

Billing Code 4810-25-P

DEPARTMENT OF THE TREASURY

31 CFR Part 31

RIN 1505-AC05

TARP Conflicts of Interest

AGENCY: Departmental Offices, Treasury.

ACTION: Interim rule.

SUMMARY: This interim rule provides guidance on conflicts of interest pursuant to Section 108 of the Emergency Economic Stabilization Act of 2008 (EESA), which was enacted on October 3, 2008.

DATES: Effective date: [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comment due date: [INSERT DATE THAT IS 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Interested members of the public are invited to submit comments on this interim rule. Comments may be submitted to Treasury by either of the following methods: Submit electronic comments through the federal government e-rulemaking portal, www.regulations.gov, or send comments in hard copy to the Executive Secretariat, Office of Financial Stability, Department of the Treasury, 1500 Pennsylvania Avenue, NW, Washington, DC 20220.

In general, Treasury will post all comments to www.regulations.gov without change, including any business or personal information provided such as names, addresses, e-mail addresses, or telephone numbers. The Treasury will also make such comments available for public inspection and copying in the Treasury's Library, Room 1428, Main Department Building, 1500 Pennsylvania Avenue, NW, Washington, DC 20220, on official business days

between the hours of 10:00 a.m. and 5:00 p.m. Eastern Time. Members of the public can make an appointment to inspect comments by telephoning (202) 622-0990. All comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure.

FOR FURTHER INFORMATION CONTACT: For further information regarding this interim rule contact the Troubled Asset Relief Program Chief Compliance Officer, Office of Financial Stability, Department of the Treasury, 1500 Pennsylvania Avenue, Washington, DC, 20220, (202) 622-2000, or TARP.Compliance@do.treas.gov.

SUPPLEMENTARY INFORMATION:

I. Background

Section 101(a) of EESA requires the Secretary of the Treasury to establish a Troubled Asset Relief Program (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 this Act and policies and procedures developed and published by the Secretary.” Section 120 of EESA provides that the TARP authorities generally terminate on December 31, 2009, unless extended upon certification by the Secretary of the Treasury to Congress, but no later than two years from the date of enactment (October 3, 2008).

Section 108 of EESA authorizes the Secretary to issue regulations or guidelines necessary to address and manage or to prohibit conflicts of interest that may arise in connection with the administration and execution of the EESA authorities. On October 6, 2008, Treasury issued interim guidelines for potential conflicts of interest related to the authorities granted under

EESA. This interim rule implements the guidelines by addressing conflicts that may arise during the selection of individuals or entities seeking a contract or financial agency agreement with the Treasury (retained entities), particularly those involved in the acquisition, valuation, management, and disposition of troubled assets. The interim rule also addresses conflicts and other matters that may arise in the course of those services. The interim rule does not address post-employment restrictions on Treasury employees, which we believe are already adequately covered by existing law.

II. This Interim Rule

The Department is promulgating this interim rule in order to implement the interim guidance released on October 6, 2008. The procedures in this rule outline the process for reviewing and addressing actual or potential conflicts of interest among retained entities performing services in conjunction with EESA. The procedures set forth in this interim rule are effective immediately. Upon careful consideration of public comments, a final rule will be issued.

Conflicts of interest may arise under EESA in a variety of situations, such as when retained entities perform similar work for Treasury and private clients. In these situations, retained entities may find that their duty to private clients impairs their objectivity when advising Treasury, or their judgment about the proper use of nonpublic information. Conflicts may also arise from the personal interests of individuals employed by retained entities. To address the potential for organizational and personal conflicts of interest, it may be necessary to restrict the activities of retained entities and key employees, to limit the dissemination of information, and to impose monitoring and reporting requirements. Treasury imposes these measures through its

contracts and financial agent agreements, as well as through this interim rule. This interim rule does not substitute any provisions of the Federal Acquisition Regulation and, to the extent the Federal Acquisition Regulation applies to any contracts Treasury has with a retained entity, this interim rule is in addition to the Federal Acquisition Regulation.

The interim rule addresses conflicts that may arise in connection with contracts and financial agency agreements for services under the TARP, other than administrative services identified by the TARP Chief Compliance Officer. Because some administrative services do not have substantial decision-making authority, they are unlikely to present conflicts of interest and would not warrant the burden imposed by these regulations.

The interim rule addresses organizational conflicts of interest in section 31.211. Before entering an arrangement for services, prospective contractors and financial agents must provide Treasury with sufficient information to evaluate the potential for organizational conflicts of interest and plans to mitigate them. Because the potential for conflicts is greatest when the arrangement relates to the acquisition, valuation, disposition, or management of assets, private entities seeking to perform these services must take special care when disclosing conflicts and designing mitigation plans. Once approved, a conflicts mitigation plan becomes a binding term of the arrangement.

Personal conflicts of interest are covered in section 31.212. The provisions here recognize that, in some cases, managers and employees of retained entities may have personal interests that could impair their objectivity. Conflicts may arise from their financial holdings and those of close family members, as well as from other personal interests. The regulation requires retained entities to obtain information from their managers and key employees and evaluate the potential for conflicts, and to implement monitoring and reporting requirements designed to

detect conflicts that might arise during the arrangement. Treasury expects retained entities who assist Treasury with the acquisition, valuation, management, and disposition of troubled assets to have the most stringent programs for detecting and preventing conflicts of interest.

Other provisions in the regulations notify retained entities of restrictions on their conduct while working for Treasury. These provisions are not designed to be comprehensive; they supplement other requirements that may be imposed by contract, financial agency agreement, and other federal laws. Section 31.213 includes restrictions on giving and accepting gifts, making unauthorized promises, and improper uses of government property. Section 31.214 describes general prohibitions applying to retained entities who provide services for the acquisition, valuation, disposition, and management of troubled assets. Section 31.216 prohibits certain communications with Treasury employees that might improperly influence the process of selecting contractors and financial agents. Section 31.217 describes retained entities' duty to keep nonpublic information confidential and requires a certification of compliance in the form of a nondisclosure agreement. A sample nondisclosure agreement is available at www.treas.gov.

In the course of implementing EESA, Treasury may permit its retained entities to use subcontractors (including consultants) to assist them in completing the work. Because subcontractors may have the same potential for conflicts of interest as those entities having a direct relationship with Treasury, these regulations impose requirements on "retained entities," which are defined to include contractors, financial agents, and their subcontractors. We specifically request comments on the practicality of this approach.

Overall, the regulations recognize that the potential for conflicts and measures for mitigating them depend on many factors, such as the type of services, a contractor's or financial agent's size and business structure, and length of the arrangement. Treasury will take these

factors into account when reviewing conflict mitigation plans. In rare cases, Treasury may need to waive a potential conflict that cannot be adequately mitigated. Waiver requests will be considered on a case-by-case basis, and granted in writing only when Treasury determines, in its sole discretion, that stronger measures are unnecessary to protect the interests of the Treasury. The standard for considering waivers appears in section 31.215. This section does not affect the rules for waiving contract provisions in the Federal Acquisition Regulations.

Section 31.218 describes some of the measures available to Treasury to enforce these interim regulations. Measures include rejecting work that is tainted by a conflict of interest, terminating the arrangement for default, and in serious cases, referring violations to the United States Department of Justice for criminal prosecution. When Treasury has discretion in selecting or imposing a remedy, it will take into account whether the contractor or financial agent promptly disclosed the problem.

III. Procedural Requirements

Justification for Interim Rulemaking

Under the Office of Federal Procurement Policy Act, 41 U.S.C. 418b, and Federal Acquisition Regulation (FAR) 48 CFR 1.501-3(b), a procurement regulation may take effect prior to notice and comment when there are urgent and compelling circumstances that make prior notice and comment impracticable. Such a procurement regulation must be published in the Federal Register and must include a statement that the regulation is temporary pending completion of a minimum 30-day public comment period. Under the Administrative Procedure Act, 5 U.S.C. 553(b)(B), an agency may dispense with notice and comment procedures when the agency finds that good cause exists that prior notice and comment are unnecessary,

impracticable, or contrary to the public interest. For the reasons set forth below, a determination has been made that urgent and compelling circumstances and good cause exist that justify the promulgation of this interim rule without prior opportunity for public comment.

This rule is promulgated pursuant to EESA, the purpose of which is 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. Specifically, this rule implements section 108, which requires the Secretary to develop regulations or guidelines for addressing conflicts of interest that may arise in connection with the administration and execution of the authorities provided under EESA. Because EESA provides such immediate authority to the Secretary to restore liquidity and stability to the financial system, it is essential that the conflicts of interest regulations be issued without delay so that anyone participating in the TARP program will have clear conflicts of interest information as soon as possible. Pursuant to 5 U.S.C. 553(b)(B), the Treasury finds that it would be unnecessary and contrary to the public interest to delay the issuance of this rule pending an opportunity for public comment and good cause exists to dispense with this requirement. For the same reasons, pursuant to 5 U.S.C. 553(d)(3), the Treasury has determined that there is good cause for the interim rule to become effective immediately upon publication. While this regulation is effective immediately upon publication, Treasury is seeking public comment on the regulation and will consider all comments in developing a final rule.

Regulatory Planning and Review

This regulation is a significant regulatory action as defined in 3(f)(4) of Executive Order 12866, as amended. Accordingly this interim final rule has been reviewed by the Office of

Management and Budget (OMB).

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required, this rule is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C chapter 6).

Paperwork Reduction Act

The information collections contained in the rule have been reviewed and approved by OMB under the Paperwork Reduction Act (44 U.S.C. chapter 35) and assigned OMB control number 1505-0209. Under the Paperwork Reduction Act, an agency may not conduct or sponsor and a person is not required to respond to, a collection of information unless it displays a valid OMB control number.

List of Subjects in 31 CFR Part 31

Conflicts of interest, Contracts, Executive compensation, Troubled assets.

For the reasons set out in the preamble, Title 31 of the Code of Federal Regulations is amended as follows:

1. Add part 31 to read as follows:

PART 31- TROUBLED ASSET RELIEF PROGRAM

Sec.

31.1 General.

Subpart A – [Reserved]

Subpart B - Conflicts of Interest

31.200 Purpose and scope.

31.201 Definitions.

31.211 Organizational conflicts of interest.

31.212 Personal conflicts of interest.

- 31.213 General standards.**
- 31.214 Limitations on concurrent activities.**
- 31.215 Grant of Waivers.**
- 31.216 Communications with Treasury employees.**
- 31.217 Confidentiality of information.**
- 31.218 Enforcement**

Authority: 31 U.S.C. 321; Pub. L. 110-343; 122 Stat 3765.

§ 31.1 General.

This Part sets forth regulations to implement and administer the Emergency Economic Stabilization Act of 2008 (Pub. L. 110-343; 122 Stat 3765).

Subpart A – [Reserved]

Subpart B – Conflicts of Interest

§ 31.200 Purpose and Scope.

(a) Purpose. This regulation sets forth standards to address and manage or to prohibit conflicts of interest that may arise in connection with the administration and execution of the authorities under the Troubled Asset Relief Program (TARP), established under sections 101 and 102 of the Emergency Economic Stabilization Act of 2008 (EESA).

(b) Scope. This regulation addresses actual and potential conflicts of interest that may arise from contracts and financial agency agreements between private sector entities and the Treasury for services under the TARP, other than administrative services identified by TARP Chief Compliance Officer.

§ 31.201 Definitions.

As used in this part:

Arrangement means a contract or financial agency agreement between a private sector entity and the Treasury for services under the TARP, other than administrative services identified by the TARP Chief Compliance Officer.

EESA means the Emergency Economic Stabilization Act of 2008.

Key individual means an individual providing services to a private sector entity who participates personally and substantially, through decision, approval, disapproval, recommendation, or the rendering of advice, in the negotiation or performance of, or monitoring for compliance under, the arrangement with the Treasury. For purposes of the definition of key individual, the words “personally and substantially” shall have the same meaning and interpretation as such words have in 5 CFR 2635.402(b)(4).

Management official means an individual within a retained entity's organization who has substantial responsibility for the direction and control of the retained entity's policies and operations. With respect to organizations that have a management committee or executive committee that has been given such responsibilities, this means the members of those committees and, if no such committee exists, this means each of the general partners.

Organizational conflict of interest means 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. Without limiting the scope of this definition, organizational conflicts of interest may include the following situations:

(1) A prior or current arrangement between the Treasury and the retained entity that may give the retained entity an unfair competitive advantage in obtaining a new arrangement with Treasury.

(2) The retained entity is, or represents, a party in litigation against the Treasury relating to activities under the EESA.

(3) The retained entity provides services for Treasury relating to the acquisition, valuation, disposition, or management of troubled assets at the same time it provides those services for itself or others.

(4) The retained entity gains, or stands to gain, an unfair competitive advantage in private business arrangements or investments by using information provided under an arrangement or obtained or developed pursuant to an arrangement with Treasury.

(5) The retained entity is a potential candidate for relief under EESA, is currently participating in an EESA program, or has a financial interest that could be affected by its performance of the arrangement.

Personal conflict of interest means 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;

Related entity means the parent company and subsidiaries of a retained entity, any entity holding a controlling interest in the retained entity, and any entity in which the retained entity holds a controlling interest.

Retained entity means the individual or entity seeking an arrangement with the Treasury or having such an arrangement with the Treasury, but does not include special government employees. A “retained entity” includes the subcontractors and consultants it hires to perform services under the arrangement.

Special government employee means any employee serving the Treasury with or without compensation for a period not to exceed 130 days during any 365-day period on a full-time or intermittent basis.

Treasury means the United States Department of the Treasury.

Treasury employee means an officer or employee of the Treasury, including a special government employee, or an employee of any other government agency who is properly acting on behalf of the Treasury.

Troubled assets means residential or commercial mortgages and any securities, obligations, or other instruments that are based on or related to such mortgages, that in each case originated or was issued on or before March 14, 2008; and any other financial instrument that the Secretary of the Treasury has determined, upon transmittal in writing to the appropriate committees of Congress, the purchase of which is necessary to promote financial market stability.

§ 31.211 Organizational conflicts of interest.

(a) Retained entity's responsibility. A retained entity working under an arrangement shall not permit an organizational conflict of interest unless the conflict has been disclosed to Treasury under this Section and mitigated under a plan approved by Treasury, or Treasury has waived the conflict. With respect to arrangements for the acquisition, valuation, management, or disposition of troubled assets, the retained entity shall maintain a compliance program designed to detect and prevent violations of federal securities laws and organizational conflicts of interest.

(b) Information required about the retained entity. As early as possible before entering an arrangement to perform services for Treasury under the EESA, a retained entity shall provide

Treasury with sufficient information to evaluate any organizational conflicts of interest. The information shall include the following:

(1) The retained entity's relationship to any related entities.

(2) The categories of troubled assets owned or controlled by the retained entity and its related entities, if the arrangement relates to the acquisition, valuation, disposition, or management of troubled assets.

(3) Information concerning all other business or financial interests of the retained entity, its proposed subcontractors, or its related entities, which could conflict with the retained entity's obligations under the arrangement with Treasury.

(4) A description of all organizational conflicts of interest and potential conflicts of interest.

(5) A written detailed plan to mitigate all organizational conflicts of interest, along with supporting documents.

(6) Any other information or documentation about the retained entity, its proposed subcontractors, or its related entities that Treasury may request.

(c) Plans to mitigate organizational conflicts of interest. The steps necessary to mitigate a conflict may depend on a variety of factors, including the type of conflict, the scope of work under the arrangement, and the organizational structure of the retained entity. Some conflicts may be so substantial and pervasive that they cannot be mitigated. Retained entities should consider the following measures when designing a mitigation plan:

(1) Adopting, implementing, and enforcing appropriate information barriers to prevent unauthorized people from learning nonpublic information relating to the arrangement and isolate key individuals from learning how their performance under the arrangement could affect the

financial interests of the retained entity, its clients, and related entities.

(2) Divesting assets that give rise to conflicts of interest.

(3) Terminating or refraining from business relationships that give rise to conflicts of interest.

(4) If consistent with the terms of the arrangement and permitted by Treasury, refraining from performing specific types of work under the arrangement.

(5) Any other steps appropriate under the circumstances.

(d) Certification required. When the retained entity provides the information required by paragraph (b) of this section, the retained entity shall certify that the information is complete and accurate in all material respects.

(e) Determination required. Prior to entering into any arrangement, the Treasury must conclude that no organizational conflict of interest exists that has not been adequately mitigated, or if a conflict cannot be adequately mitigated, that Treasury has expressly waived it. Once Treasury has approved a conflicts mitigation plan, the plan becomes an enforceable term under the arrangement.

(f) Subsequent notification. The retained entity has a continuing obligation to search for and to report any potential organizational conflict of interest. Within five (5) business days after learning of a potential organizational conflict of interest, the retained entity shall disclose the potential conflict of interest in writing to the TARP Chief Compliance Officer. The disclosure shall describe the steps it has taken or proposes to take to mitigate the potential conflict or request a waiver from Treasury.

(g) Periodic Certification. No later than one year after the arrangement's effective date, and at least annually thereafter, the retained entity shall certify in writing that it has no

organizational conflicts of interest, or explain in detail the extent to which it can certify, and describe the actions it has taken and plans to take to mitigate any conflicts. Treasury may require more frequent certifications, depending on the arrangement

(h) Retention of information. A retained entity shall retain the information needed to comply with this section and to support the certifications required by this section for three (3) years following termination or expiration of the arrangement, and shall make that information available to Treasury upon request. Such retained information shall include, but is not limited to, written documentation regarding the factors the retained entity considered in its mitigation plan as well as written documentation addressing the results of the retained entities' periodic review of the mitigation plan.

§ 31.212 Personal conflicts of interest.

(a) Retained entity's responsibility. A retained entity shall ensure that all management officials performing work under the arrangement and key individuals have no personal conflicts of interest unless mitigation measures have neutralized the conflict, or Treasury has waived the conflict.

(b) Information required. Before management officials and key individuals begin work under an arrangement, a retained entity shall obtain information from each of them in writing about their personal, business, and financial relationships, as well as those of their spouses, minor children, and other family members with whom the individuals have a close personal relationship that would cause a reasonable person with knowledge of the relevant facts to question the individual's ability to perform, his or her objectivity or judgment in such performance, or his or her ability to represent the interests of the Treasury. When the

arrangement concerns the acquisition, valuation, management, or disposition of troubled assets, the information shall be no less extensive than that required of certain new federal employees under Office of Government Ethics Form 278. Treasury may extend the time necessary to meet these requirements in urgent and compelling circumstances.

(c) Disqualification. The retained entity shall disqualify persons with personal conflicts of interests from performing work pursuant to the arrangement unless mitigation measures have neutralized the conflict to the satisfaction of the TARP Chief Compliance Officer. The retained entity may seek a waiver from the TARP Chief Compliance Officer to allow an individual with a personal conflict of interest to work under the arrangement.

(d) Initial Certification. No later than ten business days after the effective date of the arrangement, the retained entity shall certify to the Treasury that all management officials and key individuals performing services under the arrangement have no personal conflicts of interest, or are subject to a mitigation plan or waiver approved by Treasury. In making this certification, the retained entity may rely on the information obtained pursuant to paragraph (b) of this section, unless the retained entity knows or should have known that the information provided is false or inaccurate. Treasury may extend the certification deadline in urgent and compelling circumstances.

(e) Periodic Certification. No later than one year after the arrangement's effective date, and at least annually thereafter, the retained entity shall renew the certification required by paragraph (d) of this section. The retained entity shall provide more frequent certifications to Treasury when requested.

(f) Retained Entities' Responsibilities. The retained entity shall adopt and implement procedures designed to discover, monitor, and report personal conflicts of interest on a

continuous basis.

(g) Subsequent notification. Within five business days after learning of a personal conflict of interest, the retained entity shall notify Treasury of the conflict and describe the steps it has taken and will take in the future to neutralize the conflict.

(h) Retention of information. A retained entity shall retain the information needed to comply with this section and to support the certifications required by this section for three years following termination or expiration of the arrangement, and shall make that information available to Treasury upon request.

§ 31.213 General standards.

(a) During the time period in which a retained entity is seeking an arrangement and during the term of any arrangement, a retained entity, its officers and partners, and its employees shall not:

(1) Accept or solicit favors, gifts, or other items of monetary value from any individual or entity whom the retained entity, officer, partner, or employee knows is seeking official action from the Treasury in connection with the arrangement or has interests which may be substantially affected by the performance or nonperformance of duties to the Treasury under the arrangement.

(2) Improperly use or allow the improper use of Treasury property for the personal benefit of any individual or entity other than the Treasury.

(3) Make any unauthorized promise or commitment on behalf of the Treasury.

(b) Any individual who acts for or on behalf of the Treasury pursuant to an arrangement shall comply with 18 U.S.C. 201, which generally prohibits the direct or indirect acceptance by a

public official of anything of value in return for being influenced in, or because of, an official act. Violators are subject to criminal penalties.

(c) Any individual or entity who provides information or makes a certification to the Treasury that is relating to services under EESA or required pursuant to 31 CFR Part 31 is subject to 18 U.S.C. 1001, which generally prohibits the making of any false or fraudulent statement to a federal officer. Upon receipt of information indicating that any individual or entity has violated any provision of title 18 of the U.S. Code or other provision of criminal law, Treasury shall refer such information to the Department of Justice and the Special Inspector General provided for under EESA.

(d) A retained entity shall disclose to the Special Inspector General provided for the TARP, or the Treasury Office of the Inspector General, any credible evidence, in connection with the designation, services, or closeout of the arrangement, that a management official, employee, or contractor of the retained entity has committed a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code, or a violation of the civil False Claims Act (31 U.S.C. 3729-3733).

§ 31.214 Limitations on concurrent activities.

Treasury has determined that certain market activities by a retained entity during the arrangement are likely to cause impermissible conflicts of interest. Accordingly, the following restrictions shall apply unless waived pursuant to section 31.215, or Treasury agrees in writing to specific mitigation measures.

(a) If the retained entity assists Treasury in the acquisition, valuation, management, or disposition of specific troubled assets, the retained entity, management officials performing work

under the arrangement, and key individuals shall not purchase or offer to purchase such assets from Treasury, or assist anyone else in purchasing or offering to purchase such troubled assets from the Treasury, during the term of its arrangement.

(b) If the retained entity advises Treasury with respect to a program for the purchase of troubled assets, the retained entity, management officials performing work under the arrangement, and key individuals shall not, during the term of the arrangement, sell or offer to sell, or act on behalf of anyone with respect to a sale or offer to sell, any asset to Treasury under the terms of that program.

§ 31.215 Grant of Waivers.

The TARP Chief Compliance Officer may waive a requirement under this Part that is not otherwise imposed by law when it is clear from the totality of the circumstances that a waiver is in the government's interest.

§ 31.216 Communications with Treasury employees.

(a) Prohibitions. During the course of any process for selecting a retained entity (including any process using non-competitive procedures), a retained entity participating in the process and its representatives shall not:

(1) Directly or indirectly make any offer or promise of future employment or business opportunity to, or engage directly or indirectly in any discussion of future employment or business opportunity with, any Treasury employee with personal or direct responsibility for that procurement.

(2) Offer, give, or promise to offer or give, directly or indirectly, any money, gratuity, or

other thing of value to any Treasury employee, except as permitted by Government-Wide Ethics Rules, 5 CFR part 2635.

(3) Solicit or obtain from any Treasury employee, directly or indirectly, any information that is not public and was prepared for use by Treasury for the purpose of evaluating an offer, quotation, or response to enter into an arrangement.

(b) Certification. Before a retained entity enters a new arrangement, or accepts a modification to an existing arrangement, the retained entity must certify to the following:

(1) The retained entity is aware of the prohibitions of paragraph (a) of this section and, to the best of its knowledge after making reasonable inquiry, the retained entity has no information concerning a violation or possible violation of paragraph (a) of this section.

(2) Each officer, employee, and representative of the retained entity who participated personally and substantially in preparing and submitting a bid, offer, proposal, or request for modification of the arrangement has certified that he or she:

(i) Is familiar with and will comply with the requirements of paragraph (a) of this section; and

(ii) Has no information of any violations or possible violations of paragraph (a) of this section, and will report immediately to the retained entity any subsequently gained information concerning a violation or possible violation of paragraph (a) of this section.

§ 31.217 Confidentiality of information.

(a) Nonpublic information defined. Any information that Treasury provides to a retained entity under an arrangement, or that the retained entity obtains or develops pursuant to the arrangement, shall be deemed nonpublic until the Treasury determines otherwise in writing, or

the information becomes part of the body of public information from a source other than the retained entity.

(b) Prohibitions. The retained entity shall not:

(1) Disclose nonpublic information to anyone except as required to perform the retained entity's obligations pursuant to the arrangement, or pursuant to a lawful court order or valid subpoena after giving prior notice to Treasury.

(2) Use or allow the use of any nonpublic information to further any private interest other than as contemplated by the arrangement.

(c) Retained entity's responsibility. A retained entity shall take appropriate measures to ensure the confidentiality of nonpublic information and to prevent its inappropriate use. The retained entity shall document these measures in sufficient detail to demonstrate compliance, and shall maintain this documentation for three years after the arrangement has terminated. The retained entity shall notify the TARP Chief Compliance Officer in writing within five business days of detecting a violation of the prohibitions in paragraph (b), above. The security measures required by this paragraph shall include:

(1) Security measures to prevent unauthorized access to facilities and storage containers where nonpublic information is stored.

(2) Security measures to detect and prevent unauthorized access to computer equipment and data storage devices that store or transmit nonpublic information.

(3) Periodic training to ensure that persons receiving nonpublic information know their obligation to maintain its confidentiality and to use it only for purposes contemplated by the arrangement.

(4) Programs to ensure compliance with federal securities laws, including laws relating to

insider trading, when the arrangement relates to the acquisition, valuation, management, or disposition of troubled assets.

(5) A certification from each management official performing work under the arrangement and each key individual stating that he or she will comply with the requirements in section 31.217(b). The retained entity shall obtain this certification, in the form of a nondisclosure agreement, before a management official or key individual performs work under the arrangement, and then annually thereafter.

§ 31.218 Enforcement.

(a) Compliance with these rules concerning conflicts of interest is of the utmost importance. In the event a retained entity or any individual or entity providing information pursuant to 31 U.S.C. Part 31 violates any of these rules, Treasury may impose or pursue one or more of the following sanctions:

(1) Rejection of work tainted by an organizational conflict of interest or a personal conflict of interest and denial of payment for that work.

(2) Termination of the arrangement for default.

(3) Debarment of the retained entity for Federal government contracting and/or disqualification of the retained entity from future financial agency agreements.

(4) Imposition of any other remedy available under the terms of the arrangement or at law.

(5) In the event of violation of a criminal statute, referral to the Department of Justice for prosecution of the retained entity and/or its officers or employees. In such cases, the Department of Justice may make direct and derivative use of any statements and information provided by any

entity, its representatives and employees or any individual, to the extent permitted by law.

(b) To the extent Treasury has discretion in selecting or imposing a remedy, it will give significant consideration to a retained entity's prompt disclosure of any violation of these rules.

Dated: _____

Neel Kashkari
Interim Assistant Secretary for Financial Stability