March 24, 2009

Executive Secretariat
Office of Financial Stability
Department of the Treasury
1500 Pennsylvania Avenue, N.W.
Washington D.C. 20220


Dear Sir or Madam:

On behalf of the Sections of Business Law and Public Contract Law ("Sections") of the American Bar Association ("ABA"), we appreciate the opportunity to submit comments on the Interim Rule (the "Interim Rule" or the "Treasury Regulations") addressing potential conflicts of interest under the Troubled Asset Relief Program ("TARP"). These comments have been reviewed and are supported by the ABA Task Force on Financial Markets Regulatory Reform (the "Task Force"), which was recently created by the Board of Governors of the ABA. The mission of the Task Force is to analyze the legal and regulatory implications of the financial crisis and to coordinate the ABA's responses to federal agencies in their efforts to address the situation. These comments have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and accordingly, should not be construed as representing the position of the Association.

The Interim Rule has been issued by the Treasury under the authority granted by Congress under Section 108 of the Emergency Economic Stabilization Act ("EESA"). On October 6, 2008, the Department of Treasury issued Interim Guidelines for Conflicts of Interest that identified three potential bases for conflicts of interest under the EESA: (1) impaired objectivity; (2) access to sensitive, non-public information; and (3) a difference in ethical restrictions applicable to contractors as compared to government employees. See www.ustreas.gov/press/releases/hp1180.htm. The Interim Guidelines contained general principles to be used by Treasury officials in addressing conflicts of interest arising with EESA contractors, pending the issuance of final conflict of interest regulations.
The Interim Rule was published at 74 Fed. Reg. 3431 on January 21, 2009, and contains much more extensive regulations applicable to entities retained by the Treasury ("Retained Entities"). The Interim Rule has been placed into immediate effect at 31 C.F.R. Part 31.

I. GENERAL OBSERVATIONS

The Sections strongly endorse conflict of interest regulations that will facilitate unbiased and transparent implementation of the TARP. We recognize that the public currently has a high level of skepticism that the Government and its agents/contractors will act fairly. In addition, the Treasury and the entities that are retained by the agency must have clear rules, compliance with which will produce predictable results. While the Interim Rule facially addresses this objective, we believe that the Regulations are too cumbersome and will result in inconsistent applications that will impede Treasury’s ability to administer TARP. We suggest that adoption of the recommendations in this letter would make the TARP more effective, while maintaining a robust process for identifying and mitigating conflicts of interest.

Our comments are organized by the major subjects of the Treasury Regulations: (1) Organizational Conflicts of Interest ("OCIs"); (2) Personal Conflicts of Interest ("PCIs"); (3) Gifts, Communications and Confidentiality; and (4) Enforcement. At the end of each section, we have provided recommended modifications to the Interim Rule that pertain to that section. There are, however, three overarching issues permeating all of our recommendations that we mention at the outset.

First, any set of conflict of interest requirements must balance the need for actual impartiality (as well as the need for the appearance of impartiality) with the requirement to attract experts who have the experience and ability to perform the work. Where the cost and burden of compliance is out of proportion to the risk of improper conduct, the most effective entities and individuals will simply decline to participate. We respectfully submit that in several instances, as noted below, the Treasury Regulations have not achieved this balance.

Second, as explained in Part II below, the Interim Rule applies two sets of conflict of interest regimes – the Treasury Regulations and the Federal Acquisition Regulation ("FAR") – to those private sector entities that provide goods and services through agency procurement processes (i.e., those entities that are not performing "financial agency agreements" as discussed below). This double coverage for some Treasury vendors results in certain inconsistencies and ambiguities that should be eliminated.

Third, the Interim Guidelines contemplated an active role for the Treasury in identifying potential conflicts at the outset of a procurement. The subsequent
Treasury Regulations, however, seek to place the entire obligation of defining what constitutes a conflict of interest on the private sector entities seeking work from Treasury. As described more fully below, the Treasury should play a more active role in particularizing what would constitute conflicts of interest for each transaction and in working with private sector entities to manage the conflict process.

II. THE "ARRANGEMENTS" COVERED BY THE RULE

The Interim Rule is applicable to each agency “arrangement,” which is defined to mean:

... 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.

31 C.F.R. § 31.201 (emphasis added). The private sector entities participating in such arrangements are collectively described as “Retained Entities.” The Interim Rule states: “A ‘retained entity’ includes the subcontractors and consultants it hires to perform services under the arrangement.” Id. Thus, a vendor that is providing a portion of the services called out in the arrangement would be governed by the Treasury Regulations. However, a vendor that is merely advising the retained entity, such as a law firm or accounting firm, would not be subject to the regulations.

The Interim Rule does not provide a definition of the terms “contract” or “financial agency agreement,” nor does it state the significance of any distinction between the two forms of arrangements. However, other provisions in the regulation as well as information on the Treasury website make clear that the term contract is intended to mean a procurement contract that is subject to the federal procurement laws, including the Competition in Contracting Act of 1984 (“CICA”) and the Federal Acquisition Regulation (“FAR”) at 48 C.F.R. Parts 1-53. By comparison, the term financial agency agreements is intended to mean agreements with financial institutions properly designated as financial agents under EESA § 101(c)(3).

A. Source of the Distinction Between Procurement Contracts and Financial Agency Agreements

Under EESA, Treasury is authorized to take such actions that it deems necessary to carry out the authorities in that Act, including (i) entering into contracts and (ii) “designating financial institutions as financial agents of the Federal Government.” EESA § 101(c)(2), (3). Financial agents so designated “shall perform all such reasonable duties related to this Act as financial agents of
the Federal Government as may be required.” _Id._ at (c)(3). Only “financial institutions” as defined in the Act are eligible to serve as financial agents. _Id._ Treasury has long had authority to designate financial institutions as financial agents of the federal government under provisions of the National Bank Act, 12 U.S.C. §§ 90 and 265, and regulations at 31 C.F.R. Part 202, and has routinely entered into financial agency agreements for various types of services pursuant to this authority. It has not treated these agreements as subject to the procurement laws or the FAR. Rather, Treasury regards financial agents as fiduciaries of the Government, and not as contractors.

The procurement laws, including the FAR, apply generally to any contract between the United States and another entity for the purchase of goods or services. See FAR § 2.101 (definition of “contract”); _see, e.g.,_ 31 U.S.C. § 6303 (“agencies shall use a procurement contract as the legal instrument reflecting a relationship between the United States Government and a state, a local government, or other recipient when (1) the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government . . . .”). Contractors that enter into procurement contracts are not generally deemed to have a fiduciary relationship with the Government.

The courts have not adopted uniform criteria for making the distinction between those services that must be provided by a financial agent under a financial agency agreement and those services that may be provided by a contractor under a procurement contract. Some decisions have analyzed the issue in terms of whether the government is acting in its “sovereign” capacity (calling for a financial agency agreement) or in its “commercial” capacity (calling for a procurement contract). Other decisions have looked at the nature of the services to be provided, and have evaluated whether some provision in applicable law restricts performance of those services to federal agents. _See, e.g.,_ United States v. Citizens & Southern Nat’l Bank, 889 F.2d 1067 (Fed. Cir. 1989); Transactive Corp. v. United States, 91 F.3d 232 (D.C. Cir. 1996); Grigsby Brandford & Co., Inc. v. United States, 869 F. Supp. 984 (D.D.C. 1994). _See also_ B-236146, 69 Comp. Gen. 314 (Mar. 13, 1990).

These and other decisions suggest that it will not always be obvious whether an arrangement to provide services under TARP must be provided by a financial agent or may be provided by a contractor. The distinctions are difficult to draw, and require analysis of: applicable banking laws and regulations; the procurement laws and regulations; the purpose of the arrangement and nature of the services being solicited; whether a fiduciary relationship is required; and whether Treasury is acting in its “sovereign” capacity or more like a commercial entity.

According to the Government Accountability Office, as of January 20, 2009, Treasury had awarded one financial agency agreement and approximately 14 procurement contracts (including so-called “Blanket Purchase Agreements”) under
the TARP.\(^1\) It appears that Treasury has specifically stated in each request for proposal whether it is soliciting for a procurement contract or a financial agency agreement, but has not explained the basis for its selection of the applicable structure. However, it also appears that Treasury has inserted a clause in each of the 14 procurement contracts stating that the contractor is to be regarded as a “fiduciary” of the Government.

**B. Impact of the Distinction in Types of Arrangements**

The distinction between procurement contracts and financial agency agreements as “arrangements” covered by the Interim Rule is meaningful for two reasons. First, procurement contracts are subject to the competition requirements of CICA and the FAR regulatory regime (including the Treasury Department supplement to the FAR at 48 C.F.R. Ch. 10), as well as various socio-economic requirements such as small business preferences and other federal procurement laws and regulations. These requirements – including conflict of interest rules similar to those included in the Interim Rule – impose compliance obligations on government personnel as well as contractors and are often questioned or enforced by interested offerors through the bid protest process applicable to procurement contracts. As exemplified by *Citizens & Southern*, supra, that process may come into play if a disappointed offeror asserts that the arrangement should have been solicited as a procurement contract rather than as a financial agency agreement. Second, the Interim Rule appears to apply differently depending on which kind of arrangement is involved. As stated in the explanatory note that precedes the published rule:

> This interim rule does not substitute [sic] 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.

74 Fed. Reg. at 3431.

Accordingly, it appears that procurement contracts are subject to both the conflict of interest provisions of the FAR (FAR Subpart 9.5) and most of the conflict of interest provisions in this rule. This creates the potential for conflicts between the two regulatory schemes. By contrast, although not clearly stated in the body of the Treasury Regulations or in the explanatory text, it appears that the Treasury does not intend to have the FAR apply to financial agency arrangements. But, this applicability information is found only in an explanation in the Federal

Register, and not in the rules themselves that would actually control the analysis of a conflict of interest issue.

**Recommendation:** The Treasury Regulations should state explicitly that financial agency arrangements are governed by the Treasury Regulations, whereas procurement contracts are governed both by the Treasury Regulations and by the federal procurement laws, including the FAR, *provided*, that where provisions in the FAR conflict with provisions in the Treasury Regulations, the FAR provisions shall control unless expressly waived by the Treasury Chief Compliance Officer.

The Treasury should formalize its practice of stating clearly in its solicitations which type of arrangement it is seeking and provide an explanation of the basis for choosing a particular type of arrangement.

Only those arrangements with financial agents (and not those for procurement contracts) should describe the Retained Entity as a "fiduciary."

### III. ORGANIZATIONAL CONFLICTS OF INTEREST

A substantial portion of the Treasury Regulations addresses organizational conflict of interests expected to be encountered by the Retained Entity.

#### A. Responsibility for OCIs

1. **Treasury Regulations**

   The Interim Rule places virtually the entire burden regarding OCIs on the Retained Entity. By contrast, the role of Treasury personnel is relatively passive, focused primarily on reviewing and deciding the adequacy of OCI mitigation plans submitted by the Retained Entity. This approach fails to recognize that identification of conflicts, as well as the appropriate method of avoidance or mitigation, can be accomplished more effectively with the active participation of both parties.

   Under the Interim Rule, the obligations of the Retained Entity commence “as early as possible” before entering an arrangement to perform services for Treasury under the EESA. 31 C.F.R. § 31.211(b). At that “early as possible” time, the Treasury Regulations mandate that the Retained Entity provide Treasury with a wide range of information, including –

   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 the Treasury;

(4) a description of all organizational conflicts of interest and personal conflicts of interest;

(5) a written detailed plan to mitigate all organizational conflicts of interest, along with supporting documents; and

(6) any other information or documentation about the Retained Entity, its proposed subcontractors, or the related entities that Treasury may request.

The information that is submitted is designed to provide the basis for the Treasury to assess the sufficiency of the Retained Entity’s proposed OCI mitigation plan.

Together with these informational requirements and preparation of a proposed mitigation plan, the Interim Rule imposes on a Retained Entity the responsibility to:

(i) Certify that the information provided is “complete and accurate in all material respects,” id. § 31.211(d);

(ii) Continue to “search for and to report” any OCI and to notify the agency of any such newly-discovered or newly-developed OCIs, id. § 31.211(f);

(iii) Make a periodic written re-certification that it has no OCIs or describe the actions that it has taken to mitigate any such OCIs, id. § 31.211(g); and

(iv) Retain “information needed to comply with [the rule] and to support the certifications required for three (3) years following termination or expiration of the arrangement.” Id. § 31.211(h).

The rule further prescribes that the Retained Entity “shall not permit an [OCI] unless the conflict has been disclosed” to Treasury as required by the regulations and mitigated under an OCI mitigation plan approved by Treasury, or Treasury has waived the conflict. Id. § 31.211(a). The Treasury Regulation thus precludes the participation of any Retained Entity with an OCI unless the entity itself has identified and reported the OCI to the agency and either an OCI mitigation plan has been accepted by Treasury or the OCI has been waived.

2. FAR OCI Requirements
FAR Subpart 9.5 contains the OCI provisions generally applicable to government contracts. In contrast to the Treasury Regulations, the FAR posits a much more proactive role for the contracting officer in identifying OCI risks and crafting resolutions, such as mitigation plans, that are appropriate for each procurement and/or particular contract awardees. The contracting officer’s affirmative OCI responsibilities under the FAR begin “as early in the acquisition process as possible,” and extend to the drafting of appropriate OCI notices and proposed OCI clauses for the solicitation and the negotiation of an OCI mitigation plan tailored to the peculiar individual circumstances of the contractor. Thus, the contracting officer is called upon to identify potential OCIs at the outset of the procurement process and take steps to avoid them, even before contractors are asked to submit proposals.

**Recommendation:** Rather than place the responsibility solely on the Retained Entity to identify potential OCIs “as early as possible,” the Treasury Regulations should require greater participation by agency personnel in the planning stages in identifying potential OCIs, negotiating the neutralization or mitigation of OCIs, and monitoring OCI risks during performance.

**B. OCI Mitigation Plans**

Prior to entering an arrangement, the Treasury must determine whether an OCI exists and, if so, either approve a mitigation plan or grant a waiver. 31 C.F.R. § 31.211(a). The rule directs Retained Entities to consider several measures to mitigate OCIs. Among these are the use of commonly accepted procedures such as information barriers. In the financial services industry, information barriers have proven to be an essential and effective tool for mitigating potential conflicts of interest. Indeed, several provisions under the securities laws specifically require, or provide for defenses to liability based on, information barriers. Certain of these provisions are intended to address the types of conflicts of interest that may arise under the TARP. For instance, with regard to confidential information generally, Rule 10b5-1 under the Securities Exchange Act of 1934 (the “Exchange Act”) provides an affirmative defense to liability in cases alleging insider trading where there are effective information barriers screening the trader from material non-public information. Exchange Act Rule 14e-3 provides a similar affirmative defense in the context of tender offers, and Exchange Act Section 15(f) endorses the use of information barriers by broker-dealers for preventing the misuse of material non-public information. With regard to proprietary trading in particular, New York Stock Exchange Rule 92, National Association of Securities Dealers Rule 2111, and Interpretive Material 2110-2 each provide safe harbors from imputing information regarding customer orders to proprietary traders if a firm has effective information barriers screening off those traders from that information.

The Treasury Regulations, however, also list other much more severe measures that a Retained Entity “should” consider, such as divestiture of assets
creating the OCI, or terminating existing business relationships. *Id.* § 31.211(c).
The Treasury Regulations also state that some conflicts are so severe that they
cannot be mitigated. *Id.*

The FAR provides that the exercise of “common sense, good judgment and
sound discretion” is *required* of agency personnel and Retained Entities in
evaluating how best to neutralize or mitigate OCI in the best interests of the parties.
FAR § 9.505.

**Recommendation:** The Treasury Regulations should include the language from
the FAR allowing the agency to use “common sense, good judgment, and sound
discretion” to address the many gray OCI areas. These gray areas require that
agency personnel be accorded the appropriate discretion to fashion mitigation
solutions suitable for the peculiar OCI circumstances that will undoubtedly arise
under the TARP. Thus, for example, the rule should accord agency personnel
reasonable discretion to negotiate appropriate provisions in a mitigation plan that
will neutralize or mitigate the OCI even if the provisions do not completely
eliminate the source of the conflict. The Interim Rule should also give particular
credence to OCI management tools such as information barriers that have proven to
be effective in the financial services industry.

**C. Waivers**

Currently, waivers are addressed in three different places, creating
inconsistencies and unnecessary ambiguities. Under EESA § 107 (which does not
address conflicts of interest), Treasury may waive specific provisions of the FAR
upon a determination that urgent and compelling circumstances make compliance
contrary to the public interest; but that authority is not reflected in the Interim Rule.

The introductory text of the Interim Rule indicates that different rules for
waiver of conflicts might apply depending on the classification of the arrangement:

The standard for considering waivers [of the conflict
of interest restrictions] appears in section 31.215.
This section does not affect the rules for waiving
contract provisions in the Federal Acquisition
Regulation.

74 Fed. Reg. at 3432 (emphasis added). It is not clear whether this reference to
“the rules for waiving contract provisions” in the FAR relates to the authority of an
agency to deviate from the FAR itself, *see* FAR Part 1.4; or to the authority of an
agency head to waive “any general rule or procedure” of the FAR OCI regulation at
FAR Part 9.5; or some other authority relating to waiver of “contract provisions”
rather than waiver of regulatory requirements.

Finally, the Interim Rule itself includes the following waiver provision:
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 C.F.R. § 31.215 (emphasis added). Since the FAR has the force and effect of law, this waiver provision on its face would not permit waiver of FAR requirements.

The intent and scope of the Interim Rule on the subject of waivers is, therefore, unclear. We recommend below that 31 C.F.R. § 31.215 be revised to clarify the scope of the intended waiver authority and to make it consistent both with the EESA statute and with existing FAR authorities.

**Recommendation:** The Interim Regulation at § 31.215 should be clarified to make it consistent with the statute and the FAR, as follows:

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. In addition, the TARP Chief Compliance Officer may waive any provision of Part 9.5 of the Federal Acquisition Regulation that would otherwise apply to an arrangement, upon a written determination that urgent and compelling circumstances make compliance contrary to the public interest.

**D. Meaningful Guidance**

1. **The Treasury Regulations**

The Interim Rule at 31 C.F.R. § 31.201 provides a definition of "organizational conflict of interest" that includes a list of five situations in which OCIs may arise. Guidance in the form of examples is useful. However, the five examples are quite general and in most cases simply state the obvious.

By illustration, the first situation that may create an OCI is described as "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." 31 C.F.R. § 31.201. This is a tautology and provides little insight into the types of situations that might actually create conflicts; it essentially states that an OCI is an OCI.
The second situation listed in the Interim Rule states that there is a conflict if the Retained Entity is litigating against Treasury on a TARP matter. This is an obvious conflict that does not assist in identifying more subtle OCI issues. The other examples are equally general.

The Interim Rule at § 31.214 does identify two specific conflict situations that will be deemed impermissible in the absence of either a waiver by Treasury or an approved mitigation plan:

(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.

These two examples are specific as to time limits and scope, and tie the Retained Entity’s role in an arrangement directly to the prohibited activities that would otherwise create the conflict. However, the Interim Rule does not provide any discussion as to what, if any, type of mitigation plan might be acceptable to permit the arrangement to go forward. The resolution of OCIs, whether through mitigation plans or avoidance, is necessarily fact-specific. See, e.g., Gordon, Organizational Conflicts of Interest: A Growing Integrity Question, 35 Pub. Cont. L.J. 25 (2005). For that reason, the ABA believes it is useful to set forth the fundamental principles that will govern the evaluation and resolution of OCIs, as well as additional concrete, fact-specific examples of other types of OCIs, together with Treasury’s analysis of how they might be mitigated or avoided in an acceptable manner.

2. FAR

The FAR provides concrete guidance to the contracting officer by giving examples of specific limitations on contracting as the means of avoiding, neutralizing, or mitigating OCIs. The examples are instructive in the circumstances here, as they appear directly relevant to likely TARP vendors. Thus, under the
FAR, OCIs can arise from: providing technical direction, including developing work statements, determining parameters, directing other contractors’ operations, and resolving technical controversies (FAR § 9.505-1(b)); preparing work statements, including specifications (FAR § 9.505-2); providing evaluation services (FAR § 9.505-3); and obtaining access to proprietary information creating an unfair advantage (FAR § 9.505-4). The FAR provides a variety of other illustrative examples of these situations, providing contracting officers and contractors additional guidance and tools to support a robust, efficient, and effective OCI analysis. See FAR § 9.508.

Recommendation: The Treasury Regulations should instruct Treasury personnel to use consistent approaches in applying “common sense, good judgment, and sound discretion” in dealing with the sometimes difficult OCI issues. Treasury should also publish its OCI determinations, redacting all proprietary and confidential information. This will provide prospective Retained Entities with an ability to predict in advance the likely Treasury response to OCI issues and proposed mitigation plans. The regulations should add more extensive and more substantive guidance as to situations raising or not raising OCI issues, perhaps along the lines of the examples provided in the FAR.

E. Notice of New OCIs

The Interim Rule imposes on Retained Entities a “continuing obligation to search for and to report any potential conflict of interest” during performance of the arrangement and mandates a five business day reporting obligation after the Retained Entity learns of a potential conflict of interest. § 32.211(f). For most business entities, a five-day requirement to arrive at a formal, reportable conclusion regarding a newly-discovered OCI is unreasonably short. A comparable reporting obligation in the FAR merely requires that the contractor make a “timely” submission to the Government. See FAR § 3.1003 (requiring “timely” disclosure of reportable circumstances, thus allowing for a reasonable investigation by contractor).

Recommendation: The Treasury Regulations should be amended to adopt a more flexible “reasonable” or “timely” standard that will allow the agency to take into account the peculiar circumstances of each case. Such a provision would allow the Retained Entity to undertake an investigation into the pertinent circumstances and prepare a well-considered report to Treasury.

F. Level of Management Knowledge

The Interim Rule does not identify the level of official within the Retained Entity who must learn of an OCI to trigger a reporting obligation. A relatively low level employee of the Retained Entity could become aware of factual circumstances that activate the reporting obligation while senior management is without any
knowledge of such circumstances. It is not reasonable to hold Retained Entities responsible for a failure to report until more senior management personnel learn of the reportable circumstance.

**Recommendation:** The Treasury Regulations should be revised to limit the Retained Entity's obligation to disclose OCIs to those individuals who qualify as “management personnel” or “key individuals” under the definitions of the Interim Rule (see discussion below under Personal Conflicts of Interest).

G. Relationship Between OCI and the Rules of Professional Conduct Governing Lawyers

The OCI provisions have a particular application to law firms that are Retained Entities under the TARP. All lawyers are subject to the rules of professional conduct adopted in the states and territories in which they are admitted or allowed to practice law. A failure to comply with these requirements subjects lawyers and their firms to disciplinary action from the state bar, including possible disbarment, and to potential liability to the client. While the ethics rules differ somewhat from state to state, the American Bar Association Model Rules of Professional Conduct (“ABA Model Rules”) provide the template for most states’ rules. Accordingly, this letter will address the issues as they would be governed by the ABA Model Rules.

ABA Model Rule 1.7 prohibits a lawyer from representing a client if the representation involves a concurrent conflict of interest, unless (among other elements) the lawyer has obtained the informed consent, confirmed in writing, of each affected client. ABA Model Rule 1.10 imputes the conflicts held by one lawyer to all lawyers in the same firm. For example, this means that, absent client consent, one lawyer in a firm may not represent a client in a matter where that client is adverse to a client of other lawyers at the firm, even if the representation is on unrelated matters. Client consent in these situations is often secured based upon written representations by the firm that the lawyers working for one client will not share information related to that matter with the lawyers working for the other client, and *vice versa.* This screening process is also referred to as an “ethical wall” or an “information barrier.”

In some limited circumstances, the ABA Model Rules permit a potentially conflicting representation without client consent. Thus, specific rules have been adopted to deal with lawyers who served as government employees and then transfer to private law firms. Under ABA Model Rules 1.6 and 1.11, a former government lawyer is prohibited from disclosing confidential information received

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2 To date, the Treasury has entered into contracts with four law firms to provide legal services. All of these contracts preceded publication of the Interim Rule.

3 See also discussion above concerning information barriers under the securities laws.
while a government employee. In the absence of informed consent from the agency, confirmed in writing, the former government lawyer is also precluded from representing a private client on a matter in which the lawyer participated personally and substantially as a government employee. However, the former government lawyer’s current law firm may represent a private client in such a matter, as long as the former government lawyer is effectively and timely screened from any participation in the matter and is apportioned no part of the fee from that matter. 4 No written consent is required from the government agency, but the law firm must provide prompt notice to the agency of this arrangement to enable it to ascertain compliance with the rule. The purpose of this unilateral screening procedure is to encourage lawyers at the highest levels of professional capability to serve in important government positions, while assuring them that they and their law firms will be able to work in their areas of expertise when they leave government service. From our experience, former government lawyers have been overwhelmingly meticulous in complying with the requirements of this rule.

We do not suggest this unilateral screening process established for former government lawyers should apply to conflicts encountered by lawyers in private practice whose firms are Retained Entities in the TARP. However, it does provide a useful framework for analyzing the problems that will be encountered under the TARP. Just as clients often seek out firms who employ former government lawyers because of their special expertise, Treasury can be expected to seek out law firms with special expertise in order to provide legal services to the TARP program. Every law firm with the expertise and experience required to effectively assist the Treasury on the TARP will, however, need to preserve its ability to continue to represent financial institutions. For example, a law firm retained by Treasury to provide legal assistance on the disposition of troubled assets should be able to continue representing banks that are TARP participants, so long as the lawyers in the firm working for the Treasury on TARP matters are screened from the lawyers working for the banks on other TARP-related matters. 5 We suggest that the Treasury Regulations encourage Treasury to grant client waivers when law firms provide adequate screening of the lawyers who are working on other matters that give rise to potential or actual conflicts from lawyers assigned to the TARP, provided that such screens comply with applicable rules of professional conduct.

**Recommendation:** The Treasury Regulations should be amended to include the following provisions with respect to law firms that are Retained Entities:

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4 In February 2009, the ABA House of Delegates approved a modification to ABA Model Rule 1.10, providing a similar unilateral screening process for lawyers transferring from one private law firm to another. ABA Resolution 109, and the related background report, are available online at http://www.abanet.org/leadership/2009/midyear/daily_journal/Adopted 109.doc.

5 Such a representation would, of course, still be subject to the absolute prohibition on representing both sides of a specific transaction.
Compliance with the rules of professional conduct pertaining to conflicts that are applicable to the retained law firm and its lawyers shall satisfy the OCI restrictions of the Treasury Regulations; and

The Treasury should agree to waive organizational conflicts where the retained law firm timely implements and provides notice of adequate screening if such screening meets the standards set forth in the rules of professional conduct or case law applicable to the retained law firm and its lawyers.

IV. PERSONAL CONFLICTS OF INTEREST

The personal conflict of interest (PCI) provisions in the Interim Rule are relatively brief, and do not provide extensive guidance. As drafted, the Interim Rule shifts almost all enforcement and review responsibility to retained entities, with little ongoing assessment by Treasury or clear standards for implementation.

The need to assess the true costs and benefits of the rule’s requirements is especially acute with regard to personal conflicts of interest. Personal conflicts of interest, in contrast to organizational conflicts of interest, by definition relate to individuals, not firms. It is important to be sensitive to individuals’ behavior, because they lack some of the institutional constraints that normally guide firms’ behavior. By the same token, though, it is important to recognize that individuals, especially individuals with market leverage, can and will respond to overly burdensome regulation by simply refusing to participate. Conversely, those with little market leverage may find themselves severely disadvantaged -- or even terminated -- if they incur a perceived conflict of interest under a vague and poorly defined regulatory regime. The costs and benefits of the rule overall, and the costs and benefits with regard to individual market participants, should be more carefully assessed to ensure the success of this initiative.

A. The PCI Provisions in the Interim Rule

The introductory material to the Interim Rule describes the rule’s purpose as follows:

Conflicts may . . . 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.

The prefatory material further explains the goals of the rule with regard to personal conflicts of interest, and articulates Treasury’s expectations regarding retained entities’ standards of compliance:

[Retained entities must] 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.


The Interim Rule then defines personal conflict of interest broadly, as follows:

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 . . . .

§ 31.201. As with other aspects of the Interim Rule, the provisions regarding personal conflicts of interest would apply to retained entities’ subcontractors as well as the retained entities themselves. 74 Fed. Reg. 3432.

Similar to the OCI provisions described above, the Interim Rule leaves it almost entirely to a Retained Entity to address personal conflicts of interest. Specifically, the regulations state that the Retained Entity must “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.” § 31.212(a) (emphasis added). Because of the burden this requirement could potentially place on retained entities, the key terms bear closer scrutiny.

1. Management Officials

“Management officials” are defined to be those individuals “within a Retained Entity’s organization who [have] substantial responsibility for the direction and control of the Retained Entity’s policies and operations.” The term may also include certain management or executive committees, or if no such
committee exists, under specified circumstances, each of an organization’s general partners. § 31.201.

2. **Key Individuals**

A “key individual” is defined to be someone “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.” *Id.*

The Interim Rule makes it explicit that, 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 C.F.R. § 2635.402(b)(4).” The regulation at 5 C.F.R. § 2635.4023(b)(4) provides a relatively fulsome definition, which has been fleshed out over many years by advisory opinions issued by the federal Office of Government Ethics, whose opinions are available at http://www.usoge.gov/ethics_guidance/opinions/opinions.aspx. This information is useful in determining which persons qualify as key individuals, but provides little assistance in determining whether those individuals have personal conflicts of interest.

B. **Retained Entities’ Responsibilities Regarding PCIs**

1. **Obligation to Ensure No Personal Conflicts of Interest**

Under the Interim Rule, a Retained Entity must “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.” § 31.212, 74 Fed. Reg. 3434.

Unlike the provisions regarding organizational conflicts of interest, however, the Interim Rule provides no examples or guidance regarding what types of measures might be taken to mitigate personal conflicts of interest, and the Interim Rule’s introductory material indicates that any waivers from Treasury will be “rare.” 74 Fed. Reg. 3432.

Because the rule covers “management officials performing work under the arrangement,” only those management officials -- those with “substantial responsibility for the direction and control of the Retained Entity’s policies and operations” -- who are performing work under the arrangement fall within the Interim Rule’s requirements regarding personal conflicts of interest. In contrast, all “key individuals” -- those who participate “personally and substantially” in work under the TARP arrangement -- are potentially covered by the Interim Rule’s personal conflict of interest requirements.
**Recommendation:** The Interim Rule assumes that retained entities will, with relatively spare guidance, be able to discern personal conflicts of interest, in many cases within a very short time period. In practice, however, personal conflicts of interest are seldom so clearly defined, and Treasury should have a clearer role in assessing potential personal conflicts of interest, rather than simply shifting that assessment to the retained entities. We recommend that Treasury be prepared to take a more nuanced approach, and be willing, for example, through individual agreements, cf., e.g., 5 C.F.R. § 2634.801 et seq. (ethics agreements), to address and resolve individual potential conflicts of interest.

2. **Obligation to Gather Information**

Under the Interim Rule, before the affected 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 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.

31 C.F.R. § 31.212(b). This suggests that there will be two classes of personal conflict of interest disclosures:

- A generalized requirement for retained entities to gather, from affected management officials and key individuals, information “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.”
• A further requirement, where the arrangement concerns the acquisition, valuation, management, or disposition of troubled assets, that retained entities require the affected managers and individuals to provide information “no less than that required ... under Office of Government Ethics Form 278.”

With regard to the first category of disclosure, the Interim Rule provides almost no guidance as to what “relationships” might “cause a reasonable person ... to question the individual’s ability to perform.” Under the Interim Rule, retained entities and affected managers and key individuals will apparently be left to assess that critical question on their own.

The second category of disclosure means that those involved directly with troubled assets will need to provide information as least as extensive as that required by Office of Government (OGE) Ethics Form 278. That form, which is available at http://www.usoge.gov/forms/sf278_pdf/fr278_00.pdf, calls for detailed reporting of, *inter alia*, assets, income, transactions, gifts, reimbursements, liabilities, agreements, positions held outside the Government, and compensation. According to the OGE’s form, at page 11, OGE Form 278 will take an estimated three hours to complete. However, the persons anticipated to respond to the TARP requirements may well have extensive financial holdings, and the OGE Form 278 requirement could easily result in personal reports hundreds of pages long requiring much longer than the standard time suggested by OGE.

OGE Form 278 is not the only available means to review potential conflicts of interest; Treasury may also wish to look to other formats, such as those used by the National Academies, at http://www.nationalacademies.org/coi/index.html.

**Recommendation:** The scope and coverage for each arrangement should be determined on a case by case basis, and the Treasury should retain the discretion to tailor personal conflict of interest disclosure requirements to specific arrangements. This ongoing case-by-case assessment is the approach that the National Academies have taken in their *Policy on Committee Composition and Balance and Conflicts of Interest*, available at http://www.nationalacademies.org/coi/bi-coi_form-0.pdf.

3. **Disqualification of Persons**

The Interim Rule requires that retained entities “disqualify persons with personal conflicts of interest from performing work pursuant to the arrangement unless mitigation measures have neutralized the conflict to the satisfaction of the TARP Chief Compliance Officer,” or a waiver has been afforded by the TARP Chief Compliance Officer.

As noted, however, the Interim Rule provides no detailed guidance as to what constitutes a personal conflict of interest, what mitigation measures might be
acceptable to the TARP Chief Compliance Officer to neutralize an actual or potential conflict, or what standards may be applied by the TARP Chief Compliance Officer in assessing any request for a waiver. The rule should also set forth clear examples and guidance for mitigation measures, and clear standards for the TARP Chief Compliance Officer to apply in assessing such mitigation measures.

Recommendation: The Treasury Regulations should draw upon the federal ethics regulations at 5 C.F.R. § 2634 to help retained entities and their employees recognize what sorts of interests, in the words of the Interim Rule, “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.”

Federal rules recognize that there are personal financial interests (e.g., mutual funds that hold mixed securities) that do not necessarily present conflicts of interest. The federal rules normally applicable to personal conflicts of interest provide possible guidelines as to permissible conduct, and a useful model for regulations with many illustrative examples to help guide lay persons attempting to comply with the rule.

In addition, Treasury should consider authorizing its ethics officials to provide reasoned opinions to Retained Entities regarding potential personal conflicts of interest of their employees, similar to the opinions provided to federal government employees on PCI issues. See, e.g., 5 C.F.R. § 2638.301 et seq.; see also FAR 3.104-6, 48 C.F.R. § 3.104-6.

The Treasury Regulations also should provide that the TARP Chief Compliance Officer, or other officials given authority to review these matters, publish decisions regarding issues of personal conflicts of interest. Those decisions would be redacted to remove proprietary or personal information. Publication of the decisions could help to clarify the standards Treasury intends to apply and, at the same time, lend assurance that the standards are being applied in a consistent manner.

4. Certification Requirements

The Interim Rule requires, no later than ten business days after the effective date of the arrangement, that the Retained Entity 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.” 31 C.F.R. § 31.212(d), 34 Fed. Reg. 3435. In making this initial certification, the Retained Entity may rely upon the information obtained pursuant to the information-gathering outlined above, “unless the Retained Entity knows or should have known that the information provided is
false or inaccurate.” *Id.* The Treasury may extend the certification deadline in urgent and compelling circumstances.

No later than one year after the arrangement’s effective date, and at least annually thereafter, the Retained Entity must renew the certification described above, and must provide more frequent certifications when requested by the Treasury. *Id.* § 31.212(e), 34 Fed. Reg. 3435.

The Interim Rule’s requirements regarding certification and record-keeping can be improved with some minor changes. The certification requirement allows too little time for a sound submission; the record-keeping requirement should be harmonized with other regulations. In practice, it is highly unlikely that retained entities will be able to gather, process, and certify to the necessary information within ten business days.

**Recommendation:** Although the Interim Rule allows for extensions to the certification deadline “in urgent and compelling” circumstances, a more flexible deadline should be adopted. The record-keeping requirement should also be harmonized with other, similar requirements for federal contractors. As noted, the Interim Rule generally requires that records be available for three years after the agreement (here the “arrangement”) ends. For uniformity, Treasury may wish to harmonize the record-keeping requirements with those, for example, of federal contractors under FAR Subpart 4.7.

5. **Ongoing Obligations Regarding Personal Conflicts of Interest**

The Interim Rule calls for retained entities to undertake ongoing obligations with respect to personal conflicts of interest:

- A Retained Entity must “adopt and implement procedures designed to discover, monitor, and report personal conflicts of interest on a continuous basis.” 31 C.F.R. § 31.212(f).

- Within five business days after learning of personal conflict of interest, a 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.” *Id.* § 31.212(g).

- A Retained Entity must retain the information needed to comply with the Interim Rule and to support the required certifications for three years following termination or expiration of the arrangement, “and shall make that information available to Treasury upon request.” *Id.* § 31.212(h).
The rule should be clarified as to when notification of a new personal conflict of interest is required. A five-day period to provide notice and a plan for neutralizing the conflict will in most cases be too short and may result in plans that are neither thoughtful nor workable.

**Recommendation:** The rule should either permit a “reasonable” time period to provide notice and a proposed plan to neutralize a new conflict, or instruct retained entities to provide notice and a plan “as soon as practicable.”

V. GIFTS, COMMUNICATIONS, AND CONFIDENTIALITY

The Interim Rule imposes specific requirements with respect to gifts, communications with Treasury during a procurement, and confidentiality. In many respects, these provisions are overbroad, unworkable in many respects, and create potential conflict with existing law. This conflict is exacerbated by the introductory language stating that the provisions of the Interim Rule “are not designed to be comprehensive; they supplement other requirements that may be imposed by contract, financial agency agreement and other federal laws.” 74 Fed. Reg. 3432.

A. Gifts

The Interim Rule states that a Retained Entity (including its officers and partners and their employees) may not:

Accept or solicit favors, gifts, or other items of monetary value from any individual or entity whom the retained entity, officer 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.

31 C.F.R. § 31.213(a)(1).

This portion of the Interim Rule restricts all the Retained Entity’s personnel from seeking or accepting “gifts.” Thus the rule’s gift restrictions are potentially imposed on personnel and operations with no connection to, and no knowledge of, the potential or actual arrangement between the Retained Entity and Treasury. This blanket restriction is unnecessary and unworkable. Since the objective is to avoid undue bias or loss of objectivity in the performance of Treasury arrangements, the restriction should be limited to a ban on the gifts to “management officials” and “key individuals” as defined in the Interim Regulations for purposes of the PCI provisions.
Moreover, the prohibition on solicitation or acceptance of "favors, gifts, or other items of monetary value" goes beyond gifts from an individual or entity that the Retained Entity (or any one of the Retained Entity's employees) knows is seeking official action from the Treasury in connection with a TARP arrangement. The ban also extends to an entity or individual who the gift-receiver knows has interests that may be substantially affected by the performance or nonperformance of the duties under a TARP arrangement. It is simply not possible to "know" in many instances whether a particular entity or individual might be substantially affected by the performance of a TARP arrangement.6

The Interim Rule also --

- fails to distinguish between the solicitation or giving of gifts or favors or other things of value for a prohibited purpose (e.g., to exert unfair influence or establish improper bias) and actions done without any unlawful or improper intent;
- taken literally, could be viewed to prohibit the acceptance of a company's or individual's offers or gifts that are made available to the general public;
- has no threshold for gifts of de minimus value, such as a cup of coffee or a certificate of merit, see 5 C.F.R. § 2635.204; and
- fails to allow gifts based upon personal relationships, even though Federal regulations would permit them in the case of Federal employees, see 5 C.F.R. §§ 2635.203, 2635.204.

Recommendation: The restrictions on gifts should be limited to items of monetary value provided to management officials and key personnel as defined in the Treasury Regulations. Further, rather than broadly stated, flat prohibitions on gifts such as those in the Interim Rule, we suggest that Treasury incorporate into the rule the reasonable scope limitations adopted by the Office of Government Ethics in the Standards of Ethical Conduct, as reflected in 5 C.F.R. § 2635.101 et seq., tying the ban on gifts to those actions taken or intended to be taken by an individual or company for the prohibited purpose of influencing or impairing the objectivity of the retained entities' activities in the transaction.

6 For example, assume Jane asks her friend John to attend a Knicks game as her guest. John is now working on a TARP arrangement or hopes to do so. It is unclear under the regulation whether John must decline the invitation if he "knows" that Jane has significant holdings in bank stocks the value of which might be affected by his work, or even whether he must obtain a complete listing of Jane's financial holdings to assure that she will not be substantially affected by performance of his duties under a Treasury arrangement, including a potential arrangement that has not yet been finalized.
B. Communications with Treasury Employees

Section 31.216(a) appears to be an attempt to import a condensed version of the Procurement Integrity Act (41 U.S.C. § 423) from the procurement world to arrangements with retained entities. The restrictions in the Treasury Regulations are already present in the FAR (FAR § 3.104) and thus compliance with the FAR would constitute compliance with this section, for those retained entities that are subject to the FAR.

Section 31.216(b) adds a certification requirement, similar to one that appeared in the FAR many years ago but has since been removed. The certification essentially requires an attestation that the Retained Entity is in compliance with the provisions of § 31.216(a). No statute requires such a certification; and compliance with the underlying substantive obligations is required whether or not a certification is provided. We respectfully submit that requiring the certification imposes an unnecessary layer of paperwork burden into a process that is already burdened with too much paperwork.

To avoid potential conflicts, the Treasury Regulations should make clear that this section does not establish new or different standards for arrangements that are subject to the FAR.

Recommendation: A provision should be added to clarify that §31.216(a) does not add new requirements to FAR-covered contracts beyond those established under the Procurement Integrity Act (41 U.S.C. § 423) and FAR § 3.104; and the certification requirement of § 31.216(b) should be removed.

C. Confidentiality

Section 31.217(a) states that all information provided by Treasury to a Retained Entity shall be deemed non-public until the Treasury decides otherwise, or the Retained Entity receives the information from another source. This would presumably include information such as the identity of the Treasury official responsible for supervising the arrangement; the address of the office to which invoices are to be sent; and information as to which operating system Treasury is using, Windows or Linux. The regulation would be improved by restricting its confidentiality rule to any information “pertaining to a TARP beneficiary or its assets, or that is otherwise marked by Treasury as confidential or proprietary.” Rather than assert confidentiality with respect to any and all information, Treasury should make confidentiality determinations specific to each arrangement, consulting with retained entities and TARP beneficiaries as necessary.

Subsection (c) provides that the Retained Entity is required to report “within 5 business days of detecting a violation” of the confidentiality prohibitions. The comments above regarding the OCI and PCI rules are equally applicable regarding
timing and the level of knowledge within a Retained Entity that would trigger a reporting obligation.

**Recommendation:** Treasury should restrict its confidentiality requirement to “any information pertaining to a TARP beneficiary or its assets, or that is otherwise marked by Treasury as proprietary or confidential.” In addition, the obligation to report violations of confidentiality obligations should apply only to violations known by management officials and key personnel; and a reasonable time should be permitted for submitting the report, rather than five days.

VI. ENFORCEMENT

A. List of Sanctions

Section 31.218 provides a list of possible sanctions that might be imposed for a violation of the Treasury Regulations. These include:

- Rejection of the work tainted by the OCI or PCI and denial of payment for that work;
- Termination of the arrangement for default;
- Debarment of the Retained Entity from federal government contracts, and/or disqualification from future financial agency agreements;
- Imposition of other remedies available under the arrangement or at law; and
- Referral to DOJ for prosecution.

These remedies are independently available to the Government, so their listing in the Treasury Regulations primarily acts as a warning to retained entities and their employees. However, other portions of the Treasury Regulations are more problematic.

B. Advice Regarding Criminal Laws

Subsections 31.213 (b) and (c) discuss federal criminal bribery and false statements laws that Retained Entities should be aware of while performing arrangements with the Treasury. Although apparently intended as explanatory material regarding potential criminal statute coverage, these discussions could be read to imply some explicit liability exposure for retained entities not otherwise provided by law, including treatment as if they are public officials.

In addition, Section 32.213(c) would purport to provide for referral for investigation or prosecution where a false or fraudulent statement relating to the
services performed under an arrangement is made by the Retained Entity or individual to the Treasury, per 18 U.S.C. § 1001. However the second sentence of this Section would provide for referral upon “receipt of information indicating ... violat[ion of] any provision of title 18 of the U.S. Code or other provision of criminal law.” (emphasis added.) Thus, the Interim Rule as currently drafted exposes the Retained Entity to referral to Justice and the EESA Special Inspector General for any violation of criminal law, even those that do not involve the TARP arrangement. In this sense, the provision goes beyond even the scope of the new mandatory disclosure rules covered by FAR 3.10, discussed below.

While some retained entities may have fiduciary obligations that merit being held to a high level of responsibility, contractors in FAR-covered procurements for goods and services do not have the same fiduciary obligations. Because the Interim Rule applies to both, it should leave the specific scope and application of criminal laws out of the actual regulation.

**Recommendation:** Language should be added to clarify that §31.213 does not expand the coverage of the criminal statutes listed in those sections, and that the statutes listed therein, such as those regarding bribery of federal employees, false claims, and false statements, may apply to retained entities that do not perform with the utmost integrity in their TARP arrangements.

**C. Mandatory Disclosure of Violations**

Section 31.213(d) of the Interim Rule includes a truncated version of the rule recently implemented in FAR 3.10 mandating contractor disclosure of certain criminal violations related to their government contracts. Since the FAR mandatory disclosure requirements and procedures are much more elaborate than those contained in the Treasury Regulations, this provision does not appear to add any obligations to procurement arrangements. This provision does impose new obligations on those retained entities that provide financial services, including the duty to disclose violations of conflicts of interest to the Special Inspector General for TARP or to the Treasury Inspector General.  

Under the recently-enacted FAR mandatory disclosure rule, no reporting is triggered thereunder until a “principal” is aware of the potentially reportable issue. “Principal” is defined to mean:

- an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary,

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7 Unlike the FAR 3.10 regulation, the Interim Rule does not contain a look-back requirement for reporting violations. As the TARP legislation has only recently been enacted, this distinction is appropriate and should be retained.
division, or business segment; and similar positions).

FAR 52.203-13(a). This definition of “principal” is quite close to the term “management official” in the TARP. Rather than adopt a new definition solely for the Treasury Regulations, we recommend that the reporting obligation in 31 C.F.R. § 31.211(f) be activated only when “management officials” learn of the matter to be reported.

Responding to the previous comments submitted by the ABA in June 2008, available at http://www.abanet.org/poladv/priorities/privilegewaiver/2008jun20_farcase_gsaltr.pdf, the contract clause implementing the FAR mandatory disclosure requirement was amended to state that mandatory disclosure does not require a Contractor “to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine, or for any officer, director, or employee of the Contractor . . . to waive his or her attorney client privilege or Fifth Amendment rights.” FAR 52.203-13(a). In addition, the FAR clause establishes that mandatory disclosure does not foreclose any contractor rights arising in law, the FAR or the contract, or restrict a contractor from conducting an internal investigation or defending a dispute relating to the disclosed matter. Id. These same protections should be extended to disclosures under § 31.213(d) of the Treasury Regulations.

**Recommendation:** Section 31.213(d) should be amended to provide that:

- The mandatory disclosure obligation is limited to those matters that come to the attention of the Retained Entity’s management officials, including such matters as are brought to management official’s attention through operation of the Retained Entity’s ethics program.

- With respect to Retained Entities that are covered by the FAR, compliance with the FAR mandatory disclosure requirements shall constitute compliance with § 31.213(d) of the Treasury Regulations.

- A disclosure under §31.213(d) does not: (1) require a Retained Entity to waive its attorney-client privilege of the protections afforded by the attorney work product doctrine; (2) require any officer, director, or employee of the Contractor to waive his or her attorney client privilege or Fifth Amendment rights; (3) foreclose any contractor rights arising in law, the applicable regulations, or the arrangement; (4) restrict a contractor from conducting an internal investigation or defending a dispute relating to the disclosed matter.
VII. CONCLUSION

The Sections appreciate the opportunity to provide these comments and are available to provide any additional information or assistance as you may require. If you have any further questions regarding our views on these issues, please contact Giovanni Prezioso at 202-974-1650 or Allan Joseph at 415-365-5333.

Sincerely,

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