The Special Inspector General for the Troubled Asset Relief Program (SIGTARP)

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Summary

This report discusses the Special Inspector General provisions in the Emergency Economic Stabilization Act of 2008 (EESA), which was enacted as P.L. 110-343 on October 3, 2008. This act created a Special Inspector General for the Troubled Asset Relief Program (SIGTARP). Under EESA, TARP funds may be used by the Secretary of the Treasury to purchase "troubled assets," defined to include both mortgage-related financial instruments and "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." The broad authorities provided to the SIGTARP by EESA have not changed even though the Secretary of the Treasury has modified the approach to stabilize the financial industry through the TARP.

The Senate passed S. 383, the Special Inspector General for the Troubled Asset Relief Program Act of 2009, without amendment by Unanimous Consent on February 4, 2009. The Senate had previously passed a similar bill in the 110th Congress. S. 383 and its companion bill, H.R. 1341, would make modifications to the SIGTARP's audit and investigative authorities, grant the SIGTARP temporary hiring power outside of the competitive civil service process, grant the SIGTARP authority to hire up to 25 retired annuitants, require coordination with other Inspectors General with regard to audits and other responsibilities, and make SIGTARP reports publicly available, with certain exceptions. Other bills addressing the SIGTARP include H.R. 384, which passed the House on January 21, 2009.

This report will compare the duties and authorities of the SIGTARP to those of the Special Inspector General for Iraq Reconstruction (SIGIR) and the Special Inspector General for Afghanistan Reconstruction (SIGAR), as well as statutory IGs under the Inspector General Act of 1978, as amended (IG Act). S. 383 and H.R. 1341 would make all three special IGs members of the newly codified Council of the Inspectors General on Integrity and Efficiency until the dates that each special IG terminates.

The report will also cover the authority that Inspectors General possess to conduct audits and investigations. Finally, the report will provide an overview of the SIGTARP's request to TARP recipients regarding their use or expected use of TARP funds, as well as their plans for following executive compensation limitations, and possible issues raised by the Paperwork Reduction Act.

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Introduction

Congress has established statutory offices of inspectors general (IGs) in many executive and legislative branch agencies, as well as two special IGs for programs and operations funded with amounts appropriated for the reconstruction of Iraq and Afghanistan.[1] The four principal responsibilities of IGs are: (1) conducting and supervising audits and investigations; (2) providing coordination and recommending policies for activities designed to promote economy and efficiency in agency programs and operations; (3) preventing and detecting fraud, waste, and abuse; and (4) keeping the agency head and Congress fully and currently informed about problems and deficiencies relating to such programs and recommending corrective actions.[2]

The Emergency Economic Stabilization Act of 2008 (EESA), which was enacted as P.L. 110-343 on October 3, 2008, established an additional special IG for the Troubled Asset Relief Program (TARP). Under EESA, TARP funds may be used by the Secretary of the Treasury to purchase "troubled assets," defined to include both mortgage-related financial instruments and other types of securities which the Secretary, after consulting the Chairman of the Board of Governors of the Federal Reserve System, determines to purchase as necessary "to promote financial stability."[3]

EESA's Provisions Regarding the Special Inspector General for the Troubled Asset Relief Program (SIGTARP)

The provisions in EESA establishing the SIGTARP are similar to the IG provisions for SIGIR and SIGAR in many respects. However, there are important substantive distinctions between these three IGs, which this report will refer to collectively as the "special IGs," as well as between the SIGTARP and statutory IGs created under the Inspector General Act of 1978, as amended (IG Act).[4] Due to the ambiguous nature of the statutory language in EESA, the scope of the powers and authorities of the SIGTARP is not clear, as discussed below.

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[1] Provisions establishing SIGIR and SIGAR are located at 5 U.S.C. App. § 8G note. Provisions establishing statutory IGs are codified at 5 U.S.C. App.

[2] 5 U.S.C. App. § 4(a).

[3] The legislation defines "troubled assets," as follows:

> (A) 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; 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.

P.L. 110-343, §§ 3(9)(A) and (B) (emphasis added).

[4] The Treasury Inspector General for Tax Administration (TIGTA), which was carved out of the Treasury IG and covers a distinct entity within the Treasury Department—the Internal Revenue Service (IRS)—is another comparable, though not identical, IG. TIGTA is currently the only statutory IG that exists within an establishment or entity that also has an agency-wide IG in place.

Appointment, Confirmation, and Removal

The SIGTARP is a presidentially appointed and Senate confirmed IG, selected "on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations."[5] Unlike statutory IGs under § 3 of the IG Act, who are also presidentially appointed and Senate confirmed, there is no provision in EESA that requires the SIGTARP to be appointed "without regard to political affiliation and solely" on the basis of the skills listed above. Although the absence of the additional IG Act language regarding political affiliation and appointment based only on job qualification skills does not change the legal protections that the IG Act and EESA afford to the SIGTARP, the SIGTARP may be less independent than other IGs as a practical matter, given that the SIGTARP is not subject to the same appointment constraints.

The nomination of a SIGTARP was required "as soon as practicable" after the establishment of the TARP and the Troubled Assets Insurance Financing Fund.[6] The SIGTARP nominee appeared in hearings before the Senate Committee on Banking, Housing and Urban Affairs and the Senate Committee on Finance in November, although the Finance Committee hearing was not an official nomination hearing. A Senate standing order approved on January 9, 2007, provided for sequential referral for a nomination to an "Office of Inspector General" to the Senate Homeland Security and Governmental Affairs Committee after proceedings in the committee with primary jurisdiction over the "department, agency, or entity." That order did not refer to special IGs, however, and both SIGIR and SIGAR are not Senate-confirmed positions, so there was no controlling precedent for the nomination of a special IG prior to the SIGTARP's nomination. The Parliamentarian determined that "the Senate Banking Committee [would] be charged with reporting the IG nominee to the full Senate."[7] Neil Barofsky was confirmed by the Senate on December 8, 2008.

Like other presidentially appointed and Senate-confirmed IGs, the SIGTARP can be removed only by the President, and the President must notify Congress of the reasons for the IG's removal.[8] The President's reasons need not be given in writing and no time limit is set.

Supervision

Unlike agency IGs, who "shall report to and be under the general supervision" of the agency head,[9] the SIGTARP will not be required to report to, or be supervised by, the head of any agency, including the Secretary of the Treasury. The IG Act does not explicitly define the meaning of "general supervision" and its legislative history does not appear to address the scope of the agency head's supervisory role. A court case relying on the legislative history of the IG Act

[5] P.L. 110-343, § 121(b)(2). For comparison, SIGAR is the only presidentially appointed, but not Senate confirmed, IG, while SIGIR is "appointed by the Secretary of Defense, in consultation with the Secretary of State." 5 U.S.C. App. § 8G note. However, "[t]he President may appoint the [SIGIR] to serve as the [SIGAR], in which case the [SIGAR] shall have all of the duties, responsibilities, and authorities set forth ... with respect to such appointed position." *Id.*

[6] P.L. 110-343, § 121(b)(3). SIGIR and SIGAR were required to be appointed "not later than 30 days after the date of the enactment" of their respective acts. *See, e.g.*, P.L. 110-181, § 1229(c).

[7] Press Release, Max Baucus, Chairman, Senate Committee on Finance, *Baucus Questions Inspector General Nominee on Responsibilities, Preparedness in Tracking Financial Rescue Program* (November 17, 2008).

[8] P.L. 110-343, § 121(b)(4).

[9] IG Act, §§ 3(a), 8G(d).

described the agency head's supervisory authority over the IG as "nominal."[10] Instead, under one interpretation of the SIGTARP's duties and responsibilities, discussed below, the SIGTARP will report only to Congress and not the agency head.[11] This reporting arrangement would be unique among statutory IGs.[12] Additionally, as discussed further below in the section entitled "EESA Authority to Conduct Investigations and Audits," the SIGTARP will have complete discretion in pursuing audits and investigations, and in issuing subpoenas. The SIGTARP appears to possess greater latitude in pursuing audits and investigations than the Treasury IG, as the Treasury IG is one of six IGs that may be prevented by an agency head from initiating, carrying out, or completing an audit or investigation, or from issuing a subpoena, for specified reasons such as preventing disclosure of national security matters.[13]

In contrast to the SIGTARP, the other special IGs report to, and are supervised by, the Secretary of State and the Secretary of Defense. SIGIR and SIGAR are also required to keep the Secretaries of State and Defense "fully and currently informed about problems and deficiencies" in program administration and the need for and progress on corrective action.[14] Additionally, SIGIR and SIGAR must coordinate with the IGs for the Departments of State and Defense, and the United States Agency for International Development IG "in carrying out the duties, responsibilities, and authorities of the Inspector General." The provisions for the SIGTARP do not require coordination with the Treasury IG or other IGs, although the SIGTARP has established a TARP-IG Council, with a GAO representative and representatives of the following IGs as members: the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, the Federal Housing Finance Agency, the Federal Reserve Board, the Department of Housing and Urban Development, the Treasury IG for Tax Administration, and the Treasury.[15] S. 383, which passed the Senate on February 4, 2009, and H.R. 1341 would require the SIGTARP to coordinate with the IGs for Treasury, the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, the Federal Reserve Board, the Federal Housing Finance Board, and "any other entity as appropriate."

[10] United States Nuclear Regulatory Commission v. Federal Labor Relations Authority, 25 F.3d 229, 235 (4th Cir. 1994).

[11] P.L. 110-343, § 121(f)(1). The absence of such supervision provisions does not mean that the TARP itself will be without an administrator—the Treasury Secretary will be responsible for implementing the TARP through a newly created Office of Financial Stability. P.L. 110-343, § 101(a)(3).

[12] It is conceivable that the President would raise constitutional objections to the direct reporting requirement for the Inspector General. However, Congress has imposed direct reporting requirements on executive branch officials since the first Congress. CRS Report RL33667, *Presidential Signing Statements: Constitutional and Institutional Implications*, by T. J. Halstead. *See* U.S. CONST. art. II, § 3; Morrison v. Olson, 487 U.S. 654, 686, 694-95 (1988) (establishing a two-step balancing test for addressing separation of powers concerns in such situations). In the IG context, the executive branch would "retain[] ample authority to assure that the [IG] is competently performing his or her statutory responsibilities." Morrison, 487 U.S. at 692.

[13] IG Act § 8D. If the Treasury Secretary were to exercise this power over the Treasury IG, the Secretary must notify the Treasury IG in writing of the reasons for exercising such power. The Treasury IG, in turn, must send this notification to congressional committees within 30 days.

[14] *See, e.g.*, P.L. 110-181, § 1229(a)(3).

[15] Hearing Before the H. Comm. on Financial Services, Subcomm. on Oversight and Investigations, Feb. 24, 2009 (statement of Neil M. Barofsky, SIGTARP), http://www.sigtarp.gov/reports/testimony/2009/Testimony_Before_the_House_Committee_on_Financial_Services_Subcommittee_on_Oversight_and_Investigations.pdf.

Duties and Responsibilities

This section discusses the interaction of EESA provisions and the duties and responsibilities section of the IG Act. The SIGTARP's authorization under EESA § 121(c)(1) to conduct audits and investigations related to the TARP, as well as proposals to modify his authorities, are discussed in detail starting on page 10 of this report.

EESA § 121(c)(3) provides that the SIGTARP "shall also have the duties and responsibilities of inspectors general under the Inspector General Act of 1978." On one hand, this provision could mean that the SIGTARP would be responsible for all of the IG duties outlined in the IG Act, presumably as amended, even those that reference interaction with the head of an establishment or those that reference responsibilities not specifically delineated in EESA. Yet it appears more likely that § 121(c)(3)'s reference to duties and responsibilities may be limited to those under § 4 of the IG Act, which is entitled "Duties and responsibilities; report of criminal violations to Attorney General."

The provision that grants the SIGTARP the same duties and responsibilities as those of IGs under the IG Act also appears in the acts that created SIGIR and SIGAR. This provision seems to bridge some, but not all, of the differences between the authorities of the special IGs and IGs created under the IG Act. If interpreted broadly, this provision will likely encompass the powers, duties, and responsibilities in certain sections of the IG Act, including, but not limited to

- §§ 4(a)(2)-(a)(5), which encompass general IG duties and the responsibility to "keep the head of such establishment and the Congress fully and currently informed, by means of the reports required by section 5 and otherwise, concerning fraud and other serious problems, abuses, and deficiencies relating to the administration of programs and operations"; and
- § 4(d), which requires IGs to report expeditiously to the Attorney General when there exist "reasonable grounds to believe there has been a violation of Federal criminal law."

The "and otherwise" language in the requirement that IGs keep Congress "fully and currently informed" has come to be understood in practice to include testifying at congressional hearings, direct communications with Members and staff, various selective or specialized reporting techniques, and responses to congressional inquiries for information, audits, and reports (both verbal and written).

Depending on how § 121(c)(3) is interpreted, it is possible that the SIGTARP's responsibilities will not encompass § 4(a)(1) of the IG Act. That section provides that IGs are "to provide policy direction for and to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of such establishment." Since the provisions creating the SIGTARP contain specific language with regard to conducting, supervising, and coordinating audits and investigations, and this specific language does not mention "policy direction," this provision of the IG Act would not seem to be included in the duties mentioned in §121(c)(3).

SIGTARP Reports

If the SIGTARP's duties and responsibilities are interpreted to be confined to those in § 4 of the IG Act, the above cross reference to "the reports required by section 5" in § 4(a)(5) of the IG Act appears to subject the SIGTARP to the IG Act § 5 reporting requirements as well. However, it is not clear as to whether the SIGTARP would need to submit the reports in § 5 of the IG Act in addition to the reports required in EESA or whether the SIGTARP would only be responsible for the required reports set forth in EESA.

For example, § 5(d) of the IG Act requires establishment IGs to immediately report "particularly serious or flagrant problems, abuses, or deficiencies" to the head of the establishment whenever the IG becomes aware of such issues. The head of the establishment then must send the report to the appropriate congressional committees within seven days, along with the establishment head's comments in his or her own report. Since EESA requires the SIGTARP to report to Congress only, and not to an establishment head, it is not clear if the SIGTARP would be required to comply with those reporting requirements in § 5(d) of the IG Act. If EESA is interpreted to include the reporting requirements in § 5 of the IG Act, then the SIGTARP could be required to submit certain reports to the establishment head, which would appear to be the Secretary of the Treasury, as TARP itself has not been designated an establishment.

EESA § 121(f) specifies certain reporting requirements for the SIGTARP, including a report 60 days after the SIGTARP's confirmation by the Senate and every *calendar* quarter thereafter. S. 383 and H.R. 1341 would amend this provision to require the SIGTARP to submit reports to the appropriate congressional committees no later than 30 days after the end of each *fiscal* quarter, instead of each 120-day period after the initial 60 day report following the SIGTARP's confirmation.

The SIGTARP report must include "a detailed statement of all purchases, obligations, expenditures, and revenues associated with" the TARP. The specificity of the language of this report provision could be interpreted to imply that the "duties and responsibilities" provision in § 121(c)(3) would not extend to the reporting requirements set out in § 5 of the IG Act, which provides that the IG office must prepare semiannual reports and submit them to the head of the establishment, who in turn must transmit them to appropriate congressional committees with his or her own report.[16] Alternatively, the IG Act § 5 reports could be required in addition to the reports set out in EESA.

There is no explicit requirement in EESA that the Treasury Secretary (or anyone else) be allowed to comment on the reports that the SIGTARP submits to Congress. Although there may be other reporting requirements with respect to TARP, they would not be intended to respond to SIG concerns or criticisms. SIGAR and SIGIR have such requirements enabling the Secretaries of State and Defense to submit comments to the appropriate congressional committees, as well as requirements that the reports be made public, and even published on a website.[17] The IG Act also provides that the head of the establishment must make the semiannual IG reports and the

[16] 5 U.S.C. §§ 5(a)-(b).

[17] *See, e.g.*, P.L. 110-181, §§ 1229(i)-(k). The President can waive the public availability requirement of the SIGIR and SIGAR reports for national security reasons.

semiannual establishment head reports available to the public, on request, within 60 days of the establishment head's transmission of the reports to the appropriate congressional committees.[18]

S. 383 and H.R. 1341 would add a provision requiring the Treasury Secretary to "take action to address deficiencies identified by a [SIGTARP] report or investigation," or to certify to the appropriate congressional committees "that no action is necessary or appropriate." Additionally, S. 383 and H.R. 1341 would require the SIGTARP to "submit a report to Congress analyzing the use of any funds received by a financial institution under the TARP" not later than September 1, 2009. Under S. 383 and H.R. 1341's amendments, such a report would be publicly available on the SIGTARP's website "within 24 hours after the submission of the report." S. 383 and H.R. 1341 would also require all reports submitted by the SIGTARP to be publicly available, with exceptions prohibiting public disclosure of certain information.

Whistleblower Protections

It is important to note that EESA § 121(c)(3) will not necessarily encompass the whistleblower protections in § 7 of the IG Act. These provisions address complaints or information provided by a whistleblowing employee, the disclosure of a whistleblower's identity, and reprisals threatened or taken against a whistleblower. Under the IG Act, not every complaint must be investigated, and the IG has discretion in accepting complaints from individuals other than employees. However, it appears that IGs are willing to accept complaints from anyone, not just employees, and the legislative history of the IG Act does not prohibit IGs from receiving and acting on information or complaints from any source. On a related note, EESA provides that the Financial Stability Oversight Board, as established by the legislation, will be responsible for "reporting any suspected fraud, misrepresentation, or malfeasance" to the SIGTARP or the Attorney General.[19]

However, a whistleblower with information concerning the possible existence of illegal activities or mismanagement regarding the purchase or insurance of troubled assets could conceivably be covered by the IG Act § 7 protections if he or she reported the information to the Treasury IG, as opposed to the SIGTARP. The acts that created SIGIR and SIGAR do not contain whistleblower protections either.

In view of the fact that the current TARP approach is concentrating on banking concerns, it is interesting to note that federal law providing whistleblower protection to employees of insured depository institutions and federal banking agencies applies only to information turned over to federal banking agencies or the Attorney General.[20]

Resources and Law Enforcement Authority

Section 121(d) of EESA states that the SIGTARP will have the authorities of § 6 of the IG Act, which provides in subsection (c) that the head of an establishment must give the IG office within the establishment adequate office space, equipment, supplies, and other services. It could be

[18] 5 U.S.C. App. § 5(c).

[19] P.L. 110-343, § 104(a)(3). Additionally, the Comptroller General must submit reports on "the activities and performance of the TARP and of any agents or representatives of the TARP" to the SIG TARP at least every 60 days. P.L. 110-343, § 116(a)(3).

[20] 12 U.S.C. § 1831j.

argued that the Secretary of the Treasury is the head of the establishment in which the TARP is located, as § 11(2) of the IG Act defines "establishment" to include the Treasury. In addition, § 6(a)(3) of the IG Act provides that the IG is authorized "to request information or assistance as may be necessary for carrying out the duties and responsibilities provided by the IG Act from any Federal, State, or local government agency or unit thereof." It is not clear if "assistance" would cover office space, however, if it does, the SIGTARP would appear to be able to request such resources from the Treasury Department.[21] In contrast, EESA specifically provides that "[t]he Secretary shall provide the Comptroller General with appropriate space and facilities in the Department of the Treasury as necessary to facilitate oversight of the TARP until the termination date established in section 120."[22]

The provisions in the act creating SIGAR enabled that special IG to rely on the personnel, facilities, and resources of another special IG, SIGIR.[23] SIGIR, in turn, could rely on the Department of State or the Department of Defense for equipment, office supplies, and communications facilities and services within either agency, including at appropriate locations of the Department of State in Iraq.[24]

Section 6(e) of the IG Act enables the Attorney General to authorize certain IGs, assistant IGs, and special agents supervised by assistant IGs to carry firearms, make arrests without warrants, and seek and execute arrest warrants. The Attorney General may authorize such powers after an initial determination that the affected IG's office is "significantly hampered" by the lack of such powers, that assistance from other law enforcement agencies is insufficient, and that internal safeguards are in place. IG Act § 6(e)(3) lists the IG offices of certain entities that are exempt from the Attorney General's initial determination. S. 383 and H.R. 1341 would add the SIGTARP to the list of IG offices exempt from such initial determination by the Attorney General.

Hiring Staff for the SIGTARP Office

EESA § 121(e) provides that the SIGTARP "may select, appoint, and employ such officers and employees as may be necessary for carrying out the duties of the [SIG], subject to the provisions of title 5, United States Code, governing appointments in the competitive service, and the provisions of chapter 51 and subchapter III of chapter 53 of such title, relating to classification and General Schedule pay rates." This provision mirrors the language in SIGIR's provisions, and means that SIGTARP employees would be hired under civil service laws. However, Congress recently provided SIGIR with temporary employment authority that follows the authority granted to temporary federal organizations.[25] Employees in such temporary federal organizations are

[21] The SIGTARP report to Congress indicates that the SIGTARP "occupies several different spaces within the main Treasury building . . . [and] intends to keep an office suite in the main Treasury building to facilitate communication with senior Treasury officials." However, SIGTARP has leased separate office space and "anticipates occupying at least a part of [it] by March 1, 2009." SIGTARP, Initial Report to the Congress, Feb. 6, 2009, at 18, http://sigtarp.gov/reports/congress/2009/SIGTARP_Initial_Report_to_the_Congress.pdf.

[22] P.L. 110-343, § 116(a)(2)(A).

[23] P.L. 110-181, §§ 1229(h)(4), (6).

[24] *See, e.g.*, P.L. 108-106, § 3001(h)(5).

[25] The SIGIR may "exercise the authorities of subsections (b) through (i) of section 3161 of title 5, United States Code (without regard to subsection (a) of such section)." P.L. 110-181, § 1221(e). Section 3161 of 5 U.S.C. addresses temporary federal organizations formed "for the purpose of performing a specific study or other project" that are "terminated upon the completion of the study or projection or upon the occurrence of a condition related to the completion of the study or project" that have a duration "not in excess of three years."

excepted from competitive civil service rules in title 5, United States Code regarding appointment, pay, and classification.[26] There are several categories of positions excepted by the Office of Personnel Management (OPM) from competitive service—Schedules A, B, and C—for which it is not practical to adhere to qualification requirements of the competitive civil service or hold competitive examinations or which are political appointments.

S. 383 and H.R. 1341 would give the SIGTARP temporary hiring power outside of competitive civil service requirements akin to that of SIGIR under 5 U.S.C. § 3161. Such temporary hiring power would only be in effect for six months after the date on which S. 383 and H.R. 1341 would be enacted. Additionally, S. 383 and H.R. 1341 would grant the SIGTARP the authority to hire up to 25 retired annuitants. Their annuity would continue while they were employed by the office of the SIGTARP.

Although EESA does not provide for this temporary hiring authority for the SIGTARP, EESA § 121(e)(3) provides that the SIG "may enter into contracts or other arrangements for audits, studies, analyses, and other services with public agencies and with private persons, and make such payments as may be necessary to carry out the duties of the Inspector General." Thus, it appears that the SIGTARP has the authority to hire employees for the office under such contracts or arrangements.

Funding

EESA § 121(g) provides that the SIGTARP shall have $50 million to carry out the duties of the office. S. 383 and H.R. 1341 would make such funds available "not later than 7 days" after the date of their enactment. S. 383 and H.R. 1341's provisions regarding funding may have been aimed at preventing issues similar to those that arose with funding for SIGAR, for which $20 million authorized in initial funding was not disbursed.[27] Congress allotted a total of $7 million, but the SIGAR noted in a report that "due to current funding restraints, SIGAR does not expect to reach full operational capacity until the 4th quarter of fiscal year 2009."[28]

Termination

EESA § 121(h) establishes that the office of the SIGTARP "shall terminate on the later of—(1) the date that the last troubled asset acquired by the Secretary under section 101 has been sold or transferred out of ownership or control of the Federal Government; or (2) the date of expiration of the last insurance contract issued under section 102."[29] In contrast, SIGIR and SIGAR "shall terminate 180 days after the date on which amounts appropriated or otherwise made available for the reconstruction of Iraq [or Afghanistan] that are unexpended are less than $250,000,000."[30] While the continuation of the other special IGs is limited based on the amount of the reconstruction accounts, the SIGTARP may be a continuing necessity to audit the purchase, transfer, sale, and insurance of troubled assets, in whatever form they may take under EESA §

[26] 5 U.S.C. § 3161(b)(3); USAJOBS, How Federal Jobs are Filled, http://www.usajobs.gov/EI55.asp.

[27] Karen DeYoung, *Official Report Faults Iraq Reconstruction*, Wash. Post, December 14, 2008, at A17.

[28] *Id.*

[29] P.L. 110-343, § 121(h).

[30] P.L. 110-181, § 1221(h), § 1229(o).

3(9).[31] In the event that the office of the SIGTARP is terminated, H.R. 384 from the 111th Congress would provide that the Treasury IG assumes the SIGTARP's responsibilities "under this subsection," which refers to the auto industry financing and restructuring.[32]

IGs' Authority to Conduct Audits and Investigations

This portion of the report provides a legal analysis of the general ability of IGs to conduct audits and investigations, as well as the specific authority of the SIGTARP to conduct audits and investigations. At the outset, it is important to recognize that most IGs have virtually unfettered discretion over initiating and conducting audits and investigations dealing with waste, fraud, and abuse within their own agencies. As a corollary, they may accept, delay, modify, or reject a request to conduct an audit or investigation from any party, including individual Members of Congress, officials at the Office of Management and Budget, other IGs, IG councils, agency officials, and private parties and organizations. Only a provision in a statute could officially order an IG investigation or audit. However, IGs are intended to serve as an oversight arm of Congress within agencies, and it is Congress that has explicitly delegated auditing and investigative functions to IGs. Congress is not prohibited from requesting IGs to conduct audits or investigations, and no improprieties are raised when a committee or a Member makes such a request. The legislative history of the IG Act supports the understanding that Congress could ask IGs for information.[33] IGs generally comply with such requests.

Background

Under § 6 of the IG Act, IGs have been granted broad authority to conduct audits and investigations; to gain direct access to agency records and information; to request assistance from other federal, state, and local government agencies; to subpoena information and documents; to administer oaths when taking testimony; to hire staff and manage their own resources; and to carry firearms, make arrests, and execute warrants. The SIGTARP most likely retains these powers as well, as EESA § 121(d) provides that the SIGTARP "shall have the authorities provided in section 6 of the Inspector General Act of 1978."[34]

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[31] Under TARP's Capital Purchase Program, the Treasury Department is contracting to receive, in addition to senior preferred stock, stock warrants exercisable over a ten-year term. TARP Capital Purchase Program, Senior Preferred Stock and Warrants, Summary of Senior Preferred Terms, http://www.ustreas.gov/press/releases/reports/termsheet.pdf.

[32] H.R. 384, § 302 (amending P.L. 110-343 by adding a new § 410(b)).

[33] Representative Jack Brooks, the House Floor Manager of the Inspector General bill, explained after completion of the conference with the Senate that "there is no prohibition [in the bill] with respect to filing [with congressional committees] all the information which Congress wants. We will be able to get it. There is no problem with it." 124 Cong. Rec. 32032 (1978) (Rep. Brooks).

[34] The Homeland Security Act of 2002 gave law enforcement powers to criminal investigators in offices headed by IGs appointed under IG Act § 3. P.L. 107-296, § 812 (amending IG Act § 6). Section 11 of the Inspector General Reform Act of 2008, P.L. 110-409, granted this authority to IGs appointed under IG Act § 8G, the designated federal entity IGs. It is not clear whether the SIG TARP possesses these law enforcement powers. In contrast, § 1229(g)(1) of P.L. 110-181, which created SIGAR, specifies that SIGAR "shall have the authorities provided in section 6 of the Inspector General Act of 1978, including the authorities under subsection (e) of such section." The provisions addressing SIGIR contain similar language.

However, concerns have been expressed with regard to the SIGTARP's ability to obtain records from third parties. The equity purchase transactions under the TARP involve applications to Treasury from regulated banks, thrifts, bank holding companies, and thrift holding companies, through their federal regulators, who have access to virtually all the records of the institutions and are required to examine them periodically.[35] Some of these records may be subject to laws preventing disclosure except to bank regulators.[36] On the other hand, this may not be the case with many of the entities that may be involved in mortgage-related securities purchases, either as contractors to aid Treasury in pricing the assets or as holders of mortgage-related securities. Such entities include mortgage-backed securities trusts, hedge funds, and investment banks. The books of these entities would not have undergone the routine scrutiny involved in bank supervision, and the entities may be unaccustomed to opening their books to federal regulators outside of their participation in the TARP program.

SIGTARP's Authority to Conduct Investigations and Audits

EESA grants discretion for the SIGTARP in setting investigative priorities and making specific commitments. The SIGTARP is authorized under EESA § 121(c)(1) "to conduct, supervise, and coordinate audits and investigations of the purchase, management, and sale of assets by the Secretary of the Treasury under any program established by the Secretary under section 101, and the management by the Secretary of any program established under section 102, including by collecting and summarizing [certain] information" related to troubled assets.[37] Other than these categories, EESA contains no requirements or criteria directing what types of audits and investigations might be conducted, at what level and extent, when, and at what expense (within the office's budget).

The authorities available to the SIGTARP under the duties and responsibilities outlined in IG Act § 4 (which applies to the SIGTARP per EESA § 121(c)(3)) would still provide the SIGTARP with the ability to conduct audits and investigations of activities related to EESA funds and would not appear to limit the SIGTARP's authority to the TARP-specific duties specified in EESA § 121(c)(1). Moreover, as previously mentioned, unlike the limits on the Treasury IG's authority, there is no clause in EESA specifying that the SIGTARP may be "prevent[ed] or prohibit[ed] ... from initiating, carrying out, or completing any audit or investigation, or from issuing any subpena during the course of any audit or investigation."[38] Additionally, there appear to be no

[35] Since the institutions which are participating in the TARP Capital Purchase Program include national banks, it is possible that 12 U.S.C. § 484(a) might be invoked to question the authority of the TARP SIG to conduct an investigation of the records of a national bank. This statute specifies that "no national bank shall be subject to any visitorial powers except as authorized by federal law, vested in the courts of justice or such as shall be exercised by Congress.... " In the banking context, visitorial powers involve the authority to "visit" a bank and examine its activities and observance of laws and regulations, including the examination of records.

[36] Under 18 U.S.C. § 1906, there are criminal penalties applicable to disclosing certain information from bank examination reports.

[37] P.L. 110-343, § 121(c)(1).

[38] 5 U.S.C. App. §§ 3(a), 8D. Only a few agency heads are specifically authorized to prevent, prohibit, or halt an IG audit or investigation, including the heads of the Departments of Defense, Homeland Security, Justice, Treasury, the U.S. Postal Service, and the Central Intelligence Agency. 5 U.S.C. App. § 8. (The CIA IG operates under P.L. 101-193.) Even in such exceptions, however, Congress has taken pains to assure the integrity of its ability to continue to receive information from these IGs. The six agency heads may exercise this power only for specified reasons—dealing with national security, intelligence, counterintelligence, ongoing criminal investigations, and other law enforcement matters—and must notify the IG and Congress of their reasons when doing so. For example, within 30 days of receipt of the notice of the Secretary of Homeland Security's decision to prohibit an IG from continuing an audit or (continued...)

prohibitions or restrictions in EESA or the IG Act that would prevent the SIGTARP from inquiring into a matter currently and directly through his or her own office of inspector general at the request of a committee or Member of Congress.

S. 383, H.R. 1341, and H.R. 384 would amend § 121(c) to address concerns regarding the SIGTARP's authority to audit and investigate actions with regard to TARP funds. S. 383 and H.R. 1341 would add a provision to the SIGTARP's existing authorities. The provision would state that the SIGTARP "shall have the authority to conduct, supervise, and coordinate an audit or investigation of *any action taken under this title* [which covers the TARP] as the [SIGTARP] determines appropriate," with the exception of actions taken under EESA §§ 115, 116, 117, and 125. These sections respectively address graduated authorization granted to the Treasury Secretary to purchase troubled assets, oversight and audits by the Comptroller General (head of the Government Accountability Office), a Comptroller General study and report on margin authority "to determine the extent to which leverage and sudden deleveraging of financial institutions was a factor behind the current financial crisis," and the Congressional Oversight Panel. Although the language in S. 383 and H.R. 1341 provides additional authorities to the SIGTARP's existing authority regarding audits and investigations under the TARP program, it appears to be broader than the language addressing the SIGTARP's authority to conduct audits and investigations in H.R. 384.

H.R. 384 would strike language in EESA § 121(c) related to the "conduct[ing], supervis[ing], and coordinat[ing] of audits and investigations of the purchase, management, and sale of assets by the Secretary of the Treasury under" the TARP program and a related insurance program that was to be established under EESA.[39] Instead, H.R. 384 would clarify the SIGTARP's authority to conduct, supervise, and coordinate audits and investigations of "*any action taken by the Secretary of the Treasury* under this title [which covers the TARP]," as the SIGTARP determines appropriate, with the exception of sections 115, 116, 117, and 125. If H.R. 384 was enacted, and the TARP funds did not pass through the Treasury Secretary, this provision could limit the ability of the SIGTARP to conduct audits or investigations.

H.R. 384 from the 111th Congress would also amend EESA to address auto industry financing and restructuring and provide an additional duty for the SIGTARP—conducting, supervising, and coordinating audits and investigations of the "President's designee."[40] H.R. 384 defines the "President's designee" as "one or more officers from the Executive Branch having appropriate expertise in such areas as economic stabilization, financial aid to commerce and industry, financial restructuring, energy efficiency, and environmental protection to carry out" the auto industry financing and restructuring.[41] Additionally, H.R. 384 provides that "[t]he Special Inspector General shall also have the duties, responsibilities, and authorities of inspectors general under the Inspector General Act of 1978, including section 6 of such Act." The bill may add this

(...continued)

investigation, the IG must transmit a response to the President of the Senate, the Speaker of the House, and to "appropriate committees and subcommittees of Congress." 5 U.S.C. App. § 8I(a)(3). In addition, Congress provided that the exercise of the Secretary's prohibitory power "should not be construed as limiting the right of Congress or any committee of the Congress *to access any information it seeks*" (emphasis added). 5 U.S.C. App. § 8I(b).

[39] P.L. 110-343, § 121(c)(1).

[40] H.R. 384, § 302 (amending P.L. 110-343 by adding a Title IV that would address auto industry financing and restructuring). Section 410 of the new Title IV addresses oversight and audits and the additional duty for the SIG TARP.

[41] H.R. 384, § 302 (amending P.L. 110-343 by adding § 402, Presidential Designation).

sentence regarding § 6 because it would emphasize that the SIGTARP's duties, responsibilities, and authorities are not confined to those in P.L. 110-343 § 121(c). P.L. 110-343 § 121(d)(1) states: "In carrying out the duties specified in subsection(c), the Special Inspector General shall have the authorities provided in section 6 of the Inspector General Act of 1978."

Jurisdiction

Additionally, for most IGs, there are no boundaries on the jurisdiction of the IG over agency programs, operations, or internal units.[42] Most IGs are authorized "to make such investigations and reports relating to the administration of the programs and operations of the applicable establishment as are, in the judgment of the Inspector General, necessary or desirable."[43] As with other references to IG Act § 6, this provision applies to the SIGTARP. Courts have also held that the IGs' investigative authority extends to private contractors:

> [T]he legislative history of the Act clearly indicates that Congress specifically intended to extend the OIG's power of review over private entities working closely with government agencies because such entities are privy to highly confidential information and are paid large sums of federal funds for their services, creating a potential risk for abuse both inside and outside government agencies.[44]

Access to Agency Materials

Supporting their responsibilities, IGs are "to have access to all records, reports, audits, reviews, documents, papers, recommendations, and other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under this Act."[45] There is no limitation on this right of access in the IG Act. The IG's ability to "have access to all records" indicates that the IG's investigative and audit powers extend into the private sector and to individuals outside the agency, for instance, when the IG audits contracts with industry or investigates suspected fraud in agency purchases or other wrongdoing by private individuals in connection with agency operations and programs.

The SIGTARP retains these powers as well, as EESA § 121(d) provides that the SIGTARP "shall have the authorities provided in section 6 of the Inspector General Act of 1978." As a result, it appears that the SIGTARP would be able to access records of third-parties that participate in the TARP program and that relate to EESA funds. However, additional legislation could make the SIGTARP's authority in this area more explicit. In the event that a private entity would not

[42] The IG in the Department of Justice was limited to examining the Federal Bureau of Investigation and the Drug Enforcement Administration, until an Attorney General directive and a subsequent statutory amendment placed all department components under the Office of Inspector General's jurisdiction with the exception of certain misconduct allegations. P.L. 107-273, § 308.

[43] 5 U.S.C. App. § 6(a)(2).

[44] United States v. Hunton & Williams, 952 F. Supp. 843, 849 (D.D.C. 1997) (citing Adair v. Rose Law Firm, 867 F. Supp. 1111, 1115 (D.D.C. 1994), and holding "[t]he statutory law, legislative history and case law support the OIG-RTC's authority to investigate outside contractors for the purpose of detecting and preventing fraud by outside legal contractors"); *see also* United States v. Aero Mayflower Transit Co., 831 F.2d 1142 (D.C. Cir. 1987) (upholding the enforcement order for 377 subpoenas issued by the Department of Defense IG "directed to interstate van lines and their local agents").

[45] 5 U.S.C. App. § 6.

voluntarily yield its records to the SIGTARP, the IG would have the option of using his subpoena power, as discussed below.

Subpoena Power

Section 6(a)(4) of the IG Act, states that "each Inspector General, in carrying out the provisions of this Act, is authorized ... to require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and other data in any medium (including electronically stored information, as well as any tangible thing) and documentary evidence necessary in the performance of the functions assigned by this Act.... "[46] Subpoena authority under the IG Act is delegable,[47] and subpoenas issued under the act are judicially enforceable.[48] The IG Act contains no explicit prohibition on disclosure of the existence or specifics of a subpoena issued under this authority. The SIGTARP retains these subpoena powers as well, as EESA § 121(d) provides that the SIGTARP "shall have the authorities provided in section 6 of the Inspector General Act of 1978."

The legislative history of the IG Act addresses the subpoena as an investigative tool intended for use in both administrative and criminal investigations:

> Subpoena power is absolutely essential to the discharge of the Inspector and Auditor General's functions. There are literally thousands of institutions in the country which are somehow involved in the receipt of funds from Federal programs. Without the power necessary to conduct a comprehensive audit of these entities, the Inspector and Auditor General could have no serious impact on the way federal funds are expended. . . .
>
> The committee does not believe that the Inspector and Auditor General will have to resort very often to the use of subpoenas. There are substantial incentives for institutions that are involved with the Federal Government to comply with requests by an Inspector and Auditor General. In any case, however, knowing that the Inspector and Auditor General has recourse to subpoena power should encourage prompt and thorough cooperation with his audits and investigations. The committee intends, of course, that the Inspector and Auditor General will use this subpoena power in the performance of is statutory functions. The use of subpena power to obtain information for another agency component which does not have such power would clearly be improper.[49]

The Justice Department reports that the "the Inspector General['s administrative subpoena] authority is mainly used in criminal investigations,"[50] and the courts have held that "the Act gives the Inspectors General both civil and criminal investigative authority and subpoena powers coextensive with that authority."[51]

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[46] 5 U.S.C. App. § 6(a)(4).

[47] *United States v. Custodian of Records*, 743 F.Supp. 783, 786 (W.D.Okla. 1990); *Doyle v. U.S. Postal Service*, 771 F.Supp. 138, 140 (E.D.Va. 1991).

[48] 5 U.S.C. App. § 6(a)(4)(" ... which subpena, in the case of contumacy or refusal to obey, shall be enforceable by order of any appropriate United States District Court ... "); *Inspector General v. Banner Plumbing Supply Co., Inc.*, 34 F.Supp. 682, 686 (N.D. Ill. 1998); *University of Medicine and Dentistry v. Corrigan*, 347 F.3d 57, 63 (3d Cir. 2003).

[49] S.Rep.No. 95-1071, at 34 (1978).

[50] Office of Legal Policy, United States Department of Justice, *Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities*, 6 (2002).

[51] *United States v. Aero Mayflower Transit Co., Inc.*, 831 F.2d 1142, 1145 (D.C.Cir. 1987); *see also Inspector General* (continued...)

The legislative history of the IG Act also discusses subpoenas of third-party bank records:

> [The committee recognizes that there is a substantial ongoing dispute about the propriety of so-called third party subpoenas: i.e., subpoenaing records of an individual which are in the hands of an institution, such as a bank. Since *U.S. v. Miller*, 425 U.S. 435 (1976), individuals have been regarded as having no protectable right of property with respect to their bank records. A law enforcement agency can obtain such records from a bank without any showing of cause to a neutral magistrate or any notice to the individual involved. The committee notes that progress has been made on legislation concerning financial privacy which would require notice to be given to an individual whose bank records are being obtained by a law enforcement agency. Hopefully, this progress will lead to legislation of general applicability to all law enforcement authorities, including Inspector and Auditor Generals].[52]

Authority to Administer Oaths and Conduct Interviews

IGs and the SIGTARP (through the authorities in IG Act § 6 as provided by EESA § 121(d)) have the authority "to administer to or to take from any person an oath, affirmation, or affidavit, whenever necessary in the performance of the functions assigned by this Act."[53] The phrase "any person" indicates that the IG's investigative powers extend into the private sector and to individuals outside the agency. Oaths administered by IGs "shall have the same force and effect as if administered or taken by or before an officer having a seal."[54] False material statements made to an IG under oath may subject an individual to criminal prosecution or perjury charges.[55]

Several court cases discuss an OIG's ability to conduct interviews in the course of investigations. In *United States Nuclear Regulatory Commission v. Federal Labor Relations Authority* (FLRA), the United States Court of Appeals for the Fourth Circuit noted that the IG Act facilitates the IG's auditing and investigative functions by giving "each Inspector General access to the agency's documents and agency personnel."[56] The court held that four proposals by a union "regarding procedures to be followed during investigatory interviews of the agency's employees by the Inspector General" were not consistent with the IG Act because "Congress intended that the Inspector General's investigatory authority include the power to determine when and how to investigate."[57] To grant the union's proposals regarding interviews "would directly interfere with the ability of the Inspector General to conduct investigations."[58]

(...continued)

v. Banner Plumbing Supply, Co., Inc., 34 F.Supp.2d 682, 688 (N.D.Ill. 1998); *United States v. Medic Housing, Inc.*, 736 F.Supp. 1531, 1535 (W.D.Mo. 1989).

[52] S.Rep.No. 95-1071, at 34 (1978)(footnote 7 of the committee report in brackets).

[53] 5 U.S.C. App. § 6(a)(5).

[54] 5 U.S.C. App. § 6(a)(5).

[55] 18 U.S.C. §§ 1001, 1621; *see* United States v. Debrow, 346 U.S. 374, 377 (1953) ("The oath administered must be authorized by a law of the United States."); United States v. Correia, 1995 U.S. App. LEXIS 3061 (1st Cir. 1995) (unpublished).

[56] 25 F.3d 229, 234 (4th Cir. 1994).

[57] *Id.* at 230, 234.

[58] *Id.* at 235.

The United States Court of Appeals for the D.C. Circuit echoed the Fourth Circuit's remarks regarding IG independence in *United States Department of Justice v. FLRA*.[59] The court stated "there cannot be the slightest doubt that Congress gave the Inspector General the independent authority to decide 'when and how' to investigate; that the Inspector General's authority encompasses determining how to conduct interviews under oath."[60] Although both this case and *United States Nuclear Regulatory Commission v. FLRA* dealt with OIG interviews of agency employees, the D.C. Circuit noted that "[a]nyone—whether a union member, a management official or an individual not employed by the federal government—would be prudent to secure legal representation if they are to be questioned under oath."[61]

In *National Aeronautics and Space Administration* (NASA) *v. FLRA*,[62] the United States Supreme Court detailed the independent characteristics of OIGs and their authority to conduct audits and investigations. The court held that, in the context of a federal labor relations statute, the NASA-OIG investigative interviewer was a representative of the agency and found that "those [independent IG Act] characteristics do not make NASA-OIG any less a representative of NASA when it investigates a NASA employee.... As far as the IG [Act] is concerned, NASA-OIG's investigators are employed by, act on behalf of, and operate for the benefit of NASA."[63] The Court also noted two limitations of the IG Act: (1) it "grants Inspectors General the authority to subpoena documents and information, but not witnesses,"[64] and (2) "[t]here may be other incentives for employee cooperation with OIG investigations, but formal sanctions for refusing to submit to an OIG interview cannot be pursued by the OIG alone."[65] Rather, the OIG may request assistance from the agency head "insofar as is practicable and not in contravention of the law," which has been interpreted to mean that the agency head could direct the employee to appear at an OIG interview.[66]

Possible Rationales for Delaying, Modifying, or Rejecting a Requested Audit or Investigation

As noted above, an IG has discretion in mounting audits and investigations. This means that the IG may decline a request to conduct an audit or investigation. For instance, other investigative priorities might take precedence in the IG's judgment. Or the IG might determine that indications of wrongdoing or lax enforcement are insufficient to warrant the office of inspector general's commitment to investigate them.

[59] 39 F.3d 361 (D.C. Cir. 1994).

[60] *Id.* at 367 (quoting United States Nuclear Regulatory Comm'n, 25 F.3d at 234).

[61] *Id.* at 368.

[62] 527 U.S. 229 (1999).

[63] Id. at 241; see id. at 231, 234, 246.

[64] *Id.* at 242; *see also* United States v. Iannone, 610 F.2d 943, 945 (D.C. Cir. 1979).

[65] 527 U.S. at 242; *see id.* at 253 (Thomas, J. dissenting) ("Inspectors General, moreover, have no authority under the Inspector General Act to punish agency employees, to take corrective action with respect to agency programs, or to implement any reforms in agency programs that they might recommend on their own."); *see also id.* at 256 (Thomas, J. dissenting) (noting that subpoenas issued by OIGs for records, reports, audits, documents, and the like "are enforceable by an appropriate United States district court"). Justice Thomas also states that while OIGs "do not have the statutory authority to compel an employee's attendance at an interview ... if an employee refuses to attend an interview voluntarily, the Inspector General may request assistance, § 6(a)(3), and the agency head 'shall ... furnish ... information or assistance,' to OIG." 527 U.S. at 256.

[66] *Id.* at 256, 260-61 (Thomas, J. dissenting); *see also id.* at 242.

Additionally, the IG might consider that an investigation now could prove disruptive to, delay, or compromise any ongoing administrative and judicial proceedings. An immediate IG investigation might also prove counterproductive to future inquiries, including an effort by the office of inspector general itself. Along these lines, an investigation started after the conclusion of administrative and judicial proceedings could benefit from the possible presentation of additional information.

Finally, certain practical considerations might delay or prevent an investigation. Possibilities include: already existing commitments for specific investigations and audits; competing priorities for new audits and investigations; limitations on office of inspector general resources now and for the remainder of the fiscal year; and the need to rely on contracting out for relevant expertise, which could delay the start of an investigation, if in-house capabilities are lacking.

The SIGTARP Letter to TARP Recipients and the Paperwork Reduction Act

On January 22, 2009, SIGTARP Neil Barofsky noted in a letter to the Chairman of the House Committee on Financial Services that his office was preparing requests to TARP recipients asking them to provide information and documentation related to their use or expected use of TARP funds, as well as their plans for following executive compensation limitations, within 30 days of the request.[67]

On January 30, 2009, in a letter to the Director of the Office of Management and Budget (OMB), Peter R. Orszag, Senator Grassley disclosed that OMB had "advised the IG that SIGTARP could not initiate its significant oversight effort to improve the general transparency of TARP funds due to restrictions of the Paperwork Reduction Act" (PRA).[68] According to the letter, SIGTARP requested "Emergency Processing" by OMB of its letter to TARP recipients.[69] Reportedly, OMB initially noted that SIGTARP "would not be limited" by the PRA, and then subsequently withdrew its emergency approval within several minutes of granting such approval.[70] According to the letter, it was Senator Grassley's understanding at the time that OMB "is requiring SIGTARP to post a proposed letter of inquiry to TARP recipients for 15 days, wait for comments, and then justify to OMB that it has taken into account the public comments in redrafting the inquiry letter."[71] It is not clear if a proposed letter of inquiry was posted for 15 days, but it appears unlikely that it was posted, given the following chain of events.

[67] Letter to The Honorable Barney Frank, Chairman, Committee on Financial Services, from Neil M. Barofsky, Special Inspector General (Jan. 22, 2009).

[68] Letter to The Honorable Peter R. Orszag, Director, Office of Management and Budget, from Senator Charles E. Grassley, Ranking Member of the Committee on Finance (Jan. 30, 2009).

[69] The "emergency processing" request may have been an authorization request made to the OMB Director under 44 U.S.C. § 3507(j)(1), which is described in further detail in the next section, or under 5 C.F.R. § 1320.13.

[70] Letter to The Honorable Peter R. Orszag, Director, Office of Management and Budget, from Senator Charles E. Grassley, Ranking Member of the Committee on Finance (Jan. 30, 2009).

[71] *Id.*

According to testimony on February 5, 2009, by SIGTARP Neil M. Barofsky, the office "received approval from OMB to send letter requests to each of the TARP recipients" that week.[72] On that day, the SIGTARP began issuing letters with an OMB control number that expires in August 2009. Such letters were sent from February 5-11, 2009, and encompass the issues indicated in the SIGTARP's January 22, 2009 letter.[73] According to the SIGTARP's testimony on February 24, 2009, the office has "already begun to receive responses to these requests and look[s] forward to providing an interim report to Congress on this audit project after we receive the responses."[74]

Also on February 5, 2009, the Department of the Treasury posted a comment request regarding the collection of information that the SIGTARP proposed to undertake under the PRA with regard to TARP recipients. It was published in the *Federal Register* on February 11, 2009. The comment request noted that the SIGTARP's information collection requirement was submitted to OMB "for emergency review, and it has been approved under the [PRA]."[75] The section of the comment request describing the purpose of the SIGTARP information collection noted that the questionnaires "are intended to accommodate a September 2009 report to Congress," and the summary of the proposed information collection estimated that the questionnaires would be sent to 350 respondents, "[b]ased upon current program participants."[76] This estimate may increase as the Treasury announced its plan for the use of the remainder of the TARP funds on February 10, 2009, the date before the comment request was published.[77]

The Paperwork Reduction Act

Under the PRA, agencies must receive approval (signified by an OMB control number displayed on the information collection) for each collection of information request before it is implemented.[78] Failure to obtain approval for an active collection, or the lapse of that approval, represents a violation of the Act, and triggers the PRA's public protection provision. Under that provision, no one can be penalized for failing to comply with a collection of information subject to the PRA if the collection does not display a valid OMB control number or if the agency does not inform the respondents that they are not required to respond unless the collection of information contains a valid OMB control number.[79] OIRA can disapprove any collection of information if it believes the collection is inconsistent with the requirements of the PRA.[80] It has

[72] Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs, Feb. 5, 2009 (statement of Neil M. Barofsky, SIGTARP), http://www.sigtarp.gov/reports/testimony/2009/Testimony_Before_the_Senate_Banking_Committee_on_Banking_Housing_and_Urban_Affairs.pdf. According to one administration official, SIGTARP's request was granted one day after it was submitted to OMB under the emergency processing provisions in 5 C.F.R. § 1320.13.

[73] SIGTARP, Reports, Audits and Special Reports, http://www.sigtarp.gov/reports.shtml.

[74] Hearing Before the H. Comm. on Financial Services, Feb. 24, 2009 (statement of Neil M. Barofsky, SIGTARP), http://www.house.gov/apps/list/hearing/financialsvcs_dem/sig_testimony_2-24-09.pdf.

[75] 74 Fed. Reg. 6946 (Feb. 11, 2009).

[76] *Id.*

[77] Stephen Labaton and Edmund L. Andrews, *Bailout Plan: $2.5 Trillion and a Strong U.S. Hand*, N.Y. Times (Feb. 11, 2009), at A1.

[78] 44 U.S.C. § 3507(g).

[79] 44 U.S.C. § 3512.

[80] Independent regulatory agencies can, by majority vote, void any OIRA disapproval of a proposed collection of information. 44 U.S.C. § 3507.

been estimated by some in the IG community that it takes nine to ten months to receive approval for a collection of information under the PRA.

The Act generally defines a "collection of information" as the obtaining or disclosure of facts or opinions by or for an agency by 10 or more nonfederal persons. The PRA does not apply to collections of information "during the conduct of a Federal criminal investigation," or "during the conduct of . . .an administrative action or investigation involving an agency against *specific* individuals or entities,"[81] which would appear to include IG investigations that fall within this category. However, the PRA does apply to "the collection of information during the conduct of *general* investigations . . . undertaken with reference to a category of individuals or entities such as a class of licensees or an entire industry."[82] The PRA requires agencies to justify any collection of information from the public by establishing the need and intended use of the information, estimating the burden that the collection will impose on respondents, and showing that the collection is the least burdensome way to gather the information.[83]

Each agency must "establish a process within the office headed by the Chief Information Officer" whereby the proposed collections of information are reviewed before being submitted to OMB.[84] Agencies cannot conduct a collection of information until after undertaking such a review, evaluating public comments received, and submitting a certification that the information collection meets statutory requirements (such as being written in plain terms and "necessary for the proper performance of the functions of the agency"[85]), in addition to receiving OMB approval and a control number.[86] However, an agency "may request the Director [of OMB] to authorize a collection of information," upon the agency head's determination that

> (A) a collection of information-
> (i) is needed prior to the expiration of time periods established . . .; and
> (ii) is essential to the mission of the agency; and
> (B) the agency cannot reasonably comply with the provisions of [the PRA] because--
> (i) public harm is reasonably likely to result if normal clearance procedures are followed;
> (ii) an unanticipated event has occurred; or
> (iii) the use of normal clearance procedures is reasonably likely to prevent or disrupt the collection of information or is reasonably likely to cause a statutory or court ordered deadline to be missed.[87]

OMB must report to Congress annually and include in such report "a list of all violations" of the PRA.[88]

Neither the PRA, the IG Act, nor EESA contain explicit language discussing whether IG investigations and audits are subject to the requirements of the PRA. Both the PRA and IG Acts and their subsequent major amendments or reform acts (in 1986 and 1995 for the PRA, and in 1988 and 2008 for the IG Act) are silent on this issue, as is EESA. A search of the *Congressional*

[81] 44 U.S.C. § 3518(c)(1) (emphasis added).

[82] 44 U.S.C. § 3518(c)(2) (emphasis added).

[83] 44 U.S.C. § 3506(c).

[84] 44 U.S.C. § 3506(c).

[85] 44 U.S.C. § 3506(c)(3).

[86] 44 U.S.C. § 3507(a).

[87] 44 U.S.C. § 3507(j)(1); *see also* 5 C.F.R. § 1320.13.

[88] 44 U.S.C. § 3514(a)(2)(A)(ii).

Record debate regarding EESA similarly indicated that this issue was not raised. Nor does it appear that the issue of the PRA and its potential impact on the SIGTARP's ability to obtain information was raised in SIGTARP confirmation hearings.

Potential Approaches for the SIGTARP and Congress with Regard to Requests Presumed to be Subject to the PRA

Assuming that the PRA is construed to apply to the SIGTARP and future information collection requests, in the event that the SIGTARP encounters additional difficulties under the PRA process, there are several approaches that the SIGTARP or Congress could pursue. One approach would be for the SIGTARP to proceed with the information collection regardless of the requirements of the PRA or to only send future requests to nine entities. The potential repercussions of ignoring the PRA would be that the public protection provision of the PRA would be triggered and that the entities that received the SIGTARP request could not be penalized for failing to comply with that collection of information. However, public expectations might decrease potential noncompliance by recipients of TARP funds or the challenge of a request from SIGTARP, whose purpose is to provide oversight of such expenditures, for information regarding how the entity spent its funds.

A second approach to address the SIGTARP's responsibilities and the PRA would be for Congress to enact an amendment to the PRA that would exclude SIGTARP, or executive branch IGs generally, from the definition of "agency," similar to the exclusions currently provided for the GAO and the Federal Election Commission. It could be argued that GAO has similar auditing and investigative functions to those of IGs. The former President's Council on Integrity and Efficiency, a council of presidentially-appointed IGs that has now been codified, reconstituted, and renamed under the Inspector General Reform Act of 2008, has previously suggested amendments that would (1) exempt federal IGs from the PRA definition of "agency,"[89] and (2) add a new section which, when read with the rest of the statute, would state: "Except as provided in paragraph (2), this chapter shall not apply to the collection of information . . . (B) during the conduct of . . . (iii) audits, inspections, evaluations, investigations or other reviews conducted by federal inspectors general."[90]

A third approach would be for Congress to create an exemption from the PRA for collections of information undertaken specifically with regard to TARP funds in 44 U.S.C. § 3518(c)(2), which states that the PRA applies to "the collection of information during the conduct of general investigations . . . undertaken with reference to a category of individuals or entities such as a class of licensees or an entire industry."[91] Such a legislative fix could state that the provision would not apply to collections of information undertaken by the SIGTARP.

A fourth approach would be for SIGTARP to use its subpoena powers to compel the production of such information by TARP fund recipients. As mentioned above, EESA § 121(d) gives the SIGTARP the "authorities provided in section 6" of the IG Act, which encompass subpoena powers.

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[89] Specifically, the PCIE would add a new 44 U.S.C. § 3502(1)(E) exemption for federal IGs to the PRA definition of "agency."

[90] President's Council on Integrity and Efficiency (PCIE), Conflict between the Paperwork Reduction Act of 1995 and the Independence of Inspectors General under the Inspector General Act of 1978, March 2007.

[91] 44 U.S.C. § 3518(c)(2) (emphasis added).

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