

**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:** Final rule.

**SUMMARY:** On January 21, 2009, the Department issued an interim rule that provided 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. This final rule takes into account the public comments received and adopts revisions to the interim rule.

**DATES:** Effective date: [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

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

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Pursuant to Section 108 of EESA (Pub. L. 110-343; 122 Stat 3765), which authorizes the Secretary of the Treasury 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, Treasury promulgated an interim final rule on conflicts of interest on January 21, 2009 (“Interim Rule”) (74 FR 3431). Treasury invited the public to submit comments on the Interim Rule and received requests from several commentators requesting that Treasury modify aspects of the Interim Rule. Treasury carefully considered all comments received and, in section II of this rule, discusses the comments received and sets out modifications in this final rule.

The January 21, 2009, interim rule’s provisions are available at 74 FR 3431. The interim rule defines organizational and personal conflicts of interest. Further, the interim rule sets forth: (1) the requirements for retained entities to search for, disclose, certify to, and mitigate organizational or personal conflicts of interest, (2) general standards related to the handling of conflicts of interest, favors, gifts, Treasury property, and items of monetary value, (3) limits on retained entities’ activities concurrently with providing services to Treasury, (4) limits on retained entities’ communications with Treasury employees, (5) requirements with respect to the receipt and handling of nonpublic information, and (6) enforcement powers with respect to the interim rule.

## **II. Summary of Comments, Treasury’s Resulting Changes, and Final Rule**

Treasury is promulgating this rule to finalize the Interim Rule issued on January 21, 2009. Interested members of the public submitted several comments to the Interim Rule. The comments have been carefully considered. Comments are described below, as are the approaches that Treasury has taken in addressing them.

Commentators asked Treasury to eliminate the reference to “management officials” in 31

CFR 31.201 and 31 CFR 31.212. One commentator took issue with what they felt was the presumption, by defining management official, that such officials had knowledge related to the Treasury arrangement by virtue of status, rather than by virtue of having a substantive role in the arrangement. Treasury agrees, and decided to limit various obligations previously required of management officials to those key individuals who are personally and substantially involved in providing services under an arrangement with Treasury. Management officials performing a substantive role under an arrangement will be subsumed in the definition of key individual, rendering the definition of management official unnecessary.

Treasury received a comment that inquired whether Treasury considered the examples listed in the definitional provisions in 31 CFR 31.201 to *per se* constitute organizational conflict of interests. The illustrations set forth in the definitional provisions in section 31.201 are examples of situations that may give rise to a conflict of interest. They are not pronouncements that a particular set of facts will necessarily give rise to a conflict of interest, or that such conflict of interest cannot be mitigated. Treasury also received a comment suggesting the rule include specific mitigation plans for some of the conflicts examples. Treasury believes that including specific mitigation plans as part of the regulation would not be useful because the facts and circumstances of each potential or actual conflict determine whether a conflict of interest exists and dictate the appropriate mitigation controls. Treasury notes that it routinely interfaces directly with retained entities to formulate conflicts of interest mitigation plans that are dependent on the particular facts underlying the potential conflict.

Treasury also received comments questioning the relationship of the rule to contractors versus financial agents. To clarify, this final rule applies to both financial agency agreements and procurement contracts. Of course, procurement contracts are also subject to the Federal

Acquisition Regulation (the “FAR”) along with other regulatory requirements. Treasury also notes that the TARP Chief Compliance Officer lacks the direct or delegated authority to waive FAR rules related to organizational conflicts of interests. Thus, a waiver issued under 31 CFR Part 31 does not itself ensure compliance with the applicable FAR requirements.

Treasury notes that pursuant to section 31.200(b), vendors hired under an arrangement to perform purely administrative services (*e.g.*, parking services for Treasury) are not subject to this rule because, in Treasury’s estimation, the providers of such services are not likely to exercise the discretion core to Treasury’s mission under the Troubled Asset Relief Program (“TARP”) which would likely create conflicts of interest and, therefore, the burden of subjecting such vendors to the rule is unnecessary.

Treasury added a specific reference to the appearance of a conflict of interest to sections 31.200, 31.211 and 31.212 to clarify that facts or situations that give rise to the appearance of a conflict of interest are also considered potential conflicts. This clarification is consistent with the overall approach of, and policy underlying, the regulation.

One commentator advocated the adoption of a rule that a retained entity which is an SEC-registered investment adviser is *per se* deemed to have complied with the federal securities laws mentioned in section 31.211(a) or that, in the alternative, the rule should require that the compliance programs only be “reasonably designed” to detect and prevent violations of federal securities laws and organizational conflicts of interest. Treasury does not agree with the first suggestion but agrees with the latter, and has revised section 31.211(a) accordingly.

Treasury also received comments that the standards related to gifts in section 31.213(a)(1) should be limited to individuals deployed for Treasury and include reasonable scope limitations. In response, Treasury agreed to limit application of section 31.213(a)(1) to

individuals performing work under the arrangement and added specific dollar figures to the restriction on accepting or soliciting favors, gifts, or other items of monetary value (above \$20 per gift or \$50 for the year) to make it consistent with the standards used by the Office of Government Ethics.

Treasury clarifies that it intends to follow the same standard for “credible evidence” in section 31.213 that is used in relation to FAR Clause 52.203-13(b) (3).

One commentator believed that the definition of “retained entity” was overly broad, in that it included subcontractors and consultants hired to perform services under the arrangement, and that the reference to subcontractors and consultants should be removed or, in the alternative, limited to those providing substantive services under the arrangement. Treasury disagrees and notes that subcontractors and vendors may possess conflicts of interest that could cause a reasonable person with knowledge of the relevant facts to question the retained entity’s objectivity or judgment. As stated previously, pursuant to section 31.200(b), administrative contracts are excluded from the rule, thus avoiding application of the rule to entities unlikely to possess organizational conflicts of interest.

A commentator also recommended that “related entities” be defined more narrowly, to eliminate parents, subsidiaries, etc. which operate independently from the retained entity. It was noted that some conflict mitigation procedures, such as barriers to eliminate the sharing of information, may also inhibit the discovery of conflicts of interest involving related entities. Treasury understands the commentator’s concern, but believes revising the related entity definition is unnecessary as the conflict mitigation measures listed in section 31.211(c) are provided for illustrative purposes only and can be tailored as necessary in the actual mitigation plan agreed upon by the retained entity and Treasury.

One comment maintained that the rule inappropriately places too much of a the burden of discovering conflicts of interest, both organizational and personal, on the retained entity, and that the rule should be amended to explicitly state the burden falls on both the retained entity and the Treasury. Treasury does not agree. Although Treasury takes independent steps to identify conflicts of interest and determine appropriate mitigants, the rule focuses on the obligation of the retained entity, pursuant to section 31.211(a), to identify conflicts and formulate a conflicts of interest mitigation plan.

One commentator stated the rule should specify the level of employee within the retained entity that must learn of an organizational conflict of interest before a reporting obligation is triggered. Treasury believes that such a limitation would be opposed to its policy objectives that any employee of a retained entity who knows of a conflict should be required to report it.

Treasury also received a comment in favor of a materiality threshold in judging what constitutes an organizational conflict of interest. Treasury was directed to look to applicable case law concerning Rule 10b-5 of the Securities Exchange Act of 1934. Treasury has not adopted a materiality threshold because Treasury should be alerted to any possible conflict of interest, and post-notification Treasury can decide whether a conflict is material. Additionally, the adoption of a materiality threshold could invite abuse.

Treasury received a comment expressing the view that, since the American Bar Association's (ABA) Rules of Professional Conduct already contain conflicts of interest provisions, that Treasury should disregard organizational conflicts of interest concerns when the retained entity is a law firm that has complied with the standards set forth in either these rules or applicable case law. Treasury does not adopt this change because this regulation is specifically related to the requirements of EESA and the ABA Rules of Professional Conduct may not

adequately address all conflicts of interest.

Treasury received comments suggesting that the continuing obligation to search for any potential organizational and personal conflicts of interest and to report new conflicts of interest within five business days of learning of them is unreasonable and invites failure. It was requested that Treasury adopt a more flexible standard, and one commentator even recommended eliminating the notification requirement altogether and relying only upon the periodic certifications. Treasury believes such a five day timeframe is appropriate and does not need to be revised or lengthened. Experience has shown five days is not too short of a period as the retained entity need only provide Treasury notification of the conflict and the initial proposal for mitigating the conflict. In addition, it is important for mitigation controls to be implemented without delay. Eliminating the notification requirement and relying solely upon the periodic certification may result in situations in which certain conflicts of interest have not been mitigated adequately and, thus, Treasury's ability to monitor such conflicts in a timely manner would be undercut.

One comment requested the clarification that the notification requirement applies only to conflicts of interest not yet identified, and not to new conflicts that can be addressed by a previously-approved conflicts mitigation plan. The notification requirement applies to all new conflicts.

The same comment questioned whether the five day timeframe begins at the time the new conflicts arises, or when the retained entity's TARP Compliance Officer is informed of the new conflict. For avoidance of doubt, the five day timeframe begins when any person at the retained entity becomes aware of the new conflict (not just the TARP Compliance Officer).

Treasury also received comments to the effect that the section 31.212(b) concept of

identifying and monitoring close personal relationships was improperly subjective because the phrase “close personal relationship” is open to broad interpretation. Treasury agrees and revised the definition of a personal conflict of interest in section 31.201 and the requirements of section 31.212(b) to include “an individual, or any dependent child (meaning son, daughter, stepson or stepdaughter who is either (a) unmarried, under age 21, and living in the individual’s house, or (b) considered a “dependent” of the individual under the U.S. tax code),” In making this modification, Treasury adopted the standards used in completing the Office of Government Ethics (“OGE”) Form 450.

Treasury received many comments expressing the view that requiring the use of OGE Form 278 as a disclosure standard in the personal conflicts inquiry process (section 31.212(b)) presented an overly invasive, unwarranted burden, in that it took too long to fill out the form and that the form asked intrusive questions regarding personal activities. Treasury reviewed these comments in light of its own experience, and also in light of having received an official recommendation from the Government Accountability Office (GAO) suggesting that Form 450 would be a more appropriate model on which vendors should base their inquiries into the personal conflicts of their employees than Form 278. The GAO believed that the using Form 450 as a model could appropriately reduce the burden of providing financial information as opposed to the Form 278. *See TROUBLED ASSET RELIEF PROGRAM: March 2009 Status of Efforts to Address Transparency and Accountability Issues*, GAO March 2009 p. 45, available at <http://www.gao.gov/new.items/d09504.pdf>. On these bases, Treasury agrees that Form 450 is more appropriate than Form 278 as a personal conflicts inquiry model, and has substituted Form 450 for Form 278 in the rule.

Treasury received a comment asserting the rule did not provide enough detail in regard to

what would constitute a personal conflict of interest, and what the related mitigation steps would be. Since the Interim Rule has been released, Treasury has found that the definition of “personal conflicts of interest” is sufficiently broad to encompass the wide range of personal conflicts of interest that may arise, but yet provides enough guidance for retained entities to recognize which circumstances could constitute a personal conflict of interest, and that the variables that would determine a sufficient mitigation plan are such that providing specific examples would be of limited value.

Some commentators expressed concern that the ten-business day timeframe for submitting the personal conflicts of interest certification is too little time for a sound submission, contending it is unlikely a retained entity would be able to gather, process, and certify the required information in that time. Treasury disagrees because it has found in its experience in applying the Interim Rule that ten business days is sufficient time to gather the information required to submit the personal conflicts of interest certification, particularly since the retained entity can begin at least part of the process before the arrangement is signed. If a retained entity feels ten business days may not be adequate (for example, if the retained entity has a large number of key individuals), it may request an extension.

Treasury also received a comment that the three-year document retention requirement in sections 31.211(h) and 31.212(h) should be shortened. Treasury believes the three-year document retention requirement is necessary in case any question should surface regarding a past determination or mitigation as to a particular personal conflict of interest.

One commentator felt that section 31.213(c) should be revised so that Treasury would no longer refer all violations of 18 U.S.C. 1001 to the Department of Justice and to SIGTARP, but would instead refer only those violations relating to services under EESA and related

certifications. Treasury sees no reason to limit which violations it refers to the Department of Justice or to SIGTARP, as Treasury does not wish for any false statements to go unreported.

Treasury received a comment that the phrase “impermissible conflicts of interest” referred to in section 31.214 should be limited so that it only relates to activities in connection with buying or selling assets under the TARP program, and not to “customary” business activities such as managing client accounts that hold securities or other financial instruments issued by TARP-funded entities. Treasury was also urged to limit the prohibitions set forth in section 31.214(a) and (b) to concurrent activities involving the specific assets for which the retained entity has entered into an arrangement with Treasury, and further, to adopt a *de minimis* exception in order to permit a retained entity to engage in certain incidental market activities involving TARP securities without such activities rising to the level of an “impermissible” conflict of interest. Treasury believes that because such activities can be addressed in the retained entity’s conflicts mitigation plan agreed upon by Treasury, and because section 31.214 specifically states its restrictions do not apply if “Treasury agrees in writing to specific mitigation measures,” including these exceptions in the rule is unnecessary.

The same commentator argued that section 31.217(a)’s treatment of all information provided by Treasury to a retained entity under an arrangement as non-public until Treasury determines otherwise is overbroad. It was recommended that the confidentiality requirement apply only to information pertaining to a TARP beneficiary or its assets, or that is otherwise marked by Treasury as proprietary or confidential. Treasury understands the commentator’s concern, but believes the consequences of sensitive information becoming public are such that maintaining a broad determination of confidentiality is warranted and appropriately protective of confidential information.

Treasury also received comments recommending that only management officials and key personnel be subject to a duty to report violations of confidentiality obligations. As stated earlier, Treasury believes that any employee of the retained entity should be required to report a breach of confidentiality.

Treasury received one comment expressing the view that the penalties contemplated by section 31.218(a) are overly broad and not reasonably calculated to address the nature and severity of the perceived transgression. Treasury believes that the appropriateness of the sanction will depend heavily on the violation, such that leaving the potential penalties listed in the rule broad is appropriate.

Treasury received a comment recommending that section 31.218(b) be eliminated due to perceived uncertainty regarding Treasury's expectations regarding the times and extent of the disclosure requirements found in the rule. Treasury believes section 31.218(b) encourages prompt disclosure of violations of the rule, and thus rejects the recommendation.

The definition of "key individual" in section 31.201 has been changed to clarify that the list of actions that may constitute personal and substantial participation in a matter provides examples and is not necessarily an exclusive list of such actions. This change is made to more closely track the language of 5 C.F.R. § 2635.402(b)(4), upon which the list is based. It should be stressed that while § 2635.402(b)(4), which applies to Government employees, covers participation in a Government matter, personal and substantial participation in a decision or other matter under consideration by the retained entity itself will satisfy the criteria for a key individual under this part 31. For example, an employee of the retained entity who provides advice to other employees of the retained entity concerning performance of the arrangement qualifies as a key individual if the other elements of the definition are satisfied.

For consistency, Treasury replaced the previous definition of “troubled assets” (in section 31.201) with a reference to the definition given in EESA, 12 U.S.C. 5209(9).

### **III. Procedural Requirements**

#### Regulatory Planning and Review

Executive Orders 13563 and 12866 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a “significant regulatory action” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget. .

#### 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, Troubled assets.

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

1. Revise 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, or circumstances that give rise to the appearance of a conflict 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 the 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.

Dependent child means a son, daughter, stepson or stepdaughter who is either (a) unmarried, under age 21, and living in the individual's house, or (b) considered a "dependent" of the individual under the U.S. tax code.

EESA means the Emergency Economic Stabilization Act of 2008, as amended.

Key individual means an individual providing services to a private sector entity who participates personally and substantially, through, for example, 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).

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.

(6) The retained entity maintains a business or financial relationship with institutions that

have received funds from Treasury pursuant to the EESA.

Personal conflict of interest means a personal, business, or financial interest of an individual, his or her spouse or any dependent child 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 an officer or employee serving the Treasury, serving 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, for purposes of this rule, shall have the same meaning as set forth in 12 U.S.C. §5202(9).

**§ 31.211 Organizational conflicts of interest.**

(a) Retained entity's responsibility. A retained entity working under an arrangement shall not permit an actual or potential organizational conflict of interest (including 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), 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 reasonably 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, report, and mitigate any and all potential organizational conflicts of interest that have not already been disclosed to Treasury under a plan approved by Treasury or previously waived by Treasury. The retained entity shall search regularly for conflicts and shall, within five (5) business days after learning of a potential organizational conflict of interest, 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 key individuals have no personal conflicts of interest (including a situation 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), unless mitigation measures have neutralized the conflict, or Treasury has waived the conflict.

(b) Information required. Before 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 and dependent children 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 450. Treasury may extend the time necessary to meet these requirements in urgent and compelling circumstances.

(c) Disqualification. The retained entity shall disqualify key individuals 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 a key 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 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 time necessary to meet these requirements where the retained entity has a large number of key individuals, or in other appropriate 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 search for, report, and mitigate 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:

(1) The retained entity's officers, partners, or employees performing work under the arrangement shall not accept or solicit favors, gifts, or other items of monetary value above \$20 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, provided that the total value of gifts from the same person or entity does not exceed \$50 in any calendar year.

(2) The retained entity and its officers and partners, and its employees shall not improperly use or allow the improper use of Treasury property for the personal benefit of any individual or entity other than the Treasury.

(3) The retained entity and its officers and partners, and its employees shall not 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 that 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 for the Troubled Asset Relief Program (SIGTARP).

(d) A retained entity shall disclose to the SIGTARP, any credible evidence, in connection with the designation, services, or closeout of the arrangement, that an 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 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 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 the Standards of Conduct for Employees of the Executive Branch, 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, 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 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 key individual performs work under the arrangement, and then annually thereafter.

(d) Certification. No later than ten business days after the effective date of the

arrangement, the retained entity shall certify to the Treasury that it has received a certification form from each key individual stating that he or she will comply with the requirements in section 31.217(b). 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.

**§ 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: September 19, 2011

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Timothy G. Massad  
Assistant Secretary for Financial Stability