example—which added to the uncertainty. This original idea was changed after the TARP was enacted and the government announced that it would simply inject capital into the banks. When the uncertainty was removed, conditions began to improve.

Another aspect of the TARP rollout that is consistent with the view that it helped to worsen financial conditions is that government officials told lawmakers in closed hearings, which soon leaked out to an alarmed public, that America would experience another great depression if the TARP legislation were not passed, and perhaps even if it were passed. Clearly this helped cause panic in the financial markets. You can see this in the equity markets in the United States and abroad. As shown in the chart below, covering the September-October 2008 period, the S&P 500 closed at 1252 on Friday, September 12, 2008, before the Lehman bankruptcy. It fell on Monday after the news of the bankruptcy but recovered during the week closing on the following Friday, September 19 at 1255, above the level before the bankruptcy. It was not until the following week and the rollout of the TARP that the market began to fall sharply. And it continued to fall until Friday October 10, when the S&P 500 hit 899. This was the last trading day before the government clarified how the TARP would be used.



Here are the corresponding data for equity markets in Britain, Germany, France, Brazil, and Japan. The timing of the moves tells the same story.

	S&P	FTSE	DAX	CAC	IBOVESPA	NIKKEI
Sept 12	1252	5417	6235	4332	52393	12215
Sept 15	1192	5204	6064	4169	48419	11609
Sept 19	1255	5311	6134	4324	53055	11921
Oct 10	899	3821	4544	3176	40829	8276

Other views

There have been other assessments of the effectiveness of the TARP. In a book published last year, former FDIC chairman William Isaac concluded[3] that "any objective analysis would conclude that the TARP legislation did nothing to stabilize the financial system that could not have been done without it. Moreover, the negative aspects of the TARP legislation far outweighed any possible benefit." In recent testimony before the Congressional Oversight Panel, economist Joseph Stiglitz[4] said that "TARP has not only been a dismal failure…but the way the program was managed has, I believe, contributed to the economy's problems."

Not everyone of course has such negative assessments. In its last report[5] the Congressional Oversight Panel said, "It is now clear that, although America has endured a

[3] William G. Isaac *Senseless Panic: How Washington Failed America*, Wiley, New Jersey, 2010. p. 175.

[4] Joseph Stiglitz, "Testimony on Impact of the TARP on Financial Stability," Congressional Oversight Panel Hearing March 4, 2011

[5] *Final Report of the Congressional Oversight Panel*, Congressional Oversight Panel, Washington DC March 16, 2011

wrenching recession, it has not experienced a second Great Depression. The TARP does not deserve full credit for this outcome, but it provided critical support to markets at a moment of profound uncertainty." In testimony before the Congressional Oversight Panel, acting Assistant Secretary of Treasury Timothy Massad goes further arguing that the TARP prevented an even more severe crisis,[6] citing as empirical evidence a paper[7] by Alan Blinder and Mark Zandi. However, Blinder and Zandi explain in their paper that they did not do a separate evaluation of the TARP, stating that "We make no attempt to decompose the financial-policy effects into portions attributable to TARP, to the Fed's quantitative easing policies, etc." Empirical evidence showing the effectiveness of TARP is lacking.

It should also be noted that many of those economists who view the TARP as having a beneficial effect argue that there were much better alternatives that could have avoided the financial panic and would have been far less costly with fewer long-term side effects. For example, Luigi Zingales[8] notes that "it is both false and misleading to say that there were no other alternatives. False because there were feasible, and in fact superior, alternatives. Misleading because it made TARP appear inevitable, forcing people not to question its costs."

In my view the TARP was not effective in stabilizing the financial system, especially if one takes into account the panic caused by its chaotic rollout and the fact that other actions could have been taken. Indeed other actions were taken, including the Fed's support for the commercial paper market and money market mutual funds, and I believe these were effective in mitigating the panic, which evidence shows was in part caused by the TARP

Legacy Costs

Although disagreement remains about whether TARP was destabilizing or stabilizing in the short run, there is very little disagreement about the longer-run legacy costs which are substantial, long-lasting, and already being felt. Consider the views from recent reports by oversight bodies and independent observers.

In January the Special Investigator General of the TARP listed these costs:[9]

- "damage to Government credibility that has plagued the program,"
- "failure of programs designed to help Main Street rather than Wall Street,"
- "moral hazard and potentially disastrous consequences associated with the continued existence of financial institutions that are 'too big to fail'"

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[6] Massad, Timothy G, "Written Testimony before the Congressional Oversight Panel," March 4, 2011

[7] Alan Blinder and Mark Zandi "Policy Responses and the Great Recession," July 2010

[8] Luigi Zingales, "Overall Impact of TARP on Financial Stability," Congressional Oversight Panel, March 4, 2011

[9] *Quarterly Report*, Office of the Special Inspector General for the Troubled Asset Relief Program, January 26, 2011

At the last hearing of the Congressional Oversight Panel earlier this month, economists Joseph Stiglitz, Allan Meltzer, Simon Johnson, and Luigi Zingales, who rarely all agree with each other, were unanimous in their view that the precedent set by TARP has created an incentive for financial institutions and their creditors to take high risks due to the expectation of being bailed out, unfairly favoring large financial institutions and leaving the financial system more vulnerable than ever to financial crisis. Here they echoed the third point of Special Inspector General for the TARP. They also agreed that the Dodd-Frank legislation has not solved the too big to fail problem.

And just yesterday the Congressional Oversight Panel released its final report listing these additional effects of TARP:

- "continuing distortions in the market"
- "public anger toward policymakers,"
- "a lack of full transparency and accountability."

To these I would add that the TARP established an unfortunate precedent of heavy government intervention in the operations of private businesses along with the use of a great deal of power. For example, the government forced some financial institutions to take TARP capital injections, even if they did not want them, by threatening costly actions from their regulators, and then placed additional controls on such institutions because they had the unwanted capital. In addition, the government used the TARP for purposes other than originally stated in Congressional hearings, including the bailing out of automobile companies.

Most of these legacy costs will be a drag on the U.S. financial system and economy for years to come unless the precedents are reversed, perhaps through legislation. Some argue that the costs of TARP are small because estimates show that the government will lose less money than budget experts originally thought. But government programs can cause much harm to the economy and to people even if they raise revenue. For example, inflation is enormously costly to society even though it is a source of revenue to the government.

Conclusion

In sum, in my view there is no convincing evidence to support the view that the TARP had a stabilizing effect on the financial markets or the U.S. economy. On the contrary there is evidence that the chaotic rollout of the TARP exacerbated the crisis. Even if one can find some stabilizing effects, it is clear that other actions could have been taken that did not have these rollout costs. Finally, there is a considerable consensus among economists that the legacy costs of TARP are large, especially the perpetuation and amplification of the destabilizing "too big to fail" problem in our financial system caused by the expectations of more bailouts in the future.

How the Great Recession Was Brought to an End

JULY 27, 2010

Prepared By
Alan S. Blinder
[illegible]
[illegible]
[illegible]

Mark Zandi
Chief Economist, Moody's Analytics
[illegible]
[illegible]

How the Great Recession Was Brought to an End

BY ALAN S. BLINDER AND MARK ZANDI[1]

The U.S. government's response to the financial crisis and ensuing Great Recession included some of the most aggressive fiscal and monetary policies in history. The response was multifaceted and bipartisan, involving the Federal Reserve, Congress, and two administrations. Yet almost every one of these policy initiatives remain controversial to this day, with critics calling them misguided, ineffective or both. The debate over these policies is crucial because, with the economy still weak, more government support may be needed, as seen recently in both the extension of unemployment benefits and the Fed's consideration of further easing.

In this paper, we use the Moody's Analytics model of the U.S. economy—adjusted to accommodate some recent financial-market policies—to simulate the macroeconomic effects of the government's total policy response. We find that its effects on real GDP, jobs, and inflation are huge, and probably averted what could have been called Great Depression 2.0. For example, we estimate that, without the government's response, GDP in 2010 would be about 11.5% lower, payroll employment would be less by some 8½ million jobs, and the nation would now be experiencing deflation.

When we divide these effects into two components—one attributable to the fiscal stimulus and the other attributable to financial-market policies such as the TARP, the bank stress tests and the Fed's quantitative easing—we estimate that the latter was substantially more powerful than the former. Nonetheless, the effects of the fiscal stimulus alone appear very substantial, raising 2010 real GDP by about 3.4%, holding the unemployment rate about 1½ percentage points lower, and adding almost 2.7 million jobs to U.S. payrolls. These estimates of the fiscal impact are broadly consistent with those made by the CBO and the Obama administration.[2] To our knowledge, however, our comprehensive estimates of the effects of the financial-market policies are the first of their kind.[3] We welcome other efforts to estimate these effects.

HOW THE GREAT RECESSION WAS BROUGHT TO AN END

The U.S. economy has made enormous progress since the dark days of early 2009. Eighteen months ago, the global financial system was on the brink of collapse and the U.S. was suffering its worst economic downturn since the 1930s. Real GDP was falling at about a 6% annual rate, and monthly job losses averaged close to 750,000. Today, the financial system is operating much more normally, real GDP is advancing at a nearly 3% pace, and job growth has resumed, albeit at an insufficient pace.

From the perspective of early 2009, this rapid snap back was a surprise. Maybe the country and the world were just lucky. But we take another view: The Great Recession gave way to recovery as quickly as it did largely because of the unprecedented responses by monetary and fiscal policymakers.

A stunning range of initiatives was undertaken by the Federal Reserve, the Bush and Obama administrations, and Congress (see Table 1). While the effectiveness of any individual element certainly can be debated, there is little doubt that in total, the policy response was highly effective. If policymakers had not reacted as aggressively or as quickly as they did, the financial system might still be unsettled, the economy might still be shrinking, and the costs to U.S. taxpayers would have been vastly greater.

Broadly speaking, the government set out to accomplish two goals: to stabilize the sickly financial system and to mitigate the burgeoning recession, ultimately restarting economic growth. The first task was made necessary by the financial crisis, which struck in the summer of 2007 and spiraled into a financial panic in the fall of 2008. After the Lehman Brothers bankruptcy, liquidity evaporated, credit spreads ballooned, stock prices fell sharply, and a string of major financial institutions failed. The second task was made necessary by the devastating effects of the financial crisis on the real economy, which began to contract at an alarming rate after Lehman.

The Federal Reserve took a number of extraordinary steps to quell the financial panic. In late 2007, it established the first of what would eventually become an alphabet soup of new credit facilities designed to provide liquidity to financial institutions and markets.[4] The Fed aggressively lowered interest rates during 2008, adopting a zero-interest-rate policy by year's end. It engaged in massive quantitative easing in 2009 and early 2010, purchasing Treasury bonds and Fannie Mae and Freddie Mac mortgage-backed securities (MBS) to bring down long-term interest rates.

The FDIC also worked to stem the financial turmoil by increasing deposit insurance limits and guaranteeing bank debt. Congress established the Troubled Asset Relief Program (TARP) in October 2008, part of which was used by the Treasury to inject much-needed capital into the nation's banks. The Treasury and Federal Reserve ordered the 19 largest bank holding companies to conduct comprehensive stress tests in the spring of 2009, to determine if they had sufficient capital to withstand further adverse circumstances—and to raise more capital if necessary. Once the results were made public, the stress tests and subsequent capital raising restored confidence in the banking system.

The effort to end the recession and jump-start the recovery was built around a series of fiscal stimulus measures. Tax rebate checks were mailed to lower- and middle-income households in the spring of 2008; the American Restoration and Recovery Act (ARRA) was passed in early 2009; and several smaller stimulus measures became law in late 2009 and early 2010.[5] In all, close to $1 trillion, roughly 7 percent of GDP, will be spent on fiscal stimulus. The stimulus has done what it was supposed to do: end the Great Recession and spur recovery. We do not believe it a coincidence that the turnaround from recession to recovery occurred last summer, just as the ARRA was providing its maximum economic benefit.

Stemming the slide also involved rescuing the nation's housing and auto industries. The housing bubble and bust were the proximate causes of the financial crisis, setting off a vicious cycle of falling house prices and surging foreclosures. Policymakers appear to have broken this cycle with an array of efforts, including the Fed's actions to bring down mortgage rates, an increase in conforming loan limits, a dramatic expansion of FHA lending, a series of tax credits for homebuyers, and the use of TARP funds to mitigate foreclosures. While the housing market remains troubled, its steepest declines are in the past.

The near collapse of the domestic auto industry in late 2008 also threatened to exacerbate the recession. GM and Chrysler eventually went through bankruptcies, but TARP funds were used to make the process relatively orderly. GM is already on its way to being a publicly traded company again. Without financial help from the federal government, all three domestic vehicle producers and many of their suppliers might have had to liquidate many operations, with devastating effects on the broader economy, and especially on the Midwest.

Although the economic pain was severe and the budgetary costs were great, this sounds like a success story.[6] Yet nearly all aspects of the government's response have been subjected to intense criticism. The Federal Reserve has been accused of overstepping its mandate by conducting fiscal as well as monetary policy. Critics have attacked efforts to stem the decline in house prices as inappropriate; claimed that foreclosure mitigation efforts were ineffective; and argued that the auto bailout was both unnecessary and unfair. Particularly heavy criticism has been aimed at the TARP and the Recovery Act, both of which have become deeply unpopular.

The Troubled Asset Relief Program was controversial from its inception. Both the program's $700 billion headline price tag and its goal of "bailing out" financial institutions—including some of the same institutions that triggered the panic in the first place—were hard for citizens and legislators to swallow. To this day, many believe the TARP was a costly failure. In fact, TARP has been a substantial success, helping to restore stability to the financial system and to end the freefall in housing and auto markets. Its ultimate cost to taxpayers will be a small fraction of the headline $700 billion figure: A number below $100 billion seems more likely to us, with the bank bailout component probably turning a profit.

Criticism of the ARRA has also been strident, focusing on the high price tag, the slow speed of delivery, and the fact that the unemployment rate rose much higher than the Administration predicted in January 2009.

TABLE 1

Federal Government Response to the Financial Crisis

$ bil	Originally Committed	Currently Provided	Ultimate Cost
Total	11,937	3,513	1,590
Federal Reserve			
Term auction credit	900	0	0
Other loans	Unlimited	68	3
Primary credit	Unlimited	0	0
Secondary credit	Unlimited	0	0
Seasonal credit	Unlimited	0	0
Primary Dealer Credit Facility (expired 2/1/2010)	Unlimited	0	0
Asset-Backed Commercial Paper Money Market Mutual Fund	Unlimited	0	0
AIG	26	25	2
AIG (for SPVs)	9	0	0
AIG (for ALICO, AIA)	26	0	1
Rescue of Bear Stearns (Maiden Lane)**	27	28	4
AIG-RMBS purchase program (Maiden Lane II)**	23	16	1
AIG-CDO purchase program (Maiden Lane III)**	30	23	4
Term Securities Lending Facility (expired 2/1/2010)	200	0	0
Commercial Paper Funding Facility** (expired 2/1/2010)	1,800	0	0
TALF	1,000	43	0
Money Market Investor Funding Facility (expired 10/30/2009)	540	0	0
Currency swap lines (expired 2/1/2010)	Unlimited	0	0
Purchase of GSE debt and MBS (expired 3/31/2010)	1,425	1,295	0
Guarantee of Citigroup assets (terminated 12/23/2009)	286	0	0
Guarantee of Bank of America assets (terminated)	108	0	0
Purchase of long-term Treasuries	300	300	0
Treasury			
Fed supplementary financing account	560	200	0
Fannie Mae and Freddie Mac	Unlimited	145	305
FDIC			
Guarantee of U.S. banks' debt*	1,400	305	4
Guarantee of Citigroup debt	10		0
Guarantee of Bank of America debt	3		0
Transaction deposit accounts	500	0	0
Public-Private Investment Fund Guarantee	1,000	0	0
Bank Resolutions	Unlimited	23	71
Federal Housing Administration			
Refinancing of mortgages, Hope for Homeowners	100	0	0
Expanded Mortgage Lending	Unlimited	150	26
Congress			
TARP (see detail in Table 9)	600	277	101
Economic Stimulus Act of 2008	170	170	170
American Recovery and Reinvestment Act of 2009***	784	391	784
Cash for Clunkers	3	3	3
Additional Emergency UI benefits	90	39	90
Other Stimulus	21	12	21

NOTES: *Includes foreign denominated debt; **Net portfolio holdings; *** Excludes AMT patch

While we would not defend every aspect of the stimulus, we believe this criticism is largely misplaced, for these reasons:

The unusually large size of the fiscal stimulus (equal to about 7% of GDP) is consistent with the extraordinarily severe downturn and the limited ability to use monetary policy once interest rates neared zero.

Regarding speed, almost $500 billion has been spent to date (see Table 2). What matters for economic growth is the pace of stimulus spending, which surged from nothing at the start of 2009 to over $100 billion (over $400 billion at an annual rate) in the second quarter. That is a big change in a short period, and it is one major reason why the Great Recession ended and recovery began last summer.[7]

Critics who argue that the ARRA failed because it did not keep unemployment below 8% ignore the facts that (a) unemployment was already above 8% when the ARRA was passed and (b) most private forecasters (including Moody's Analytics) misjudged how serious the downturn would be. If anything, this forecasting error suggests the stimulus package should have been even larger than it was.

This study attempts to quantify the contributions of the TARP, the stimulus, and other government initiatives to ending the financial panic and the Great Recession. In sum, we find they were highly effective. Without such a determined and aggressive response by policymakers, the economy would likely have fallen into a much deeper slump.

Quantifying the economic impact

To quantify the economic impacts of the fiscal stimulus and the financial-market policies such as the TARP and the Fed's quantitative easing, we simulated the Moody's Analytics' model of the U.S. economy under four scenarios:

1. a baseline that includes all the policies actually pursued
2. a counterfactual scenario with the fiscal stimulus but without the financial policies
3. a counterfactual with the financial policies but without fiscal stimulus
4. a scenario that excludes all the policy responses.[8]

The differences between Scenario 1 and Scenario 4 provide the answers we seek about the impacts of the panoply of anti-recession policies. Scenarios 2 and 3 enable us to decompose the overall impact into the components stemming from the fiscal stimulus and financial initiatives. All simulations begin in the first quarter of 2008 with the start of the Great Recession, and end in the fourth quarter of 2012.

Estimating the economic impact of the policies is not an accounting exercise, but an econometric one. It is not feasible to identify and count each job created or saved by these policies. Rather, outcomes for employment and other activity must be estimated using a statistical representation of the economy based on historical relationships, such as the Moody's Analytics model. This model is regularly used for forecasting, scenario analysis, and quantifying the impacts of a wide range of policies on the economy. The Congressional Budget Office and the Obama Administration have derived their impact estimates for policies such as the fiscal stimulus using a similar approach.

The modeling techniques for simulating the fiscal policies were straightforward, and have been used by countless modelers over the years. While the scale of the fiscal stimulus was massive, most of the instruments themselves (tax cuts, spending) were conventional, so not much innovation was required on our part. A few details are provided in Appendix B.

But modeling the vast array of financial policies, most of which were unprecedented and unconventional, required some creativity, and forced us to make some major simplifying assumptions. Our basic approach was to treat the financial policies as ways to reduce *credit spreads*, particularly the three credit spreads that play key roles in the Moody's Analytics model: The so-called TED spread between three-month Libor and three-month Treasury bills; the spread between fixed mortgage rates and 10-year Treasury bonds; and the "junk bond" (below investment grade) spread over Treasury bonds. All three of these spreads rose alarmingly during the crisis, but came tumbling down once the financial medicine was applied. The key question for us was how much of the decline in credit spreads to attribute to the policies, and here we tried several different assumptions.[9] All of this is discussed in Appendix B.

The results

Under the baseline scenario, which includes all the financial and fiscal policies, and is the most likely outlook for the economy, the recovery that began a year ago is expected to remain intact. The economy struggles during the second half of this year, as the sources of growth that powered the first year of recovery—including the stimulus and a powerful inventory swing—begin to fade. Fallout from the European debt crisis also weighs on the U.S. economy. But by this time next year, the economy gains traction as businesses respond to better profitability and stronger balance sheets by investing and hiring more. In the baseline scenario, real GDP, which declined 2.4% in 2009, expands 2.9% in 2010 and 3.6% in 2011, with monthly job growth averaging near 100,000 in 2010 and above 200,000 in 2011. Unemployment is still close to 10% at the end of 2010, but closer to 9% by the end of 2011. The federal budget deficit is $1.4 trillion in the current 2010 fiscal year, equal to approximately 10% of GDP. It falls only slowly, to $1.15 trillion in FY 2011 and to $900 billion in FY 2012.

In the scenario that excludes all the extraordinary policies, the downturn continues into 2011. Real GDP falls a stunning 7.4% in 2009 and another 3.7% in 2010 (see Table 3). The peak-to-trough decline in GDP is therefore close to 12%, compared to an actual decline of about 4%. By the time employment hits bottom, some 16.6 million jobs are lost in this scenario—about twice as many as actually were lost. The unemployment rate peaks at 16.5%, and although not determined in this analysis, it would not be surprising if the *under*employment rate approached one-fourth of the labor force. The federal budget deficit surges to over $2 trillion in fiscal year 2010, $2.6 trillion in fiscal year 2011, and $2.25 trillion in FY 2012. Remember, this is with *no policy response.* With outright deflation in prices and wages in 2009-2011, this dark scenario constitutes a 1930s-like depression.

TABLE 2

American Recovery and Reinvestment Act Spendout

$ bil, Historical data through June 2010

	Currently Provided	2009 Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	09Q1	09Q2	09Q3	09Q4	10Q1	10Q2
Total	472	0.0	3.4	9.7	20.3	36.6	45.8	24.6	26.9	52.2	30.1	30.4	28.9	13.1	102.8	103.7	89.4	80.8	82.4
Infrastructure and Other Spending	56	0.0	0.0	0.0	0.0	1.5	3.7	1.7	3.2	4.3	3.8	3.9	4.7	0.0	5.2	9.2	12.4	14.1	15.1
Traditional Infrastructure	14	0.0	0.0	0.0	0.0	0.2	0.2	0.8	1.2	0.7	1.8	1.5	1.4	0.0	0.4	2.6	4.6	2.9	3.4
Nontraditional Infrastructure	42	0.0	0.0	0.0	0.0	1.3	3.5	0.9	2.1	3.5	2.1	2.4	3.3	0.0	4.8	6.5	7.8	11.2	11.6
Transfers to state and local governments	119	0.0	3.4	6.6	5.8	9.4	8.4	8.2	8.0	8.4	8.2	8.0	7.7	10.0	23.5	24.6	23.9	17.2	20.2
Medicaid	69	0.0	3.4	6.6	5.4	4.8	4.7	4.5	4.3	4.3	4.1	4.3	4.1	10.0	14.9	13.1	12.6	9.0	9.3
Education	51	0.0	0.0	0.0	0.3	4.6	3.7	3.7	3.7	4.1	4.1	3.7	3.6	0.0	8.7	11.5	11.4	8.2	10.9
Transfers to persons	109	0.0	0.0	0.8	6.1	17.5	7.6	6.1	6.4	6.4	6.4	6.7	6.7	0.8	31.2	18.9	19.8	19.4	18.8
Social Security	13	0.0	0.0	0.0	0.0	11.6	1.5	0.0	0.0	0.0	0.0	0.0	0.0	0.0	13.1	0.0	0.0	0.0	0.0
Unemployment Assistance	66	0.0	0.0	0.0	4.1	4.1	4.1	4.1	4.5	4.5	4.5	4.8	4.8	0.0	12.2	13.1	14.1	13.6	13.0
Food stamps	10	0.0	0.0	0.0	0.6	0.6	0.6	0.6	0.6	0.6	0.6	0.6	0.6	0.0	1.9	1.9	1.9	1.9	1.9
Cobra Payments	20	0.0	0.0	0.8	1.4	1.3	1.4	1.4	1.3	1.3	1.3	1.3	1.3	0.8	4.1	3.9	3.8	3.9	3.9
Tax cuts	188	0.0	0.0	2.3	8.5	8.3	26.1	8.6	9.3	33.2	11.7	11.9	9.7	2.3	42.8	51.1	33.2	30.2	28.4
Businesses and other tax incentives	40	0.0	0.0	0.0	0.0	0.0	18.0	0.0	0.0	22.0	0.0	0.0	0.0	0.0	18.0	22.0	0.0	0.0	0.0
Individuals ex increase in AMT exemption	148	0.0	0.0	2.3	8.5	8.3	8.1	8.6	9.3	11.2	11.7	11.9	9.7	2.3	24.8	29.1	33.2	30.2	28.4

Sources: Treasury, Joint Committee on Taxation, Recovery.gov, Moody's Analytics

HOW THE GREAT RECESSION WAS BROUGHT TO AN END

TABLE 3

Simulation of No Policy Response

☐ No Policy Response ☐ Baseline (with actual policy response)

	08q1	08q2	08q3	08q4	09Q1	09Q2	09Q3	09Q4	10Q1	10Q2	10Q3	10Q4	2008	2009	2010	2011	2012
Real GDP (Bil. 05$, SAAR)	13,367	13,365	13,251	13,003	12,609	12,324	12,132	12,014	11,903	11,831	11,771	11,760	13,246	12,270	11,816	12,008	12,620
annualized % change	-0.7	-0.1	-3.4	7.3	-11.6	-8.7	-6.1	-3.8	-3.6	-2.4	-2.0	-0.3	-0.1	-7.4	-3.7	1.6	5.1
Real GDP (Bil. 05$, SAAR)	13,367	13,415	13,325	13,142	12,925	12,902	12,973	13,150	13,239	13,335	13,400	13,490	13,312	12,987	13,366	13,852	14,552
annualized % change	-0.7	1.5	-2.7	-5.4	-6.4	-0.7	2.2	5.6	2.7	2.9	2.0	2.7	0.4	-2.4	2.9	3.6	5.1
Payroll Employment (Mil., SA)	137.9	137.5	136.6	134.6	131.6	128.4	125.9	124.0	122.8	122.3	121.5	121.3	136.7	127.5	122.0	122.4	125.9
annualized % change	0.1	1.3	-2.4	-5.7	-8.8	-9.3	-7.7	-6.0	-3.8	-1.5	-2.8	-0.4	-0.7	-6.7	-4.3	0.3	2.9
Payroll Employment (Mil., SA)	137.9	137.5	136.7	135.0	132.8	131.1	130.1	129.6	129.7	130.4	130.5	130.8	136.8	130.9	130.4	132.2	136.0
annualized % change	0.1	-1.2	-2.3	-4.8	-6.4	-5.0	-3.1	1.3	0.2	2.1	0.4	1.0	-0.6	-4.3	-0.4	1.4	2.9
Unemployment Rate (%)	5.0	5.3	6.1	7.1	8.7	10.6	12.1	13.5	14.0	15.0	15.7	16.2	5.9	11.2	15.2	16.3	15.0
Unemployment Rate (%)	5.0	5.3	6.0	7.0	8.2	9.3	9.6	10.0	9.7	9.7	9.8	9.9	5.8	9.3	9.8	9.8	8.3
CPI (Index, 1982-84=100, SA)	212.8	215.6	218.9	213.6	212.2	212.7	211.4	209.4	208.1	207.2	205.6	204.8	215.2	211.4	206.4	204.4	208.7
annualized % change	4.7	5.2	6.3	-9.3	-2.6	1.1	-2.5	-3.7	-2.5	-1.6	-3.0	-1.6	3.8	-1.8	-2.4	-1.0	2.1
CPI (Index, 1982-84=100, SA)	212.8	215.6	218.9	213.7	212.5	213.5	215.4	216.8	217.6	218.1	218.6	219.4	215.2	214.5	218.4	222.7	229.6
annualized % change	4.7	5.3	6.4	-9.2	-2.2	1.9	3.7	2.6	1.5	0.8	1.0	1.4	3.8	-0.3	1.8	2.0	3.1

Sources: BEA, BLS, Moody's Analytics

TABLE 4

Baseline vs. No Policy Response Scenario

Difference	2008	2009	2010	2011	2012
Real GDP (Bil. 05$, SAAR)	66	718	1,549	1,843	1,933
percentage points	0.50	4.93	6.61	2.07	-0.03
Payroll Employment (Mil., SA)	0.12	3.45	8.40	9.82	10.03
Unemployment Rate (%)	-0.05	-1.96	-5.46	-6.55	-6.74
CPI (percentage points)	0.02	1.44	4.17	2.94	1.00

The *differences* between the baseline scenario and the scenario with no policy responses are summarized in Table 4. These differences represent our estimates of the combined effects of the full range of policies—and they are huge. By 2011, real GDP is $1.8 trillion (15%) higher because of the policies; there are almost 10 million more jobs, and the unemployment rate is about 6½ percentage points lower. The inflation rate is about 3 percentage points higher (roughly 2% instead of -1%). That's what averting a depression means.

But how much of this gigantic effect was due to the government's efforts to stabilize the financial system and how much was due to the fiscal stimulus? The other two scenarios are designed to answer those questions.

The financial policy responses were especially important. In the scenario without them, but including the fiscal stimulus, the recession would only now be winding down, a full year after the downturn's actual end. Real GDP declines by 5% in 2009, and it grows only a bit in 2010, with a peak-to-trough decline of about 6% (see Table 5). Some 12 million payroll jobs are lost peak-to-trough in this scenario, and the unemployment rate peaks at 13%. There is also a lengthy period of modest deflation in this scenario. The federal deficit is $1.75 trillion in fiscal year 2010, and remains a disconcertingly high $1.5 trillion in fiscal year 2011 and $1.1 trillion in FY 2012.

The *differences* between the baseline and the scenario based on no financial policy responses are summarized in Table 6. They represent our estimates of the combined effects of the various policy efforts to stabilize the financial system—and they are very large. By 2011, real GDP is almost $800 billion (6%) higher because of the policies, and the unemployment rate is almost 3 percentage points lower. By the second quarter of 2011—when the difference between the baseline and this scenario is at its largest—the financial-rescue policies are credited with saving almost 5 million jobs.

In the scenario that includes all the financial policies but none of the fiscal stimulus, the recession ends in the fourth quarter of 2009 and expands very slowly through summer 2010. Real GDP declines almost 4% in 2009 and increases only 1% in 2010 (see Table 7). The peak-to-trough decline in employment is more than 10 million. The economy finally gains some traction by early 2011, but by then unemployment is peaking at nearly 12%. The federal budget deficit reaches $1.6 trillion in fiscal year 2010, $1.3 trillion in FY 2011, and $1 trillion in FY 2012. These results are broadly consistent with those of the Congressional Budget Office in its analysis of the economic impact of the ARRA.[10]

The *differences* between the baseline and the scenario based on no fiscal stimulus are summarized in Table 8. These differences represent our estimates of the sizable effects of all the fiscal stimulus efforts. Because of the fiscal stimulus, real GDP is about $460 billion (more than 6%) higher by 2010, when the impacts are at their maximum; there are 2.7 million more jobs, and the unemployment rate is almost 1.5 percentage points lower.

Notice that the *combined* effects of the financial and fiscal policies (Table 4) exceed the sum of the financial-policy effects (Table 6) and the fiscal-policy effects (Table 8) in isolation. This is because the policies tend to reinforce each other. To illustrate this dynamic, consider the impact of providing housing tax credits, which were part of the stimulus. The credits boost housing demand. House prices are thus higher, foreclosures decrease, and the financial system suffers smaller losses. These smaller losses, in turn, enhance the effectiveness of the financial-market policy efforts. Such positive interactions between financial and fiscal policies play out in numerous other ways as well.

Conclusions

The financial panic and Great Recession were massive blows to the U.S. economy. Employment is still some 8 million below where it was at its pre-recession peak, and the unemployment rate remains above 9%. The hit to the nation's fiscal health has been equally disconcerting, with budget deficits in fiscal years 2009 and 2010 of close to $1.4 trillion.

These unprecedented deficits reflect both the recession itself and the costs of the government's multi-faceted response to it. The total *direct* costs, including the TARP, the fiscal stimulus, and other efforts, such as addressing the mortgage-related losses at Fannie Mae and Freddie Mac, are expected to reach almost $1.6 trillion. Adding in nearly $750 billion in lost revenue from the weaker economy, the total budgetary cost of the crisis is projected to top $2.35 trillion, about 16% of GDP. For historical comparison, the savings-and-loan crisis of the early 1990s cost some $350 billion in today's dollars: $275 billion in direct costs plus $75 billion due to the associated recession. This sum was equal to almost 6% of GDP at that time.

It is understandable that the still-fragile economy and the massive budget deficits have fueled criticism of the government's response. No one can know for sure what the world would look like today if policymakers had not acted as they did—our estimates are just that, estimates. It is also not difficult to find fault with isolated aspects of the policy response. Were the bank and auto industry bailouts really necessary? Do extra UI benefits encourage the unemployed not to seek work? Should not bloated state and local governments be forced to cut wasteful budgets? Was the housing tax credit a giveaway to buyers who would have bought homes anyway? Are the foreclosure mitigation efforts the best that could have been done? The questions go on and on.

While all of these questions deserve careful consideration, it is clear that *laissez faire* was not an option; policymakers had to act. Not responding would have left both the economy and the government's fiscal situation in far graver condition. We conclude that Ben Bernanke was probably right when he said that "We came very close in October [2008] to Depression 2.0."[11]

While the TARP has not been a universal success, it has been instrumental in stabilizing the financial system and ending the recession. The Capital Purchase Program gave many financial institutions a lifeline when there was no other. Without the CPP's equity infusions, the entire system might have come to a grinding halt. TARP also helped shore up asset prices, and protected the system by backstopping Fed and Treasury efforts to keep large financial institutions

TABLE 5

Simulation of No Financial Policy Response

No Policy Response | Baseline (with actual policy response)

	08q1	08q2	08q3	08q4	09Q1	09Q2	09Q3	09Q4	10Q1	10Q2	10Q3	10Q4	2008	2009	2010	2011	2012
Real GDP (Bil. 05$, SAAR)	13,367	13,415	13,325	13,073	12,733	12,597	12,565	12,637	12,634	12,647	12,658	12,724	13,295	12,632	12,665	13,065	13,774
annualized % change	*-0.7*	*1.5*	*-2.7*	*-7.4*	*-10.0*	*-4.3*	*-0.9*	*2.3*	*-0.1*	*0.4*	*0.4*	*2.1*	*0.3*	*-5.0*	*0.3*	*3.2*	*5.4*
Real GDP (Bil. 05$, SAAR)	13,367	13,415	13,325	13,142	12,925	12,902	12,973	13,150	13,239	13,335	13,400	13,490	13,312	12,987	13,366	13,852	14,552
annualized % change	*-0.7*	*1.5*	*-2.7*	*-5.4*	*-6.4*	*-0.7*	*2.2*	*5.6*	*2.7*	*2.9*	*2.0*	*2.7*	*0.4*	*-2.4*	*2.9*	*3.6*	*5.1*
Payroll Employment (Mil., SA)	137.9	137.5	136.7	134.8	131.9	129.4	127.5	126.4	125.8	125.9	125.8	126.1	136.7	128.8	125.9	127.4	131.3
annualized % change	*0.1*	*-1.2*	*-2.3*	*-5.5*	*-8.2*	*-7.4*	*-5.9*	*-3.5*	*-1.7*	*0.4*	*-0.5*	*0.9*	*-0.6*	*-5.8*	*-2.2*	*1.2*	*3.1*
Payroll Employment (Mil., SA)	137.9	137.5	136.7	135.0	132.8	131.1	130.1	129.6	129.7	130.4	130.5	130.8	136.8	130.9	130.4	132.2	136.0
annualized % change	*0.1*	*-1.2*	*-2.1*	*-4.8*	*-6.4*	*-5.0*	*-3.1*	*-1.3*	*0.2*	*2.1*	*0.4*	*1.0*	*-0.6*	*-4.3*	*-0.4*	*1.4*	*2.9*
Unemployment Rate (%)	5.0	5.3	6.0	7.1	8.4	9.9	10.9	11.9	11.9	12.5	12.6	12.8	5.8	10.3	12.5	12.7	11.1
Unemployment Rate (%)	5.0	5.3	6.0	7.0	8.2	9.3	9.6	10.0	9.7	9.7	9.8	9.9	5.6	9.3	9.8	9.8	8.3
CPI (Index, 1982-84=100, SA)	212.8	215.6	218.9	213.6	212.3	213.1	213.5	213.8	212.9	212.5	211.9	211.8	215.2	213.1	212.3	212.9	218.0
annualized % change	*-4.7*	*5.3*	*6.4*	*-9.3*	*-2.5*	*1.4*	*0.9*	*-0.4*	*-0.7*	*-0.8*	*-1.2*	*-0.2*	*3.8*	*-1.0*	*-0.4*	*0.3*	*2.4*
CPI (Index, 1982-84=100, SA)	212.8	215.6	218.9	213.7	212.5	213.5	215.4	216.8	217.6	218.1	218.6	219.4	215.2	214.5	218.4	222.7	229.6
annualized % change	*-4.7*	*5.3*	*6.4*	*-9.2*	*-2.2*	*1.9*	*3.7*	*2.6*	*1.5*	*0.8*	*1.0*	*1.4*	*3.8*	*-0.3*	*1.8*	*2.0*	*3.1*

Sources: BEA, BLS, Moody's Analytics

TABLE 6

Baseline Scenario vs. No Financial Policy Scenario

Difference	2008	2009	2010	2011	2012
Real GDP (Bil. 05$, SAAR)	17	356	700	787	778
percentage points	*0.13*	*2.55*	*2.65*	*0.48*	*0.37*
Payroll Employment (Mil., SA)	0.06	2.12	4.46	4.77	4.64
Unemployment Rate (%)	-0.02	-1.00	-2.70	2.91	-2.81
CPI (percentage points)	0.01	0.69	2.18	1.68	0.69

TABLE 7

Simulation of No Fiscal Stimulus

☐ No Policy Response ☐ Baseline (with actual policy response)

	08q1	08q2	08q3	08q4	09Q1	09Q2	09Q3	09Q4	10Q1	10Q2	10Q3	10Q4	2008	2009	2010	2011	2012
Real GDP (Bil. 05$, SAAR)	13,367	13,365	13,251	13,098	12,875	12,759	12,719	12,761	12,802	12,873	12,931	13,026	13,270	12,779	12,908	13,474	14,216
annualized % change	*-0.7*	*-0.1*	*-3.4*	*-4.5*	*-6.6*	*-3.6*	*-1.2*	*1.3*	*1.3*	*2.3*	*1.8*	*3.0*	*0.1*	*-3.7*	*1.0*	*4.4*	*5.5*
Real GDP (Bil. 05$, SAAR)	13,367	13,415	13,325	13,142	12,925	12,902	12,973	13,150	13,239	13,335	13,400	13,490	13,312	12,987	13,366	13,852	14,552
annualized % change	*-0.7*	*1.5*	*-2.7*	*-5.4*	*-6.4*	*-0.7*	*2.2*	*5.6*	*2.7*	*2.9*	*2.0*	*2.7*	*0.4*	*-2.4*	*2.9*	*3.6*	*5.1*
Payroll Employment (Mil., SA)	137.9	137.5	136.6	135.0	132.8	130.6	129.2	128.0	127.5	127.8	127.6	127.9	136.7	130.1	127.7	129.6	133.9
annualized % change	0.1	-1.3	-2.4	-4.8	-6.4	-6.3	-4.3	-3.5	-1.6	1.0	-0.5	0.7	-0.6	-4.8	-1.9	1.5	3.3
Payroll Employment (Mil., SA)	137.9	137.5	136.7	135.0	132.8	131.1	130.1	129.6	129.7	130.4	130.5	130.8	136.8	130.9	130.4	132.2	136.0
annualized % change	*0.1*	*-1.2*	*-2.3*	*-4.8*	*-6.4*	*-5.0*	*-3.1*	*-1.3*	*0.2*	*2.1*	*0.4*	*1.0*	*-0.6*	*-4.3*	*-0.4*	*1.4*	*2.9*
Unemployment Rate (%)	5.0	5.3	6.1	7.0	8.2	9.5	10.2	10.8	10.8	11.0	11.2	11.6	5.8	9.7	11.2	11.4	9.5
Unemployment Rate (%)	5.0	5.3	6.0	7.0	8.2	9.3	9.6	10.0	9.7	9.7	9.8	9.9	5.8	9.3	9.8	9.8	8.3
CPI (Index, 1982-84=100, SA)	212.8	215.6	218.9	213.7	212.4	213.2	214.0	214.2	214.3	214.4	214.3	214.6	215.2	213.4	214.4	216.8	223.0
annualized % change	*4.7*	*5.2*	*6.3*	*-9.2*	*-2.3*	*1.6*	*1.4*	*0.4*	*0.3*	*0.2*	*-0.2*	*0.5*	*3.8*	*-0.8*	*0.5*	*1.1*	*2.9*
CPI (Index, 1982-84=100, SA)	212.8	215.6	218.9	213.7	212.5	213.5	215.4	216.8	217.6	218.1	218.6	219.4	215.2	214.5	218.4	222.7	229.6
annualized % change	*4.7*	*5.3*	*6.4*	*-9.2*	*-2.2*	*1.9*	*3.7*	*2.6*	*1.5*	*0.8*	*1.0*	*1.4*	*3.8*	*-0.3*	*1.8*	*2.0*	*3.1*

Sources: BEA, BLS, Moody's Analytics

TABLE 8

Baseline Scenario vs. No Fiscal Stimulus Scenario

Difference	2008	2009	2010	2011	2012
Real GDP (Bil. 05$, SAAR)	42	209	458	378	336
percentage points	*0.32*	*1.26*	*1.90*	*-0.75*	*-0.45*
Payroll Employment (Mil., SA)	0.04	0.76	2.65	2.59	2.11
Unemployment Rate (%)	-0.01	-0.40	-1.40	-1.58	-1.24
CPI (percentage points)	0.01	0.50	1.35	0.86	0.21

functioning. TARP money was also vital to ensuring an orderly restructuring of the auto industry at a time when its unraveling would have been a serious economic blow. TARP funds were not used as effectively in mitigating foreclosures, but policymakers should not stop trying.

The fiscal stimulus also fell short in some respects, but without it the economy might still be in recession. Increased unemployment insurance benefits and other transfer payments and tax cuts put cash into households' pockets that they have largely spent, supporting output and employment. Without help from the federal government, state and local governments would have slashed payrolls and programs and raised taxes at just the wrong time. (Even with the stimulus, state and local governments have been cutting and will cut more.) Infrastructure spending is now kicking into high gear and will be a significant source of jobs through at least this time next year. And business tax cuts have contributed to increased investment and hiring.

When all is said and done, the financial and fiscal policies will have cost taxpayers a substantial sum, but not nearly as much as most had feared and not nearly as much as if policymakers had not acted at all. If the comprehensive policy responses saved the economy from another depression, as we estimate, they were well worth their cost.

Appendix A: Some Details on the Financial and Fiscal Policies

Troubled Asset Relief Program

The Troubled Asset Relief Program (TARP) was established on October 3, 2008 in response to the mounting financial panic. As originally conceived, the $700 billion fund was to buy "troubled assets" from struggling financial institutions in order to re-establish their financial viability. But because of the rapid unraveling of the financial system, the funds were used for direct equity infusions into these institutions instead and ultimately for a variety of other purposes.

Some elements of the TARP clearly have been more successful than others. Perhaps the most effective was the Capital Purchase Program—the use of TARP funds to shore up banks' capital. It seems unlikely that the system would have stabilized without it or something similar. A small amount of TARP money was eventually used to facilitate the purchase of troubled assets through the Fed's TALF program and Treasury's PPIP program. The volume of transactions was small, but the TALF appears to have improved the pricing of these assets, thus reducing pressure on the system as a whole. The TARP also helped bring about the orderly bankruptcies of GM and Chrysler, forestalling what otherwise would have been a disorderly liquidation accompanied by massive layoffs during the worst part of the recession. The TARP has probably been least effective, at least to date, in easing the foreclosure crisis.

While TARP's ultimate cost to taxpayers will be significant—it is projected between $100 billion and $125 billion—it will fall well short of the $700 billion originally proposed. Indeed, the bank bailout part will likely turn a profit. To date, more than half the banks that received TARP funds have repaid them with interest and often with capital gains (on options) as well.

TARP history

The nation's financial system nearly collapsed in the fall of 2008. Fannie Mae and Freddie Mac and insurer AIG were effectively nationalized; Lehman Brothers, Wachovia, and Washington Mutual failed; Merrill Lynch and Citigroup staggered, and nearly every other major U.S. financial institution was contemplating the consequences of failure. There were silent deposit runs on many money market funds, and the commercial paper market shut down, threatening the ability of major nonfinancial businesses to operate. Global financial markets were in disarray.

Poor policymaking prior to the TARP helped turn a serious but seemingly controllable financial crisis into an out-of-control panic. Policymakers' uneven treatment of troubled institutions (for example, saving Bear Stearns but letting Lehman fail) created confusion about the rules of the game and uncertainty among shareholders, who dumped their stock, and creditors, who demanded more collateral to provide liquidity to financial institutions.

The TARP was the first large-scale attempt by policymakers to restore stability to the system. In late September 2008, the U.S. Treasury and Federal Reserve asked Congress to establish a $700 billion fund, primarily to purchase the poorly performing mortgage loans and related securities that threatened the system. Responding to a variety of economic and political counter-arguments, Congress initially rejected the TARP, further exacerbating the financial turmoil.

With the financial panic intensifying and threats to the economy growing clearer, Congress quickly reversed itself, however, and the TARP was established on October 3, 2008. But with the banks deteriorating rapidly and asset purchases extremely complex, the TARP was quickly shifted to injecting capital directly into major financial institutions. Initially, this meant buying senior preferred stock and warrants in the nine largest American banks, a tactic subsequently extended to other banks.

TARP costs

While Congress appropriated $700 billion for the TARP, only $600 billion was ever committed, and as of June 2010, only $261 billion was still outstanding (see Table 9). TARP's ultimate cost to taxpayers probably will end up close to $100 billion, nearly half of that from GM.[12] While this is a large sum, early fears that much of the $700 billion would be lost were significantly overdone.

The largest use of the TARP funds has been to recapitalize the banking system via the Capital Purchase Program. At its conception, the CPP was expected to amount to $250 billion. Instead, its peak in early 2009 was actually about $205 billion, and as financial conditions have improved, many of the nation's largest banks have repaid the funds. There is only $67 billion outstanding in the CPP. Banks also paid an appropriately high price for their TARP funds in the forms of restrictions on dividends and executive compensation, and additional regulatory oversight. These costs made banks want to repay TARP as quickly as possible. Since nearly all CPP funds are expected to be repaid eventually with interest, with additional proceeds from warrant sales, the CPP almost certainly will earn a meaningful profit for taxpayers.

Approximately $200 billion in TARP funds were committed to support the financial system in other ways. Some $115 billion went to three distressed and systemically important financial institutions: AIG, Bank of America, and Citigroup. BofA and Citi have repaid what they owed, but the $70 billion provided to AIG is still outstanding, and an estimated $40 billion is now expected to be lost.[13] Other efforts to support the financial system, including TALF, PPIP, and the small business lending initiatives have not amounted to much, quantitatively, ensuring that the costs of these programs to taxpayers will be minimal.

The TARP commitment to the motor vehicle industry, including GM, GMAC, Chrysler, and various auto suppliers, totaled more than $80 billion. Approximately half of this is estimated as a loss, although the actual loss will depend significantly on the success of the upcoming GM initial public offering.

For taxpayers, the costliest part of the TARP will likely be its efforts to promote residential mortgage loan modifications, short sales, and refinancings via the Homeowner Affordability and Stability Plan. All of the $50 billion committed for the various aspects of this effort are expected to be spent and not recouped.

TABLE 9

Troubled Asset Relief Program

$ bil	Orginally Committed	Post-FinReg	Currently Provided	Ultimate Cost
Total	600	475	261	101
CPP (Financial institutions)	250	205	67	-24
Tarp Repayments			138	
Losses			2	
Dividends, Warrant proceeds			21	
AIG	70	70	70	38
Citi (TIP)	20	20	Repaid	0
Bank of America (TIP)	20	20	Repaid	0
Citi debt guarantee	5	NA	Repaid	0
Federal Reserve (TALF)	55	4	4	0
Public-Private Investment Fund (PPIP)	30	22	10	1
SBA loan purchase	15	0	>1	0
Homeowner Affordability and Stability Plan	52	49	41	49
GMAC	13	13	13	4
GM	50	50	43	25
GM (for GMAC)	1	1	1	0
Chrysler	13	13	11	8
Chrysler Financial Loan	2	2	Repaid	0
Auto suppliers	5	5	Repaid	0

Sources: Federal Reserve, Treasury, FDIC, FHA, Moody's Analytics

Capital Purchase Program

The CPP has been the most successful part of the TARP. Without capital injections from the federal government, the financial system might very well have collapsed. It is difficult to trace out such a scenario, but at the very least the resulting credit crunch would have been much more severe and long-lasting. As it is, private financial and non-financial debt outstanding has been contracting for nearly two years.

The financial system is still not functioning properly—small banks continue to fail in large numbers, bank lending is weak and the private-label residential mortgage and commercial securities markets remain largely dormant—but it is stable. Evidence of normalization in the financial system is evident in the sharp narrowing of credit spreads. For example, the spread between Libor (the rate banks charge each other for loans) and Treasury bills hit a record 450 basis points at the height of the financial panic (see Chart 1). Today, despite the uncertainty created by the European debt crisis, the Libor-T-Bill bill spread is nearly 25 basis points, close to the level that prevailed prior to the crisis. Nonetheless, while depository institutions are lending more freely to each other, they remain reluctant to extend credit to businesses and consumers.

A variety of other policy initiatives helped restore stability to the financial system. The unprecedented monetary policy response, the bank stress tests, and the FDIC's guarantees on bank debt issuance as well as higher deposit insurance limits were all important. Yet none of these efforts would likely have succeeded without the CPP, which bought the time necessary to allow these other efforts to work.

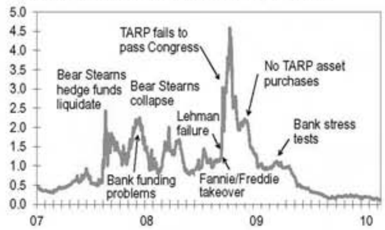
Toxic assets

TARP has also been useful in mitigating systemic risks posed by the mountain of toxic assets owned by financial institutions.[14] Because institutions are uncertain of these assets' value and thus of their own capital adequacy, they have been less willing and able to provide credit.

The Fed's TALF program and Treasury's PPIP program provided favorable financing to investors willing to purchase a wide range of "toxic" assets. TARP funds were available to cover the potential losses in both programs. While neither program resulted in a significant amount of activity, they did help support asset prices as interest rates came down and spreads over risk-free Treasuries narrowed.[15] When TALF was announced in late 2008, the option-adjusted spread on auto-loan-backed securities stopped rising, topping out at a whopping 1,000 basis points (see Chart 2). By the time of the first TALF auction in early 2009, the spread had narrowed to 900 basis points, and it is now hovering close to 100 basis points. While

Chart 1: The Financial System Has Stabilized

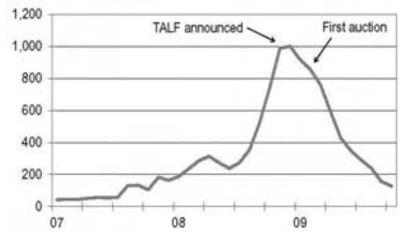
Difference between 3-mo Libor and Treasury bill yields



Sources: Federal Reserve Board, Moody's Analytics

Chart 2: TALF Caused ABS Spreads to Narrow

Automobile ABS, option-adjusted spread, bps



Source: BofA Merrill Lynch

this narrowing of spreads was driven by a multitude of factors, arguably most important was the TALF.

The TARP also supported asset prices by forestalling the collapse of AIG, Bank of America, and Citi. Had these huge institutions failed, they might have been forced to dump their toxic assets at fire-sale prices, thereby imperiling other institutions that owned similar assets. In a sense, the troubled assets owned by AIG, BofA and Citi were quarantined so they would not infect asset markets and drive prices even lower. The government still owns nearly all of AIG, and although it has been selling its Citi shares, it continues to hold a sizable ownership stake.[16]

Auto bailout

TARP also was instrumental in assuring the orderly bankruptcy of GM and Chrysler and supporting the entire motor vehicle industry. Without money from the TARP, these firms would have very likely ceased as going concerns. The liquidation of GM and Chrysler would have in turn caused the bankruptcy of many vehicle part suppliers and, as a result, Ford as well.

Without government help, the vehicle manufacturers' Chapter 11 restructurings would have likely turned into Chapter 7 liquidations. Their factories and other operations would have been shut down and their assets sold to pay creditors. The collapse in the financial system and resulting credit crunch made financing the companies while they were in the bankruptcy process all but impossible. Debtor-in-possession (DIP) financing is critical to pay suppliers, finance inventories, and meet payroll while companies restructure. It is risky even in good times, so DIP lenders become senior creditors when a bankruptcy court distributes a firm's assets and can charge high rates and fees for their risks. Yet in the credit crunch that prevailed in early 2009, it is unlikely that DIP lenders would have taken such risks. Money from the TARP was necessary to fill this void.

GM and Chrysler have now been significantly rationalized and appear to be financially viable even at depressed current vehicle sales rates. GM has already begun to repay its government loans, and there is even discussion of when it will go public. Ford, which did not take government funds, is doing measurably better, and conditions across the industry have improved. Production is up and employment has stabilized (see Chart 3). This seemed unlikely just a year ago, and TARP was instrumental in the turnaround.

Foreclosure crisis

The TARP has been less successful, at least so far, in combating the residential mortgage foreclosure crisis. TARP is funding the Housing Affordability Stability Plan, or HASP, which consists of the Home Affordability Mortgage Plan (HAMP) and the Home Affordability Refinancing Plan (HARP).

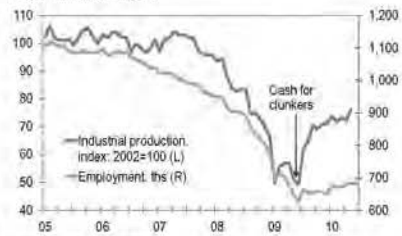
The HAMP's original strategy was to encourage homeowners, mortgage servicers, and mortgage owners to modify home loans, primarily by temporary reductions in interest rates and thus in monthly payments—not by principal reductions. Yet take-up on the HAMP plan has fallen well short of what policymakers hoped.[17] The reason: Many home loans are so deeply under water that, even with modifications that lower monthly payments, they face high probabilities of default. Thus, mortgage servicers and creditors have little interest in making such modifications. To address this impediment, the administration made a number of changes to HAMP in spring 2010 to encourage principal write-downs. While this approach is expected to work better, it is too soon to tell.

The idea behind the HARP was to allow Fannie and Freddie to refinance loans they own or insure—even on homes whose market values have sunk far below the amounts owed. The take-up on the HARP has been particularly low because homeowners need to pay transaction costs for the refinancing and are not permitted to capitalize these costs into their mortgage principal. Some homeowners whose credit characteristics have weakened also find that the interest rates offered for refinancing are not low enough to cover the transaction costs in a reasonable time.

The HAMP and other foreclosure mitigation efforts have slowed the foreclosure process a bit. Mortgage servicers and owners have been working to determine which of their troubled mortgage loans might qualify for the various plans. The slower pace of foreclosures and short sales has resulted in

Chart 3: Autos Go From Free Fall to Stability

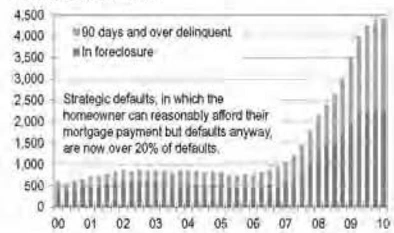
Motor vehicles and parts



Sources: Federal Reserve Board, BLS

Chart 4: The Foreclosure Crisis Continues

First mortgage loans, ths



Sources: Equifax, Moody's Analytics

more stable house prices this past year, but troubled loans are backing up in the foreclosure pipeline. As of the end of June 2010, credit file data show an astounding 4.3 million first mortgage loans in the foreclosure process or at least 90 days delinquent (see Chart 4). For context, there are 49 million first mortgage loans outstanding; so this is almost 9% of the total. Mortgage servicers and owners are deciding that many of these loans are not viable candidates for the HAMP plan, and have begun pushing these loans towards foreclosure. Thus foreclosures and short sales are expected to increase measurably in the coming months, which would put even more downward pressure on house prices.

Policymakers are hoping the revised HAMP and other private mitigation efforts will work well enough to reduce foreclosures and short sales and thus prevent house price declines from undermining the broader economy.

Fiscal Stimulus

Like the TARP, the government's fiscal stimulus has grown unpopular. There appears to be a general perception that, at best, the stimulus has done little to turn the economy around, and at worst, it has funded politicians' pet projects with little clear economic rationale. In fact, the fiscal stimulus was quite successful in helping to end the Great Recession and to accelerate the recovery. While the strength of the recovery has been disappointing, this speaks mainly to the severity of the downturn. Without the fiscal stimulus, the economy would arguably still be in recession, unemployment would be well into the double digits and rising, and the nation's budget deficit would be even larger and still rising.

In the popular mind, the fiscal stimulus is associated with the American Restoration and Recovery Act—the $784 billion package of temporary spending increases and tax cuts passed in February 2009. In fact, the stimulus began in the spring of 2008 with the mailing of tax rebate checks.[18] Smaller stimulus measures followed the ARRA, including cash for clunkers, a tax credit for homebuyers that expired in June, a payroll tax credit for employers to hire unemployed workers, and other measures. In total, the stimulus provided under both the Bush and Obama administrations amounts to more than $1 trillion, about 7% of GDP (see Table 10).[19]

Some form of fiscal stimulus has been part of the government's response to nearly every recession since the 1930s, but the current effort is the largest. For comparison, the stimulus provided during the double-dip downturn of the early 1980's equaled almost 3% of GDP, and the stimulus provided a decade ago after the tech bust totaled closer to 1.5% of GDP.[20]

Extended or expanded unemployment insurance benefits have been a common form of stimulus, as has financial help to state and local governments. Since nearly all states are legally bound to balance their budgets, and since nearly all face significant budget shortfalls during recessions, they would have been forced to cut spending and raise taxes even more in the absence of federal aid, thus adding to the economy's weakness. Aside from additional UI and state aid, fiscal policymakers have generally relied more on tax cutting than on increased spending as a stimulus. The massive public works projects of the Great Depression are an exception.

The unusually large amount of fiscal stimulus provided recently is consistent both with the extraordinarily severe downturn and the reduced effectiveness of monetary policy as interest rates approach zero. The Federal Reserve's job is further complicated by the still significant risk of deflation. Falling prices cause *real* interest rates to rise, since the Fed can not lower nominal rates further. This situation stands in sharp contrast to the early 1980s—the last time unemployment reached double digits—when interest rates and inflation were both much higher and the Federal Reserve had substantially more latitude to adjust monetary policy.

The greater use of government spending rather than tax cuts as a fiscal stimulus during the current period is also consistent with the record length of the recession and the persistently high unemployment.[21] Historically, the principal weakness of government spending, for example infrastructure projects, is that it takes too long to affect economic activity. Given the length and depth of the recent recession, however, the time-lag issue is less of a concern.

Tax cuts

Tax cuts have played an important role in recent stimulus efforts. Indeed, tax cuts

Table 10

Fiscal Stimulus Policy Efforts

$ bil	Originally Committed	Currently Provided	Ultimate Cost
Total Fiscal Stimulus	1,067	712	1,067
Spending Increases	682	340	682
Tax Cuts	383	371	383
Economic Stimulus Act of 2008	170	170	170
American Recovery and Reinvestment Act of 2009	784	473	784
Infrastructure and Other Spending	147	56	147
Traditional Infrastructure	*38*	*14*	*38*
Nontraditional Infrastructure	*109*	*42*	*109*
Transfers to state and local governments	174	119	174
Medicaid	*87*	*69*	*87*
Education	*87*	*51*	*87*
Transfers to persons	271	109	271
Social Security	*13*	*13*	*13*
Unemployment Assistance	*224*	*66*	*224*
Food stamps	*10*	*10*	*10*
Cobra Payments	*24*	*20*	*24*
Tax cuts	190	188	190
Businesses & other tax incentives	*40*	*40*	*40*
Making Work Pay	*64*	*62*	*64*
First-time homebuyer tax credit	*14*	*14*	*14*
Individuals excluding increase in AMT exemption	*72*	*71*	*72*
Cash for Appliances	*0.3*	*0.2*	*0.3*
Cash for Clunkers	3	3	3
HIRE Act (Job Tax Credit)	17	8	17
Worker, Homeownership, and Business Assistance Act of 2009	91	57	91
Extended of unemployment insurance benefits (Mar 16)	6	6	6
Extended of unemployment insurance benefits (Apr 14)	12	12	12
Extended of unemployment insurance benefits (May 27)	3	3	3
Extended of unemployment insurance benefits (July 22)	34		34
Extended/expanded net operating loss provisions of ARRA*	33	33	33
Extended/extension of homebuyer tax credit	3	3	3
Department of Defense Appropriations Act of 2010	>2	>3	>2
Extended guarantees and fee waivers for SBA loans	>1	>1	>1
Expanded COBRA premium subsidy	>1	>1	>1

Sources: CBO, Treasury, Recovery.gov, IRS, Department of Labor, JCT, Council of Economic Advisors, Moody's Analytics for individuals and businesses account for 36% of the total stimulus, nearly $400 billion. Lower- and middle-income households have received tax rebate checks, paid less in payroll taxes, and benefited from tax credits to purchase homes and appliances. All together, individuals will receive almost $300 billion in tax cuts.

The cash for clunkers program and housing tax credits were particularly well-timed and potent tax breaks. Cash for clunkers gave households a reason to trade in older gas-guzzling vehicles for new cars in the summer of 2009, when GM and Chrysler were struggling to navigate bankruptcy. Sales jumped, clearing out inventory and setting up a rebound in vehicle production and employment. The program was very short-lived, however, and sales naturally weakened in the immediate wake of the program. But they have largely held their own since.

Three rounds of tax credits for home purchasers were also instrumental in stemming the housing crash. The credit that expired in November was particularly helpful in breaking the deflationary psychology that was gripping the market. Until that point, potential homebuyers were on the sidelines, partly because they expected prices to fall even further. The tax credit offered a reason to buy sooner, helping to stabilize house prices. The credit was especially helpful in preventing the large number of foreclosed properties then hitting the market from depressing prices. The expiration of the most recent tax credit, in June, was followed by a sharp decline in sales. But this may have been partly due to potential homebuyers expecting Congress to offer yet another tax credit.

The fiscal stimulus also provided businesses with approximately $100 billion in tax cuts, including accelerated depreciation benefits and net operating loss rebates. While such incentives have historically not been particularly effective as a stimulus—they do not induce much extra near-term investment—they may be more potent in the current environment, when businesses face severe credit constraints.[22] It is also important to consider that accelerated-depreciation and operating-loss credits are ultimately not very costly to taxpayers. The tax revenue lost to the Treasury upfront is largely paid back in subsequent years when businesses have higher tax liabilities.

TABLE 11

Fiscal Stimulus Bang for the Buck

Tax Cuts	Bang for the Buck
Non-refundable Lump-Sum Tax Rebate	1.01
Refundable Lump-Sum Tax Rebate	1.22
Temporary Tax Cuts	
Payroll Tax Holiday	1.24
Job Tax Credit	1.30
Across the Board Tax Cut	1.02
Accelerated Depreciation	0.25
Loss Carryback	0.22
Housing Tax Credit	0.90
Permanent Tax Cuts	
Extend Alternative Minimum Tax Patch	0.51
Make Bush Income Tax Cuts Permanent	0.32
Make Dividend and Capital Gains Tax Cuts Permanent	0.37
Cut in Corporate Tax Rate	0.32
Spending Increases	**Bang for the Buck**
Extending Unemployment Insurance Benefits	1.61
Temporary Federal Financing of Work-Share Programs	1.69
Temporary Increase in Food Stamps	1.74
General Aid to State Governments	1.41
Increased Infrastructure Spending	1.57
Low Income Home Energy Assistance Program (LIHEAP)	1.13

Source: Moody's Analytics

Note: The bang for the buck is estimated by the one year $ change in GDP for a given $ reduction in federal tax revenue or increase in spending.

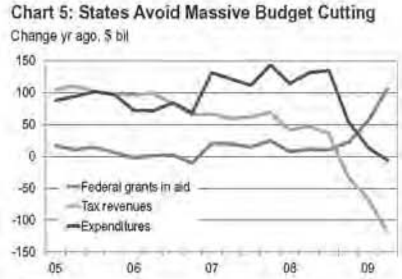
Government spending increases

A potpourri of temporary spending increases were also included in the fiscal stimulus. Additional unemployment insurance beyond the regular 26-week benefit period has been far and away the most costly type of stimulus spending, with a total price tag now approaching $300 billion. The high rate and surprisingly long duration of unemployment—well over half the jobless have been out of work more than 26 weeks—have added to the bill.

Yet UI benefits are among the most potent forms of economic stimulus available. Additional unemployment insurance produces very high economic activity per federal dollar spent (see Table 11).[23] Most unemployed workers spend their benefits immediately; and without such extra help, laid-off workers and their families have little choice but to slash their spending. The loss of benefits is debilitating not only for unemployed workers, but also for friends, family, and neighbors who may have been providing financial help themselves.

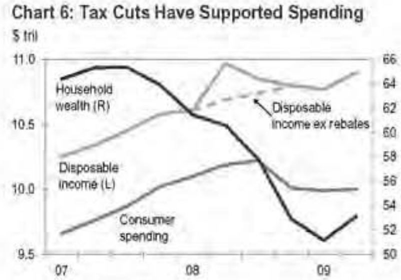
The fiscal stimulus also provided almost $50 billion in other income transfers, including Social Security, food stamps, and COBRA payments to allow unemployed workers to retain access to healthcare. Food stamps are another particularly powerful form of stimulus, as such money flows quickly into the economy. COBRA and Social Security

Chart 5: States Avoid Massive Budget Cutting



Source: BEA

Chart 6: Tax Cuts Have Supported Spending



Sources: BEA, FRB, Moody's Analytics

have smaller multipliers, as not all of the aid is spent quickly.

Strapped state and local governments have also received significant additional aid through the Medicaid program, which states fund jointly with the federal government, and through education. As part of the ARRA, states will receive almost $175 billion through the end of 2010. This money went a long way to filling states' budget holes during their just-ended 2010 fiscal year (see Chart 5). States were still forced to cut jobs and programs and raise taxes, but fairly modestly given their budget problems. Budget cutting has intensified in most states this summer, because the budget problems going into fiscal 2011 are still massive, and prospects for further help from the federal government are dwindling.

State and local government aid is another especially potent form of stimulus with a large multiplier. It is defensive stimulus, forestalling draconian cuts in government services, as well as the tax increases and weaker consumer spending that would have surely occurred without such help. In the nomenclature of the debate surrounding the merits of the stimulus, this stimulus *saves* jobs rather than *creates* them.

Funds for infrastructure projects generally do not generate spending quickly, as it takes time to get projects going. That is not a bad thing: rushing raises the risks of financing unproductive projects. But infrastructure spending does pack a significant economic punch, particularly to the nation's depressed construction and manufacturing industries. Almost $150 billion in ARRA infrastructure spending is now flowing into the economy, and is particularly welcome, as the other stimulus fades while the economy struggles.

The ARRA has also been criticized for including a hodgepodge of infrastructure spending, ranging from traditional outlays on roads and bridges to spending on electric power grids and the internet. Given the uncertain payoff of such projects, diversification is probably a plus. As Japan taught everyone in the 1990s, infrastructure spending produces diminishing returns. Investing only in bridges, for example, ultimately creates bridges to nowhere.

Arguments that temporary tax cuts have not supported consumer spending are also overstated. This is best seen in the 2008 tax rebates. While these payments significantly lifted after-tax income, consumer spending did not follow, at least not immediately. One reason was the income caps attached to the rebates. Higher-income households did not receive them, and because of rapidly falling stock and house prices, these same households were saving significantly more and spending less (see Chart 6). The saving rate for households in the top quintile of the income distribution surged from close to nothing in early 2007 to double digits by early 2008. Lower- and middle-income households did spend a significant part of their tax rebates, but the sharp pullback by higher-income households significantly diluted the impact of the tax cut on overall spending.

Appendix B: Methodological Considerations

The Moody's Analytics model of the U.S economy was used to quantify the economic impact of the various financial and fiscal stimulus policies implemented during the crisis and recession. This model is used regularly for a range of purposes, including economic forecasting, scenario and sensitivity analysis, and most relevant for the work presented here, the assessment of the economic impact of monetary and fiscal policies. It is used by a wide range of global companies, federal, state and local governments, and policymakers.

The model was already well equipped to assess the economic impact of the various fiscal stimulus measures. But several adjustments to the model were necessary to deal with the financial policies, many of which were innovative. In the context of the model, this mainly meant estimating the effects of the policies on credit conditions. Credit conditions are measured by interest rates, including both Treasury rates and credit spreads, and bank underwriting standards. The key financial policy levers included in the model are Federal Reserve assets, the capital raised by financial institutions (as a result of the CPP and the stress tests), the conforming mortgage loan limit (which was increased as part of fiscal stimulus), and the FHA share of purchase mortgage originations, which surged as the private mortgage market collapsed.

In broad terms, here is how the model works: In the short run, fluctuations in economic activity are determined primarily by shifts in *aggregate demand*, including personal consumption, business investment, international trade and government expenditures. The level of resources and technology available for production are taken as given. Prices and wages adjust slowly to equate aggregate demand and supply. In the long run, however, changes in *aggregate supply* determine the economy's growth potential. Thus the rate of expansion of the resource and technology base of the economy is the principal determinant of economic growth.

Aggregate demand

Real consumer spending is modeled as a function of real household cash flow, housing wealth, and financial wealth.[24] Household cash flow equals the sum of personal disposable income, capital gains realizations on the sale of financial assets, and *net* new borrowing—including mortgage equity withdrawal. Changes in household cash flow were substantially greater than those of disposable income during the boom and the bubble.

Mortgage equity withdrawal was a major difference between cash flow and disposable income in the boom. It is in turn driven by capital gain realizations on home sales and home equity borrowing—both of which are determined by mortgage rates and the availability of mortgage credit (see Chart 7). Fixed mortgage rates are modeled as a function of the 10-year Treasury yield, the refinancing share of mortgage originations, the foreclosure rate, and the value of Federal Reserve assets.[25] The latter variable was added to the model explicitly for this exercise. Including Fed assets captures the impact of the Fed's credit easing efforts, which involved expanding the assets it owns largely through the purchases of Treasury bonds and mortgage securities. The availability of mortgage credit is measured by the Federal Reserve's Senior Loan Officer Survey question regarding residential mortgage underwriting standards; it is modeled as a function of the foreclosure rate, the conforming loan limit, and the FHA share of purchase originations.[26]

These policy efforts have also had significant impacts on residential investment, which is determined in the model by household formation, the inventory of vacant homes, the availability of credit to homebuilders, and the difference between house prices and the costs of construction. Housing starts closely follow the number of household formations, abstracting from the number of demolitions and second and vacation homes. Inventories of homes depend significantly on home sales, which are driven by real household income, the age composition of the population, mortgage rates, and the availability of mortgage credit. The availability of credit to builders is also important, particularly in the current period given the reluctance of lenders to make construction and land development loans. The availability of such loans is proxied by the Federal Reserve's Senior Loan Officer Survey question regarding commercial real estate mortgage underwriting standards; it is modeled as a function of the delinquency rate on commercial banks' commercial real estate mortgage loans, and the spread between three-month Libor and the three-month Treasury bill yield. This so-called TED spread is one of the two key credit spreads in the Moody's model and thus one main channel via which the unconventional financial policies operated.

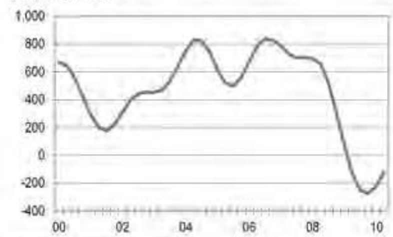
Business investment is another important determinant of aggregate demand and the business cycle. It both responds to and amplifies shifts in output. Investment also influences the supply side of the economy since it is the principal determinant of potential output and labor productivity in the long run. Investment spending not only adds to the stock of capital available per worker, but also determines the extent to which the capital stock embodies the latest and most efficient technology.

The investment equations in the model are specified as a function of changes in output and the cost of capital.[27] The cost of capital is equal to the implicit cost of leasing a capital asset, and therefore reflects the real after-tax cost of funds, tax and depreciation laws, and the price of the asset. More explicitly, the cost of funds is defined as the weighted-average after-tax cost of debt and equity capital. The cost of debt capital is proxied by the "junk" (below investment grade) corporate bond yield, which is the second of the two key credit spreads in the Moody's model. The cost of equity capital is the sum of the 10-year Treasury bond yield plus an exogenously set equity risk premium. Changes in the cost of capital, which have a significant impact on investment, reflect the fallout from the financial crisis, any benefit from the various business tax cuts, and the policy efforts to stabilize the financial system.

The availability of credit is also an important determinant of business investment and is measured by the Federal Reserve's Senior

Chart 7: Mortgage Equity Withdrawal Falls

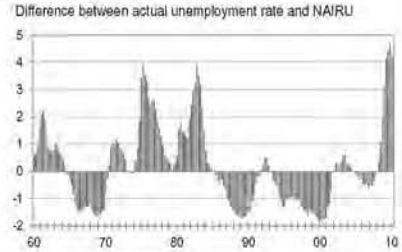
$ bil, annualized



Sources: BEA, Equifax, Moody's Analytics

Chart 8: The Output Gap Is Wide

Difference between actual unemployment rate and NAIRU



Source: BLS, Moody's Analytics

Loan Officer Survey question regarding underwriting standards for commercial and industrial loans. This is modeled as a function of the interest coverage ratio—the share of nonfinancial corporate cash flow going to servicing debt—and the three-month TED spread.

The international trade sector of the model captures the interactions among foreign and domestic prices, interest rates, exchange rates, and product flows.[28] The key determinants of export volumes are global real GDP growth and the real trade-weighted value of the U.S. dollar. Real imports are determined by specific domestic spending categories and relative prices. Global real GDP growth comes from the Moody's Analytics international model system and is provided exogenously to the U.S. model. The value of the dollar is determined endogenously based on relative U.S. and global interest rates, global growth, and the U.S. current account deficit.

Most federal government spending is treated as exogenous in the model since legislative and administrative decisions do not respond predictably to economic conditions. The principal exception is transfer payments for unemployment benefits, which are modeled as a function of unemployment and net interest payments. Total federal government receipts are the sum of personal tax receipts, contributions for social insurance, corporate profits tax receipts, and indirect tax receipts. Personal taxes (income plus payroll) account for the bulk of federal tax collections, and are equal to the product of the average effective income tax rate and the tax base, which is defined as personal income less nontaxable components of income including other labor income and government transfers. The average effective tax rate is modeled as a function of marginal rates, which are exogenous and form a key policy lever in the model.

State and local government spending is modeled as a function of the sum of tax revenues, which are the product of average effective tax rates and their corresponding tax base, and exogenously determined federal grants-in-aid. Given balanced budget requirements in most states, government spending is closely tied to revenues. Grants-in-aid are also an important policy lever in an assessment of the economic impact of fiscal stimulus.

Aggregate supply

The supply side of the economy describes the economy's capabilities for producing output. In the model, aggregate supply or potential GDP is estimated from a Cobb-Douglas production function that combines factor input growth and improvements in total labor productivity. Factor inputs include labor and business fixed capital. Factor supplies are defined by estimates of the full-employment labor force and the existing capital stock of private nonresidential equipment and structures. Total factor productivity is calculated as the residual from the Cobb-Douglas production function, estimated at full employment. Potential total factor productivity is derived from a regression of actual TFP on business-cycle specific trend variables.

The key unknown in estimating aggregate supply is the full-employment level of labor, which is derived from a measure of potential labor supply and the long-run equilibrium unemployment rate. This rate, often referred to as the Non-Accelerating Inflation Rate of Unemployment, or NAIRU, is the unemployment rate consistent with steady price and wage inflation. It is also the unemployment rate at which actual GDP equals potential GDP. NAIRU, which is estimated from an expectations-augmented Phillips curve, is currently estimated to be near 5.5%.[29] Given the current 9.5% unemployment rate, the economy is operating well below its potential (see Chart 8). This output gap is the key determinant of prices in the model. It is thus not surprising that inflation is decelerating, raising concerns that the economy may suffer outright deflation.

Monetary policy, interest rates and stock prices

Monetary policy is principally captured in the model through the federal funds rate target.[30] The funds rate equation is an FOMC reaction function that is a modified Taylor rule. In this framework, the real funds rate target is a function of the economy's estimated real growth potential, the difference between the actual and target inflation rate (assumed to be 2% for core CPI), and the difference between the actual unemployment rate and NAIRU. This specification is augmented to include the difference between the presumed 2% inflation target and inflation expecta-

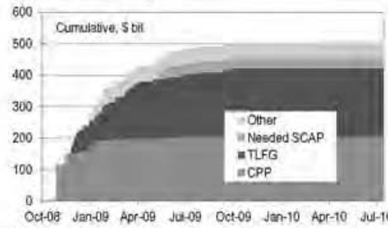
Chart 9: The Fed Expands Its Balance Sheet

Composition of Federal Reserve's balance sheet, $ bil

Sources: Federal Reserve, Moody's Analytics

Chart 10: Capital Raised Thanks to Policy Support

Bank capital raised through:



Sources: Treasury, SEC, Moody's Analytics

tions, as measured by five-year, five-year-forward Treasury yields.

Because of the Federal Reserve's extensive use of quantitative easing to respond to the financial crisis, Federal Reserve assets were added to the model for this exercise. Fed assets are specified as a function of the federal funds rate target described above. When the funds rate implied by the equation falls below zero, the Fed's balance sheet expands. And the more negative the implied funds rate, the greater the assumed balance sheet expansion. Specifically, for every 100 basis points that the desired (but unachievable) funds rate becomes negative, the Fed is presumed to expand its balance sheet by $1.2 trillion.[21] At present, the implied funds rate is near negative 2%, which suggests that the Fed should be holding close to $3 trillion in assets—compared with the Fed's actual current holdings of $2.4 (see Chart 9).

The most important private short-term interest rate in the model is the three-month Libor rate, which in turn drives home-equity and credit-card lending rates as well as the rate on adjustable residential mortgages. The TED spread between three-month Libor and three-month Treasury bill yields (which is tied closely to the funds rate) is modeled as a function of the delinquency rate on commercial bank loans and leases, the market value of equity lost in failing financial institutions during the financial crisis, and the amount of capital raised by the banking system via the CPP and stress tests (see Chart 10). The latter variable was added explicitly for these stimulations. The rationales are straightforward: As the delinquency rate increases, banks demand higher interest to lend to other banks. The equity lost in failing institutions captures the growing panic that investors felt as the crisis intensified. The capital raised by banks either from the federal government or in the equity market captures the benefit of the financial policy response in restoring stability to short-term funding markets.

The most important long-term interest rate in the model is the yield on the 10-year Treasury bond, which is a key determinant of both mortgage rates and corporate bond rates. The 10-year Treasury yield is modeled as a function of the federal funds rate, inflation expectations, the federal budget deficit as a share of GDP, and Federal Reserve assets; the latter was added to the model to capture the impact of recent quantitative easing efforts. Bond investors' expectations of future monetary policy are assumed to be driven by current inflation expectations and the federal government's future fiscal situation.

The junk bond yield is another important interest rate in the model, as it impacts businesses' cost of capital. It is driven by the 10-year Treasury yield, the interest coverage ratio for nonfinancial corporate businesses, and capacity utilization. Higher interest coverage—the greater the share of cash flow businesses must devote to meeting debt payments to remain current—and lower capacity utilization push junk yields up relative to the risk-free Treasury yield.

Stock prices, measured by the S&P 500 stock index, are modeled based on a traditional earnings discount model. The principal determinants of stock prices in this framework are thus corporate profits and the Baa corporate bond yield.[22] Changing stock prices have an important impact on consumer spending through the wealth effect and on business investment through the cost of capital.

Endnotes

JULY 28, 2010 1 P.M. CORRECTION: This article now contains corrected figures for our estimate of 2010 GDP with and without the stimulus. As the article now reflects, GDP in 2010 would be about 11.5% lower without the government's response, and the fiscal stimulus has raised GDP by about 3.4%.

1. Princeton University and Moody's Analytics, respectively. These affiliations are for identification only. None of the views expressed here should be attributed to any organization with which we are affiliated.
2. The CBO's estimates of the economic impact of ARRA can be found at http://www.cbo.gov/ftpdocs/115xx/doc11525/05-25-ARRA.pdf. The Council of Economic Advisors' most recent estimates of the economic impact of ARRA can be found at http://www.whitehouse.gov/files/documents/cea_4th_arra_report.pdf.
3. Alan Krueger, the Assistant Treasury Secretary for Economic Policy, estimated that the capital injections into banks *alone* may have added roughly 900,000 to 1.8 million jobs. See his Remarks to the American Academy of Actuaries, Washington, DC, July 20, 2009 (at www.treasury.gov/offices/economic-policy/AK-Actuaries-07-20-2009.pdf) A Federal Reserve Bank of New York staff report estimated that the Fed's purchases of long-term assets (Treasury securities and MBS) *alone* lowered long-term interest rates on a range of securities by 30-80 basis, with effects on mortgage rates about 50 basis points higher than that. See Joseph Gagnon, Matthew Raskin, Julie Remache, and Brian Sack, "Large-Scale Asset Purchases by the Federal Reserve: Did They Work?," Federal Reserve Bank of New York Staff Report No. 441, March 2010.
4. The new credit facilities include the Term Auction Facility, the Term Securities Loan Facility, the Term Asset-Backed Securities Loan Facility, the Commercial Paper Funding Facility, the Money Market Investor Funding Facility, and currency swap lines.
5. These include, among others, the cash-for-clunkers tax incentive in the fall of 2009, the extension and expansion of the housing tax credit through mid-2010, the passage of a job tax credit through year-end 2010, and several extensions of emergency UI benefits.
6. We refer here to the *response* to the crisis, once it occurred. Many government policies and regulatory lapses contributed to bringing on the crisis, however.
7. The pace of change also explains why the fiscal stimulus will soon turn into a drag on economic growth. The government's policies have added just over $80 billion per quarter to the economy since late 2009, a flow that will dry up to essentially nothing over the next several quarters.
8. Under the baseline and no-financial-policy scenarios, an additional $80 billion in fiscal stimulus is assumed through mid-2011, including approximately $50 billion for additional emergency UI benefits, $25 billion in state government aid and $5 billion in other stimulus including increased funding for small business lending. It is also assumed under all the scenarios that tax rates rise only for the top 2% of income earners and that these higher rates are phased in over two years. In all the scenarios, monetary policy is treated endogenously, with the federal funds rate target constrained to be non-negative and the Fed engaging in credit easing consistent with the degree to which the model calls for a negative federal funds rate. The broad trade-weighted dollar is also endogenously determined and falls in the scenarios, supporting an improvement in the trade balance and cushioning the economic downturn. This benefit is overstated in the scenarios, however, as global economic growth excluding the U.S. is held exogenously in order to simplify the analysis.
9. We make no attempt to decompose the financial-policy effects into portions attributable to TARP, to the Fed's quantitative easing policies, etc.
10. The CBO's estimates of the economic impact of ARRA can be found at http://www.cbo.gov/ftpdocs/115xx/doc11525/05-25-ARRA.pdf.
11. See *The Wall Street Journal*, July 24, 2009.
12. The Treasury's Office of Financial Stability recently published updated cost estimates of TARP using publicly available data through March 31, 2010. See http://www.treas.gov/press/releases/tg713.htm. Treasury currently expects TARP losses to be $105 billion. If much of the projected loss on GM stock is recouped, this figure will drop substantially.
13. This is another huge sum. But remember that the three-stage commitment to AIG amounted to over $180 billion.
14. In our (apparently minority) view, it is unfortunate that TARP wasn't used more for its original purpose, namely the purchase of toxic assets from financial institutions using, for example, a reverse auction process. This idea was quickly shelved when the rapid unraveling of the financial system forced the Treasury to change objectives from asset purchases to direct capital infusions into financial institutions.
15. TALF has supported $58 billion in asset-backed securities, along with $12 billion of securitization for commercial mortgages. Using a combination of TARP and private capital, Public-Private Investment Funds have purchased, to date, $12 billion of securities from banks.

16. In April and May, Treasury sold roughly 20% of the government's stake for $6.2 billion, $1.3 billion above its cost. The Treasury is in the process of selling another 1.5 billion shares, and plans to liquidate the remainder of its stake in an orderly fashion by the end of 2010.
17. Introducing the HAMP in spring 2009, President Obama said he expected between 3 million and 4 million loan modifications. Even with the more recent changes to the plan, the number of permanent modifications is likely to be well under half that amount.
18. These costs do not include adjustments to the Alternative Minimum Tax, which was included as part of the ARRA, but which would have been passed by Congress regardless. They do include the added costs of providing unemployment insurance benefits, which were underestimated in the original cost estimate for the ARRA.
19. The U.S. hasn't been alone in using fiscal stimulus during the current period. Nearly all major economies did so, with total global fiscal stimulus approaching $5 trillion. The Chinese were the most aggressive, adding nearly twice as much stimulus as the U.S. as a share of GDP.
20. This includes only the cost of the tax cuts from 2001 to 2003. The tax cuts instituted in this period largely expire at the end of this year.
21. The Great Recession likely lasted at least 18 months between December 2007 and June 2009. This is the longest downturn since the Great Depression and compares with an average of 10 months for recessions since World War II. The recovery over the past year has also been among the weakest in the post war period.
22. See Cohen, D. and Cummins, J. "A Retrospective Evaluation of the Effects of Temporary Partial Expensing," Federal Reserve Board, Finance and Economics Discussion Series Working Paper No. 2006-19 (April 2006). Also see House C. and Shapiro, M. "Temporary Investment Tax Incentives: Theory with Evidence from Bonus Depreciation," NBER Working Paper 12514, September 2006.
23. These multipliers are calculated based on simulations of the Moody's Analytics macroeconomic model of the U.S. economy.
24. Consumer spending in the model is actually disaggregated into various durable goods, nondurable goods, and services categories.
25. The refinance share proxies for the prepayment risk in mortgage loans.
26. The Federal Reserve's Senior Loan Officer Survey is conducted quarterly. Loan officers are asked by the Fed how their underwriting standards and loan demand have changed since the last time they responded to the survey the quarter before. Equations for three questions from this survey were added to the model for the purposes of this study.
27. The specification is based largely on the neoclassical theory of the firm. Fixed investment is divided into five categories of producers' durable equipment, and nine categories of nonresidential structures. Additional drivers important to the different categories of investment are also included in the equations. Investment in industrial equipment, for example, is also driven by capacity utilization and investment in transportation equipment is driven by vehicle sales to account for vehicle purchases by vehicle lessors.
28. Exports in the model are divided into eight different categories and imports are divided into ten categories.
29. Estimates of NAIRU were closer to 5% before the recession. They have risen because the lengthening duration of unemployment is eroding the ability of jobless workers to return to the labor market, and because of the large number of underwater homeowners whose ability to relocate for employment is limited.
30. The federal funds rate equation is estimated over the period beginning in late 1987, which coincides with Alan Greenspan's and Ben Bernanke's tenures as chairman of the Federal Reserve. Prior to this period monetary policy was much less transparent, and for a time during the late 1970s and early 1980s was based on targeting money supply growth.
31. This result is consistent with research done by Goldman Sachs. See "No Rush for the Exit," Jan Hatzius, et al, Goldman Sachs Global Economics Paper No. 200, June 30, 2010. It is also consistent with results in "The Fed's Exit Strategy for Monetary Policy," Glenn Rudebusch, San Francisco Federal Reserve Board Economic Letter, 2010-18, June 14, 2010 http://www.frbsf.org/publications/economics/letter/2010/el2010-18.html.
32. The single-A corporate bond yield is used in the equation for the S&P 500 stock index instead of the junk corporate bond yield as the larger companies in the index have closer to a single-A rating. Single-A corporate bonds are modeled as a function of Baa bonds, which are in turn modeled as a function of junk corporate bonds.

NMHC National Multi Housing Council®
Apartments: Smart Communities, Smarter Living

NATIONAL APARTMENT ASSOCIATION

STATEMENT FOR THE RECORD

ON BEHALF OF THE

NATIONAL MULTI HOUSING COUNCIL

AND THE

NATIONAL APARTMENT ASSOCIATION

BEFORE THE

SENATE COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS

STATE OF THE HOUSING MARKETS

March 9, 2011

1850 M Street, NW, Suite 540 ▪ Washington, DC 20036 ▪ 202.974.2300 ▪ FAX 202.775.0112 ▪ www.nmhc.org ▪ info@nmhc.org

The State of the Apartment Market

Chairman Johnson, Ranking Member Shelby and distinguished Members of the Committee, the National Multi Housing Council (NMHC) and the National Apartment Association (NAA) commend you for your efforts to address the recovery in the housing markets and respectfully submit this statement to present the state of the multifamily industry.

NMHC and NAA represent the nation's leading firms participating in the multifamily rental housing industry. Our combined memberships are engaged in all aspects of the apartment industry, including ownership, development, management and finance. The National Multi Housing Council represents the principal officers of the apartment industry's largest and most prominent firms. The National Apartment Association is the largest national federation of state and local apartment associations. NAA is a federation of 170 state and local affiliates comprised of more than 50,000 multifamily housing companies representing more than 5.9 million apartment homes.

State of the Apartment Market

The bursting of the single-family house price bubble ushered in the worst economic downturn of the post-war era. It cost almost 9 million payroll jobs—6.3% of the pre-recession peak—and pushed the unemployment rate above the symbolic 10% mark for the first time in 10 years. That's unmatched in the post-World War II era. Given that job growth is a key driver of apartment industry demand, it also caused a sharp drop in rental housing demand. As more people started "doubling up"—moving in with relatives or other roommates—rather than form their own households, the apartment vacancy rate rose to the highest level on record according to the U.S. Census Bureau.

It is important to understand that the apartment industry was a collateral victim of the single-family meltdown. Our sector did not overbuild during the housing boom, yet the freezing of the capital markets rippled through our industry. Transaction volume plummeted from $100 billion to around $14 billion in just two years. With construction financing severely curtailed, new apartment construction set all-time lows in 2009 and 2010, averaging just 100,000 per year.

As the economic recovery takes hold, the story of the housing market remains a story of two distinct markets. While there is still a large inventory overhang of single-family housing, on the apartment side, the pickup in demand is already outpacing new supply. In 2010, the apartment industry saw significant recovery. Despite the still-sluggish improvement in the job market, demand for apartment residences rose strongly last year: the increase in "net absorptions" (the net change in the number of apartment renters) was the largest in more than 20 years.

With household formation still below the trend level, the source of this demand was the ongoing increase in the proportion of households who rent, rather than own, their home. The homeownership rate has fallen from a peak of 69.4% (on a seasonally adjusted basis) to just 66.6% by the fourth quarter of 2010. Every one percentage point decline in the homeownership rate means 1.1 million additional renter households.

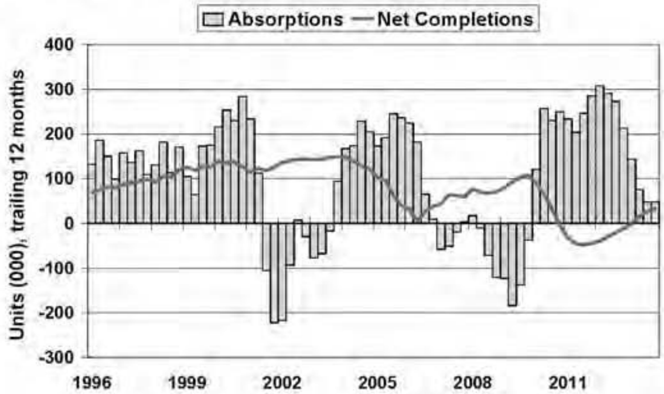
Growing Importance of Rental Housing, Experts Forecast Supply Shortage

In the near term, a stronger economy coupled with larger gains in employment should keep demand for apartments growing strongly. Beyond that, however, the United States is on the cusp of a significant change in our housing dynamics. Changing demographics mean changing housing preferences and a further uptick in rental demand that will continue long after the economic recovery. The "typical" American household of a couple with children—the driver of our suburban homeownership push for years—is now less than a quarter of our population and falling. By 2030, nearly three-quarters of our households will be childless. In addition, 78 million Echo Boomers continue to enter the housing market, primarily as renters. And some of the 78 million Baby Boomers are beginning to downsize, with well-located apartments offering an attractive option to many.

These major changes have important implications for the kind of housing we need and want. University of Utah Professor Arthur C. Nelson estimates that between 2008 and 2015, nearly two-thirds of new households formed will be renters. That's six million new renter households. As a result, he predicts that half of all new homes built between now and 2030 should be rentals to meet emerging housing demands.

New supply will not keep up with that increase in demand, however—at least, not this year or next. We need to be building an estimated 300,000 new apartment units a year to meet this expected demand. Yet most forecasts suggest we'll start fewer than half that many in 2011. That's barely enough to replace the units lost every year to demolition, obsolescence and other losses.

As the chart below shows, demand for apartment residences ("absorption") kicked into high gear in 2010, yet completions of new apartments have fallen to the lowest level since the early 1990s and are expected to fall further based on the collapse in multifamily starts over the past two years.



Source: Witten Advisors.

Some have suggested that the excess supply of single-family houses on the market will help meet this growing demand. Indeed, the continued problems in the for-sale housing market have led many owners to move their homes into the rental market. And this has helped meet some of this big increase in rental demand. But houses and condos in the for-sale market are not perfect substitutes for apartments. Apart from the important differences in location and size, apartments offer professional management and the assurance that residents won't be forced out because the owner is facing foreclosure.

This is evident in the Census Bureau data on renter vacancy rates. In buildings with 2-4, 5-9, and 10 or more units in them, the vacancy rates have fallen by 1.6, 2.2, and 2.9 percentage points, respectively, in the last year-and-a-half. By contrast, the vacancy rate for single-family dwellings has declined by only 0.6 percentage points. The increase in the number of renters has not helped absorb much of the still-large inventory overhang of single-family houses.

Meeting the Industry's Capital Needs

As policymakers craft solutions to fix the single-family housing problems, they should be mindful not to do so at the expense of the much smaller and less understood, but vital, multifamily sector. Without reliable access to affordable capital, the industry cannot meet the nation's growing demand for rental housing.

Moreover, the capital needs of the multifamily industry are quite different and deserve special attention to ensure that reform efforts in the single-family area, such as moving to a fully privatized market, do not create unintended consequences for the rental housing industry.

This is especially important given the successful track record of the GSEs' multifamily business. They continue to operate with very low default rates and generate net revenues for the government. Proposals to fully privatize the mortgage finance system threaten this success by failing to recognize that history has shown that the private markets cannot meet a majority of the industry's capital needs, even in healthy economic times. For this and other reasons, we believe a federally backed secondary market is absolutely critical to the sector's health and our continued ability to meet the nation's growing demand for rental housing.

Administration Report to Congress: Reforming America's Housing Finance Market

We are encouraged by the recently released Obama Administration's blueprint for winding down the operations of Fannie Mae and Freddie Mac, mostly for what it did not propose, i.e., a single rigid reform policy. The three options it outlined serve as a good starting point for discussion. They are:

(1) completely eliminating Fannie Mae and Freddie Mac and move to a privatized mortgage market;
(2) phasing out the government's guarantee of mortgage-backed bonds until it is left as the insurer of the last resort for times of crisis; and
(3) continuing to offer a more limited federal guarantee at all times.

We have given considerable attention to the range of options and urge lawmakers to focus their attention—at least in terms of serving the rental housing industry—on the third option, e.g., a system that provides a federal guarantee at all times.

While we are encouraged by the thawing in the private capital markets and support a return to a marketplace dominated by private capital, lawmakers need to understand that even in healthy economic times history has made it clear that the private market simply cannot meet a majority of the rental housing industry's capital needs. Multifamily mortgages are far more complicated than single-family mortgages, which are more easily served by the private sector.

We also have serious doubts about the ability of an "emergency-only" federal guarantee—option number two—to ramp up quickly enough to adequately respond to a capital crisis.

Key Points: GSE Performance and Private Capital

As you contemplate future policy positions to alter the government's role in mortgage financing, we ask that you consider the following key points about the apartment industry, the performance of the GSEs' multifamily business and the state of private capital investment in multifamily:

- The GSEs' multifamily programs did not contribute to the housing meltdown. In fact, quite the opposite can be said. Overall loan performance in the $2 trillion multifamily sector remains relatively healthy, with the strongest performance recorded by the debt provided by the GSEs. Their multifamily delinquency and default rates remain below one percent—a tenth of the size of the delinquency/default rates plaguing single-family. In short, the GSEs' multifamily programs are not broken. They pose no risk to the taxpayer and have produced net revenues for the U.S. government.

- Nearly ALL of the multifamily funding provided by the existing GSEs helped create workforce housing (not just the capital they provided to properties designated "affordable"). Fully 90% of the apartment units financed by Fannie Mae and Freddie Mac over the past 15 years—more than 10 million units—were affordable to families at or below the median income for their community. This includes an overwhelming number of market-rate apartments with no federally appropriated subsidy, produced with virtually no risk to the taxpayer.

- Through careful underwriting, the GSEs' multifamily models have met the test. They have attracted enormous amounts of private capital; helped finance millions of units of market-rate workforce housing without federal appropriations; sustained liquidity in all economic climates; and ensured safety and soundness in their multifamily business. As a result of the liquidity provided by the GSEs, the United States has the best and most stable rental housing sector in the world.

- Private market sources of capital for multifamily are not sufficient. Banks are limited by capital requirements and have never been a source of long-term financing. They currently hold 31.2% of outstanding multifamily mortgage debt. Between 1990 and 2010, they provided 24% ($136.49 billion) of the total net increase in mortgage debt but have provided limited amounts of capital to the industry since the financial crisis.

  Life insurance companies typically lend primarily only to newer, luxury high-end properties and enter and leave the multifamily market based on their investment needs and economic conditions. They currently hold just 5.6% of outstanding multifamily mortgage debt. Between 1990 and 2010, they accounted for just 3% ($18.3 billion) of the net increase in multifamily mortgage debt.

  FHA has exceeded its capacity to meet the sector's capital demands, and their capital targets construction lending. FHA/Ginnie Mae currently hold 14% of outstanding multifamily mortgage debt. From 1990 to 2010, they accounted for 10.7% ($59.6 billion) of the total net increase in mortgage debt.

  The private-label CMBS market is unlikely to return to the volume and market share it reached a few years ago. It peaked at 16.5% of the market ($17.6 billion a year) in the housing bubble years of 2005-2007. The CMBS market now holds 12.2% of the outstanding multifamily mortgage debt.

  While covered bonds might provide some additional liquidity to apartment borrowers, they are unlikely to provide the capacity, flexibility and pricing superiority necessary to adequately replace traditional sources of multifamily mortgage credit, including the GSEs.

Key Principles for GSE Reform

The apartment industry urges you to consider the following key points for inclusion in any reform measure:

1. **Do No Harm: Preserve Multifamily Lending Programs**
   The multifamily sector produces the vast majority of this nation's affordable, workforce housing. Given that private capital cannot meet the industry's financing needs, it is an appropriate and important public mission for the government to ensure sufficient liquidity to the sector. In addition, the multifamily sector, and more specifically the GSEs' multifamily programs, did not contribute to the housing meltdown. Therefore, as policymakers "fix" the problems in the single-family sector, they should not do so at the detriment of the multifamily industry.

2. **Protect the Taxpayer: Look to Proven Multifamily Models**
   The taxpayer is footing the bill for the breakdown of the single-family housing sector, and that should never happen again. The GSEs' multifamily programs can serve as a model for a reformed housing finance system. They have performed extraordinarily well and have less than a one-percent delinquency rate. Historically, they have been well capitalized, have covered all their losses through the loss reserves they collected and have earned a profit. Even during conservatorship, the GSEs' multifamily programs have earned net revenues of $2 billion.[1] Their success is the result of strong business models that use retained risk and stringent underwriting criteria.

   To protect the taxpayer going forward, these models should be carefully studied for a broader application within the larger housing finance system. Specifically, the government must ensure strong regulatory oversight. It should consider implementing some level of retained risk by mortgage originators and servicers and adequate capital standards to fund loan-loss reserves. These steps would preserve the strong mortgage loan performance and track record seen in the multifamily sector and protect the taxpayer.

3. **Federal Government Involvement Necessary and Should Be Appropriately Priced**

[1] Source: GSE SEC filings. This does not include write-downs of Low-Income Housing Tax Credit holdings that the firms have been prohibited from selling and liquidating.

Even after we transition to a new housing finance system, there will be an ongoing need for an explicit federal government guarantee on multifamily mortgage securities and portfolio-held loans. Over the past 40 years, there have been numerous occasions when the private sector has been unable or unwilling to finance multifamily loans. There is a legitimate concern that the private sector cannot be counted on, from both reliability and capacity standpoints, to consistently finance the majority of multifamily borrowers' needs. Hence, it is hard to envision a reformed housing finance system without some form of federal credit enhancement. However, that credit should be priced at an appropriate level that reflects the mortgage risk and the value of the government's credit enhancement and in such a way that it complements, but does not unfairly compete with, private debt capital.

4. **Liquidity Support Should Be Broad and Available at All Times, Not Just "Stop-Gap" or Emergency**
   Any federal credit facility should be available to the entire apartment sector and not be restricted to specific housing types or specific renter populations. Narrowing any future credit source would remove a tremendously important source of capital to a large portion of our industry, namely market-rate developers who actually provide a large volume of unsubsidized workforce housing. Such a facility should also be available at all times to ensure constancy in the U.S. housing market throughout all business cycles. It would be impossible to turn on and off a government-backed facility without seriously jeopardizing capital flows.

5. **Mission Should Focus on Liquidity, Not Mandates**
   The public mission of a federally supported secondary market should be clearly defined and focused primarily on using a government guarantee to provide liquidity and not specific affordable housing mandates. Such mandates create conflicts within the secondary market and are partially responsible for the housing crisis because of the distortions the mandates introduced into the GSEs' business practices. Instead of mandates, the new housing finance system should provide incentives to support the production and preservation of affordable multifamily housing. Absent incentives, the government should redirect the affordability mission to HUD/FHA and the Low-Income Housing Tax Credit program.

6. **Retain Portfolio Lending While Expanding Securitization**
   Securitization must be used to attract private capital for multifamily mortgage capital. However, unlike single-family loans, multifamily loans are not easily "commoditized." Without the ability to hold some loans in portfolio, multifamily lending activities will be significantly curtailed. In addition, securitizing multifamily loans is not always the best way to manage credit risk. Portfolio capacity is also required to aggregate mortgages for a structured securities sale.

7. **Create Certainty and Retain Existing Resources/Capacity During the Transition**
   To avoid market disruption, it is important that policymakers clearly define the role of the government in a reformed system and the timeline for transition. Without that certainty, private capital providers (e.g., warehouse lenders and institutional investors) are likely to limit their exposure to the market, which could cause a serious capital shortfall to rental housing. In addition, during the transition years, we believe it is critical to retain many of the resources and capacity of the existing GSEs. The two firms have extensive personnel and technology expertise as well as established third-party relationships with lenders, mortgage servicers, appraisers, engineers and other service providers that are critical to a well-functioning secondary market.

We appreciate the opportunity to present the views of the apartment industry and look forward to working with you to build a world-class housing finance system that meets the nation's changing housing needs while also protecting the taxpayers.