Section Two: Additional Views

A. Rep. Jeb Hensarling

1. General Program Overview

As a member of the Congressional Oversight Panel (COP or the panel) for the Troubled Asset Relief Program (TARP), it has become evident to me that, unfortunately, the program is no longer being utilized for its intended purposes of financial stability and taxpayer protection. It is being used instead to promote the economic, social and political agendas of the current administration. As evidenced by TARP's financing of two bankrupt auto makers, multiple capital infusions into "healthy" institutions, increased complexity for institutions wishing to repay TARP, I have come to the conclusion that Congress' original intent for financial stability and taxpayer protection is no longer being respected and the program should be unwound.

2. Background and the Congressional Oversight Panel's Statutory Responsibilities

On October 3, 2008, Congress voted to enact and the president signed into law the Emergency Economic Stabilization Act of 2008 (EESA). The act provided the United States Treasury with the authority to spend $700 billion to stabilize the U.S. economy and prevent a systemic meltdown. The act also established two bodies with broad oversight responsibilities: the COP and the Financial Stability Oversight Board (FSOB). The act placed audit responsibilities in the GAO and a Special Inspector General for the Troubled Asset Relief Program (SIGTARP).

While the oversight and audit organizations have some overlapping responsibilities, only the COP is specifically empowered to hold hearings, take testimony, receive evidence, administer oaths to witnesses, and review official data, and is required to write reports on the extent to which the information on transactions has contributed to market transparency.[196]

The EESA statute requires COP to accomplish the following, through regular reports:

- Oversee Treasury's TARP-related actions and use of authority;
- Assess the impact to stabilization of financial markets and institutions of TARP spending;
- Evaluate the extent to which TARP information released adds to transparency; and
- Ensure effective foreclosure mitigation efforts in light of minimizing long-term taxpayer costs and maximizing taxpayer benefits.

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[196] Congressional Research Service, *Emergency Economic Stabilization Act: Preliminary Analysis of Oversight Provisions* (Nov. 20, 2008).

All are tremendous responsibilities. However, the American people, through Congress, determined that each were necessary and expressed confidence that the COP, as an organization and an arm of Congress, was the right body to carry out the assigned tasks.

It is no secret that I voted against EESA. However, as the only sitting member of Congress on the COP, I have consistently expressed my commitment to ensure that the TARP program works, that decisions made are based on merit and not political considerations, and most importantly, that the taxpayers are protected. I respect the panel and each of its members and staff; however, I fear that by choosing to focus much of its work on issues not central to our mandate the panel has missed critical opportunities to provide effective oversight.

The American people have long understood that when it comes to government actions, sunshine is the best disinfectant. The COP is supposed to ensure that the sun is always shining when it comes to Treasury's actions and the use of TARP funds. However, due to the panel's pursuit of interesting topics for legislative and policy debates, taxpayers have not received answers as to whether the TARP program works, how decisions are being made or what the banks are doing with the taxpayers' money. A number of anecdotes exist, but the panel has the ability to establish the facts.

As I have said in the past, effective oversight begins with a vigorous examination of those who administer the TARP. Unfortunately, the panel has conducted only one hearing with a Treasury official during its six-month existence. As a starting point, I echo my call that the panel hold a hearing each month with the Secretary of the Treasury or a senior designee with TARP management responsibilities. If the Treasury refuses to participate, the panel should hold its officials to account for not participating. If the panel refuses to call regular hearings with Treasury officials, the American public and Congress should hold the panel to account for negligence.

Additionally, effective taxpayer accountability requires that the panel question TARP recipients. To date, the panel has questioned 3 institutions, representing 0.11 percent of total TARP authorization, out of over 600[197] TARP recipients. None of the major TARP recipients have been questioned in a public hearing.

If presented with the opportunity, I believe the taxpayers would pose the following types of questions to the TARP recipients in a matter-of-fact, plainspoken American manner:

- Did the financial stability of the economy require that you accept TARP funds in the first place? Did your business model, risk management techniques, compliance protocols and underwriting standards threaten macroeconomic stability?

[197] Total number of financial institutions participating in Treasury's Capital Purchase Plan. *See* U.S. Department of the Treasury, *Seventh Tranche Report to Congress* (June 3, 2009) (online at www.financialstability.gov/docs/TrancheReports/7th_Tranche-Report-Appendix.pdf).

- If so, have you addressed those issues to ensure that taxpayers won't be called upon once again to infuse capital into your company? Please tell us what remedial actions you took and why you think they will be effective.

- If the financial stability of our economy did not require a TARP infusion into your company, did Treasury "force" you to accept any TARP funds? If so, please tell us what happened.

- When can taxpayers expect you to repay the TARP funds?

- To achieve the goal of financial stability, do you anticipate the need for additional TARP funds? If so, how much and when will you need the additional TARP funds?

- Has Treasury refused to permit you to repay all or any part of your TARP funds in the name of financial stability? If so, please tell us about your disagreement with Treasury.

- We realize that money is fungible, but please tell us what you did with your TARP funds.

- Has Treasury or anyone from the government "encouraged" (or directed) you to (i) extend credit to any person or entity or (ii) forgive or restructure any loan that may run counter to the goal of your company's financial stability?

- Using the TARP funds your company has received as leverage, has Treasury or anyone from the government "assisted" (or directed) you in managing the affairs of your institution?

- Did your receipt of TARP funds result in new lending activity or increased lending activity?

While the COP has reviewed a number of historical precedents and commented on various policies, including how Iceland handled its banking crisis, the panel cannot tell the American people what safeguards Treasury has in place to ensure that TARP money is not being wasted or if TARP money is being used in their best interest. The panel knows the answers to ancillary questions regarding how Spain, Germany, and Italy handled their banking crises, but the panel cannot answer fundamental questions on how Treasury is handling the current crisis. For example, the COP should ascertain how Treasury measures success, how it will know when TARP funds are no longer required, and what is Treasury's exit strategy. The taxpayers deserve to know answers to these fundamental questions, and it is the COP's duty to help provide them.

As SIGTARP discussed at length in its last report, TARP has expanded a "tremendous" amount in scope, scale and complexity.[198] I am including analysis of and questions about

[198] Office of the Special Inspector General for the Troubled Asset Relief Program, *Quarterly Report to Congress* (Apr. 21, 2009) (online at

additional, key TARP-related issues upon which the panel has so far failed to shed light. I have also provided a few observations on the panel's June report.

a. Investigation of Chrysler's and GM's Bankruptcy and Restructuring

Under the terms of the proposed Chrysler restructuring plan, the Chrysler senior secured creditors will receive 29 cents on the dollar and the pension funds of the United Auto Workers (UAW), each an unsecured creditor, will receive 43 cents on the dollar and a 55 percent equity ownership interest in the "new" Chrysler, even though the claims of the senior secured creditors are of a higher bankruptcy priority than the claims of the UAW.[199] The State of Indiana's pension funds, one group of Chrysler's secured creditors, filed an appeal to the Chrysler sale, causing the bankruptcy judge to freeze the proceedings. In their filing, the funds stated, "This attack on the most fundamental of creditor rights has been funded, orchestrated and controlled by Treasury, despite its complete lack of statutory and constitutional authority to do so."[200]

Under the terms of the proposed GM restructuring plan, the United States and Canadian governments, the UAW pension funds and the GM bondholders will receive an initial common equity interest in GM of 72.5 percent, 17.5 percent and 10 percent, respectively. The equity interest of the UAW pension funds and the GM bondholders may increase (with an offsetting reduction in each government's equity share) to up to 20 percent and 25 percent, respectively, upon the satisfaction of specific conditions. The GM bondholders have been asked to swap $27 billion in debt for a 10-25 percent common equity interest in GM, while the UAW has agreed to swap $20 billion in debt for a 17.5-20 percent common equity interest and $9 billion in preferred stock and notes in GM.[201] Apparently, even though the bankruptcy claims of the UAW pension funds and the GM bondholders are of the same priority, the UAW will receive a disproportionately greater distribution than the GM bondholders in the reorganization.

Given the unorthodox reordering of the rights of the Chrysler and GM creditors, a fundamental question arises as to whether the Administration directed that TARP funds be used to advance its policy and legislative objectives rather than to stabilize the American economy as required by EESA. In other words, did the Administration use any TARP funds as a carrot or stick? The Administration should also inform the American taxpayers regarding its proposed

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www.sigtarp.gov/reports/congress/2009/April2009_Quarterly_Report_to_Congress.pdf) (hereinafter "SIGTARP April Report").

[199] Chad Bray and Alex P. Kellog, *Court Affirms Chrysler Sale but Puts Deal on Hold Until Monday,* Wall Street Journal (June 3, 2009) (online at online.wsj.com/article/SB124423529553090069.html#mod=testMod).

[200] Tiffany Kary, et al., *Chrysler Says Indiana Pension Funds Can't Win Appeal*, Bloomberg (June 4, 2009) (online at www.bloomberg.com/apps/news?pid=20601103&sid=aDSQ2KKXfDPI).

[201] Peter Whoriskey, *U.S. Gets Majority Stake in New GM,* Washington Post (June 1, 2009) (online at www.washingtonpost.com/wpdyn/content/article/2009/05/31/AR2009053101959.html?sid=ST2009060100034).

exit strategy from the Chrysler, GM and other TARP investments and whether it plans to reinvest such proceeds in other entities.

The panel has agreed to hold a public hearing on the Chrysler and GM reorganizations. I commend the panel for this oversight effort. An effective hearing will take place as soon as possible in the nation's capitol and include senior Treasury officials, auto company executives, union executives, TARP recipient bondholders, and non-TARP recipient bondholders, to name a few. In order to discharge its specific duties and responsibilities under EESA in a professional and timely manner, the panel should seek answers to the following additional questions (among others):

- Why would certain Chrysler and GM creditors agree to accept less than what they were contractually owed and entitled to receive under bankruptcy law? [202]

- Specifically, what is the legal and business justification for preferring the claims of the UAW pension funds over the claims of (i) the Chrysler senior secured creditors since the claims of such creditors are of a higher bankruptcy priority and should receive preferential treatment under bankruptcy law, and (ii) the GM bondholders since the claims of the UAW and the GM bondholders are of the same bankruptcy priority (both unsecured) and should receive identical (or at least substantially similar) treatment under bankruptcy law?

- Does it matter that some of the creditors were also TARP recipients? TARP beneficiaries who were also secured bondholders of Chrysler - including Citigroup, JP Morgan Chase, Morgan Stanley, and Goldman Sachs - agreed to the swap of $6.9 billion in debt for just $2 billion in cash. Did these institutions acquiesce with the knowledge that losses from their Chrysler holdings may be replenished with TARP funds? Were they pressured into doing so? How would the taxpayer know whether or not Treasury channeled TARP funds through these institutions as a backdoor way of financing the auto industry and, indirectly, UAW claims? Were any of the GM bondholders TARP recipients?

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[202] Thomas Lauria, a senior bankruptcy and reorganization attorney with the international law firm White & Case LLP, who represents a group of Chrysler creditors, recently stated on CNBC that the Administration flagrantly violated constitutional principles by trampling on the contractual rights of the Chrysler bondholders. This is a serious charge by a seasoned and well respected attorney at a top-tier law firm and should be investigated by the panel. *See* Thomas Lauria, *Interview: GM, Bonds & Beyond*, CNBC (May 13, 2009) (online at www.cnbc.com/id/15840232?video=1122734987&play=1); Thomas Lauria, *Interview: A Case of Gangster Government*, CNBC (May 8, 2009) (online at www.cnbc.com/id/15840232?video=1118369112&play=1); Thomas Lauria, *Interview: White House Bullying Bondholders?*, CNBC (May 6, 2009) (online at www.cnbc.com/id/15840232?video=1116040367&play=1).

- Why would TARP recipients (that by definition owe substantial sums to the United States government) agree to settle bankruptcy claims for less than the maximum amount allowable under bankruptcy law?

- Who authorized those decisions—the management of each TARP recipient or Treasury acting as the de facto manager of the TARP recipients—and what, if any, fiduciary duties were violated?

- If management of each such TARP recipient voluntarily agreed to forgive part of its claim against Chrysler and GM, as applicable, what was their legal basis for making such a gift?

- Why would TARP recipients agree to transfer part of their bankruptcy claims to another creditor—the UAW—and not use such amounts to repay their TARP loans?

- Did the Administration "reimburse" Chrysler and GM for any TARP funds transferred to the UAW?

- Did the Administration chose to prefer one group of employees—UAW members and their retiree benefits fund—over other non-UAW employees whose pension funds invested in GM bonds? Under such an approach the retirement plans of the UAW employees would be enriched while the retirement plans of the non-UAW employees would be diminished.

- What message does this send to the financial markets—should investors expect their contractual rights to be ignored when dealing with the United States government? How will the cases of GM and Chrysler affect future financings and reorganizations?

- What message does this send to non-UAW employees whose pension funds invested in Chrysler and GM indebtedness—you lose part of your retirement savings because your pension fund does not have the special relationships of the UAW?

- Is the Administration setting corporate policy and/or running the day-to-day affairs of Chrysler and GM, including the two reorganizations? If so, under what authority?

- Did the Administration "force" Chrysler to accept a deal with Fiat?

- Have the Chrysler and GM boards of directors and officers abandoned their fiduciary duties and acquiesced in the management decisions made by the Administration?

- Has the Administration appropriately discharged its fiduciary duties in its role as the de facto manager of an insolvent Chrysler and GM?

- Will the United States government be open to suit by private parties based upon the breach of its fiduciary duties owed to Chrysler and GM and their shareholders and creditors?
- Should the panel recommend that SIGTARP, which performs audits and investigations on abuse and fraud, investigate any such inappropriate use of TARP funds?
- What is the Administration's exit strategy regarding the investment of TARP funds in Chrysler and GM?

On top of a bankruptcy that will give the UAW a sweeter deal than comparable GM creditors, there is also the wider concern that GM is becoming another black hole for taxpayer dollars. The government will presumably receive a 72.5 percent initial ownership stake in exchange for $50 billion of TARP funds committed so far. Although the President has called the government a "reluctant" shareholder that will "take a hands-off approach, and get out quickly," the Administration has presented no exit strategy for its ownership, nor any plan for recouping equity investments. In its latest baseline, the Congressional Budget Office (CBO) estimated that the TARP auto program carried about a 74 percent subsidy rate for the taxpayer – a rate calculated *before* GM announced bankruptcy and *before* loans were converted to what will amount to common stock. Congress and the public still have little knowledge of how the Administration will manage the automaker, how it assesses risks of taxpayer losses, and a strategy to unwind its investment. These issues will require rigorous and ongoing investigation by the COP.

Regrettably, the consequences of these actions may not be limited to Chrysler and GM but may resonate through and have a chilling effect on the broader bond and capital markets. Once investors realize that their contracts may not be respected by the Administration, if they even agree to participate, they will demand interest rate and other premiums to compensate for the enhanced risk. Such expenses will be passed on to consumers and will render American businesses at a competitive disadvantage to their foreign counterparts. Following the well-stumbled path of unintended consequences, two misguided attempts perhaps to favor the UAW may cause other hard working Americans to lose their jobs to business enterprises organized in foreign countries that continue to respect the sanctity of a contract. How can the Administration believe that its actions in the Chrysler and GM reorganizations will go unnoticed by the investment community? These "technicalities" may have not garnered the attention of most Americans but they are front-and-center issues with financial institutions and their counsel and investors. How can an Administration that is beating the drum with one hand to encourage financial institutions to extend credit poke the same financial institutions in the eye with the other hand? I suspect this lesson has not been lost on the financial community and may serve as one of the reasons for the community's tepid embrace of the TALF and PPIP programs.

b. Transparency of Bank of America's Acquisition of Merrill Lynch

Recently, reports have appeared to the effect that Treasury "coerced" Bank of America into purchasing Merrill Lynch even though Bank of America's management concluded that the transaction was not in the best interest of the bank and its shareholder. In May the chair of the panel, Professor Elizabeth Warren, sent a letter to Treasury Secretary Geithner requesting his "thoughts on the issue." In order to determine what actually occurred, the panel should investigate whether Treasury threatened to withhold TARP funds if Bank of America withdrew from the acquisition, when any such threats were made and if such actions impacted Bank of America's decision to acquire Merrill Lynch.

c. TALF and PPIP

The COP's April report indicates a lack of participation by potential investors in other government programs like the Term Asset-Backed Securities Loan Facility (TALF) and the Public-Private Investment Program (PPIP), due to the uncertainty regarding changing terms and conditions of the programs.[203] Although the Federal Reserve announced that requests for participation in TALF increased $11.5 billion from last month, the program had a rocky start and may pose a greater risk as it brings on commercial and residential mortgage-backed securities (MBS).[204] The PPIP, which has not yet gone live, continues to be a program in limbo, and the FDIC now says it will delay the sale of legacy loans.[205]

As we await further details and in order to discharge its specific duties and responsibilities under EESA in a professional and timely manner, the panel should address the following inquiries:

- How have these uncertainties--specifically including the complex executive compensation rules, the threatened "outing" of certain AIG employees and their families, the alleged inequitable treatment of certain creditors of Chrysler and GM, and the pending SIGTARP investigations--affected the TALF and PPIP programs?

- Why haven't hedge funds, private equity funds and other investors embraced the TALF and PPIP programs as anticipated by Treasury?

- Has Treasury marketed these programs to passive foreign investors and tax exempt organizations (as well as the typical domestic investors) and what regulatory and other burdens prohibit or limit the participation by such investors?

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[203] Jody Shenn, *Dudley's TALF Comments Add Signs of a PPIP Stall*, Bloomberg (June 5, 2009) (online at www.bloomberg.com/apps/news?pid=newsarchive&sid=a2Wl7tAD6rEA).

[204] Scott Lanman and Sarah Mulholland, *Fed Says TALF Loan Requests Increase to $11.5 Billion*, Bloomberg (June 2, 2009) (online at www.bloomberg.com/apps/news?pid=20601087&sid=aUonjouK30hU).

[205] Margaret Chadbourn, *FDIC Said to Delay PPIP Test Sale of Distressed Loans*, Bloomberg (June 2, 2009) (online at www.bloomberg.com/apps/news?pid=20601103&sid=aVLm8N96tvV0&refer=us).

- Are the tax laws written so as to encourage passive foreign investors to invest in performing loans and securities but discourage such investors from investing in distressed loans and securities?
- Why hasn't the panel called leaders in the financial and investment communities to testify as to why they consider the TALF and PPIP programs unattractive?
- What do potential investors like and what do they dislike, and why?
- Is it possible to address the "dislikes" in a reasonable and mutually beneficial manner?
- Why have some investors abandoned their participation in the programs after expressing initial interest?
- What legal and financial impediments exist?
- What other impediments exist?
- If Treasury is struggling to introduce market-ready investment programs, why hasn't the panel offered its assistance?

I am certainly not suggesting that hedge fund managers be permitted to structure the programs de novo, but since Treasury desperately needs private capital to arrest the financial crisis it seems entirely appropriate for the panel to solicit and consider the views of the targeted investor classes. Treasury and the panel must remember that private sector investors have limited capital to deploy and numerous attractive opportunities to consider and will not chose to invest in any Treasury program unless they expect to earn an appropriate risk adjusted rate of return without excessive administrative and regulatory burdens. These private sector institutions owe a fiduciary duty to their investors (which often include pension funds and university endowments) and simply cannot allocate capital to off-market investments.

With the full knowledge that private dollars will not participate unless they anticipate upside potential, the panel should also ask Treasury to provide more detail on how it assesses downside risk to the taxpayers of the TALF and PPIP programs. SIGTARP, for example, has already made several recommendations to Treasury on ways to reduce risk and the potential for fraud in TALF and PPIP. It is extremely concerned with the inclusion of legacy residential MBS in TALF, stating the Treasury should screen individual securities, have more stringent requirements for loans used as collateral, and require higher haircuts for all MBS. In addition, SIGTARP believes that PPIP is "inherently vulnerable to fraud, waste and abuse," including various conflicts of interests between participants.[206]

d. June COP Report

[206] SIGTARP April Report, *supra* note 198.

The report is fairly straightforward in that it focuses on the mechanics of the recently completed stress tests. Although I voted "yes" to the report, I offer the following questions and observations.

i. Underlying Legal and Regulatory System. Increased government involvement in our housing markets created significant distortions and disruptions. This increased involvement is contrary to the oft-repeated, now disproven claims of proponents of expanded government control of our economy that a "wave" of market deregulation over the last 20 years caused the current crisis. To the contrary, facts indicate that there were at least five key factors which contributed to financial crisis, at least four of which were a direct result of government involvement. Those four factors — highly accommodative monetary policy by the Federal Reserve, continual federal policies designed to expand home ownership, the congressionally-granted duopoly status of housing GSEs Fannie Mae and Freddie Mac, and an anti-competitive government-sanctioned credit rating oligopoly — are thoroughly discussed in the Joint Dissenting Views to the COP's "Special Report On Regulatory Reform" that I offered along with Senator John Sununu along with a fifth factor (failures throughout the mortgage securitization process that resulted in the abandonment of sound underwriting practices).[207] As such, a thorough recitation of those points here would be redundant.

ii. Further Information on Counterparty Risk. The current COP report gives a broad overview of how bank holding companies (BHCs) provided estimates of counterparty losses, potentially occurring from deterioration in the credit markets, under the two stress test scenarios. But the fact remains that there is still a considerable amount of uncertainty about the inputs used to stress test counterparty agreements like credit default swaps and similarly-structured products. The panel neglects to provide much detail beyond what the Federal Reserve's SCAP "Design and Implementation" presents in its white paper. What was the interaction like between the BHCs, who ran the tests, and the Federal Reserve, who supervised them? Was the Fed able to validate counterparty data? There is also little discussion of disparate data among BHCs, and how the Federal Reserve rationalized what is a complicated framework with interdependent assumptions on the risks of default. If the financial institutions already have counterparty data available to reasonably assess losses, were another set of market shocks to occur, why is there still so much uncertainty about systemic risk? Is there any way for the Federal Reserve to separate the potential losses from agreements like credit default swaps from other potential trading losses? Information that addresses these questions would enable COP to fulfill its responsibility of assessing how effective TARP funds have been in stabilizing financial markets.

iii. Application of the Mark-to-Market Rules. Was the methodology applied to the "more adverse" scenario too conservative? That is, if the newly relaxed mark-to-market rules

[207] Congressional Oversight Panel, *Special Report on Regulatory Reform: Modernizing the American Financial Regulatory System: Recommendations for Improving Oversight, Protecting Consumers, and Ensuring Stability*, at 54-89 (Jan. 29, 2009) (online at cop.senate.gov/documents/cop-012909-report-regulatoryreform.pdf).

were applied to the "more adverse" scenario by how much would the additional capital requirements have dropped? A lesser capital requirement would decrease the likelihood that the BHCs would have to raise equity capital by (i) selling stock in the market or under CAP, (ii) converting preferred stock (whether privately held or issued under the CPP) into common stock, or (iii) selling assets. No such alternative is in the best interests of the taxpayers or the BHCs and, as such, should be avoided unless necessary and appropriate. Perhaps prudent underwriting necessitates the use of the old mark-to-market rules under the theory ABS securities will continue to be worth far less than their face values. The panel should continue to investigate by how much the additional capital requirements would have dropped if the recently modified mark-to-market rules were applied to the “more adverse” scenario.

iv. “Negotiation” of Stress Tests. The report raises the question as to whether the stress test results were "negotiated" between the BHCs and their supervisors. The report notes that the supervisors informed the staff of the panel that there was no "negotiation" of the results except with respect to specific first quarter adjustments and clear errors and omissions.

The report also asks if the process could have been better handled in a more transparent manner. Although such inquiry is no doubt appropriate, absent evidence to the contrary, I think it might be counterproductive to dig aggressively into the discussions between the BHCs and their supervisors because such discussions were no doubt candid and may have indeed resulted in lower capital requirements for specific institutions. It’s naive to think otherwise. It does not follow, however, that the regulators were persuaded to recommend inappropriately low additional capital requirements for any institution. Regulated entities and their supervisors typically discuss (and argue) at length the results of an examination or audit. Through this back-and-forth process each side presents its case and advocates the merits of its position. The regulated entity works to assist the regulator in better understanding how the applicable regulations should apply to its business, financial position and operating results, and the regulator argues in support of its application of the regulations to the regulated entity. This process is critical for the regulators because they are generally significantly outnumbered by the employees of the regulated entities. Regulated entities and their supervisors must have an open line of communication that permits each to speak frankly. Such interaction and exchange of ideas between a regulated entity and its supervisor by no mean implies that the regulated entity acted in an inappropriate manner or that the regulator conceded an issue that is not in the best interest of the taxpayers. If credible evidence develops to the contrary the panel should promptly investigate, otherwise any investigation will most likely yield only the obvious: the supervisors presented their results to the BHCs; the BHCs commented on any inconsistencies, errors and omission; the supervisors made any modifications to their reports that they considered appropriate in their sole and absolute discretion; and the results were released.

v. CMBS. I continue to receive less than enthusiastic reports regarding the commercial real estate market. If all commercial real estate loans and CMBSs were marked-to-market the additional capital requirement could jump dramatically. The supervisors should diligently monitor these loans and securities.

vi. Government Intervention, Exit Strategy and Related Issues. The following sentences were included in a draft version of the June report, but were not included in the final report. They are important issues to consider in the context of TARP's effectiveness, and I have included them below:

"To the extent that BHCs rely on CAP funds in meeting their capital buffer needs, all the issues involved in government ownership of companies' common stock are raised. Promised Treasury guidance as to the corporate governance principles that will be followed does not yet seem to have been published, and will be crucial."

"Since government intervention in the markets causes uncertainty, and may make investors less likely to participate in capital raising by the BHCs, the Administration should be as transparent as possible with respect to policy issues regarding intervention."

"Treasury should publish the corporate governance policies or guidelines which it will follow as a shareholder in institutions requiring CAP funding."

In addition, and in order to discharge its specific duties and responsibilities under EESA in a professional and timely manner, the panel should investigate the following related issues (among others):

- What is Treasury's exit strategy with respect to each TARP investment? Treasury should specify its exit strategy on an entity-by-entity basis with a time line and in sufficient detail.

- What TARP investments does Treasury expect to hold at the end of 2009 and each of the next five years? Treasury should specify on an entity-by-entity basis and in sufficient detail.

- Does Treasury anticipate that it will need to make additional investments in any of the current TARP recipients or any other entity? If so, in what amount, in what form, for what entity and for what purpose?

- Does Treasury anticipate that it will reinvest any repaid TARP funds, that is, is TARP a revolving credit/investment facility?

- Will Treasury remain a passive investor or will it undertake to designate the directors and officers of the TARP recipients and in substance exercise day-to-day control over the management and affairs of such entities?

- Will Treasury timely announce its decision to act in a passive or active manner with respect to the TARP recipients so as to lessen the uncertainty regarding the large block of shares held by the public sector?

- Will Treasury follow and respect applicable state corporate and federal and state securities law?

- If the government acts as the de facto management of any TARP recipient will it be liable to suit as a controlling person and subject to all applicable federal and state corporate, securities and other rules and regulations?

- What are the consequences of the United States government serving as the de facto manager of Chrysler, GM and the largest financial institutions?

- Will the government mandate which cars will be built and which borrowers will qualify for loans?

- How will "non-subsidized" businesses compete with TARP recipients whose government shareholder may literally print money?

- Will TARP recipients receive favorable government contracts or other direct or indirect subsidies the award of which is not based upon objective and transparent criteria?

- Will TARP recipients promptly disclose all contractual arrangements (oral or written) between each TARP recipient and the government, together with a detailed description of the contract, its purpose, the transparent and open competitive bidding process undertaken and the arm's length and market directed nature of the contract?

- Will TARP recipients be able to obtain private or public credit or enter into other contractual arrangements at favorable rates because of the implicit governmental guarantee of such indebtedness and contracts?

- Will any such subsidies violate U.S. law or the laws of any foreign jurisdiction?

- How may all aspects of the relationship between each TARP recipient and the government be made more transparent, accountable and beyond reproach?

- What are the best practices the government should adopt with respect to its role as the sole TARP investor?

- Will employees (and members of their immediate families) of the government that work with or supervise any TARP recipients be barred from seeking employment or serving as a director with TARP recipients or from working with any public policy shop, law firm or other organization that represents any TARP recipients for a period of, say, at least five-years following the departure from government service of such employee?

- Will governmental employees (and members of their immediate families) be barred from serving as directors, managers or employees of any TARP recipient during their government service?
- What corporate governance, compliance, risk management and internal control protocols and procedures will the government adopt with respect to its role as a creditor and shareholder of the TARP recipients?
- Will the government in its capacity as a shareholder of each TARP recipient undertake to abide by all insider trading, controlling shareholder and other applicable rules and regulations?
- Will the government exert disproportionate influence over management relative to its actual ownership interests in the TARP recipients?
- How will Treasury resolve any conflict of interest between its role as a creditor or equity holder in any TARP recipient and as a supervising governmental authority for any such TARP recipient?
- Will the IRS, SEC, Federal Reserve, FDIC and other governmental agencies be able to discharge their regulatory and enforcement responsibilities with respect to each TARP recipient without political influence?
- Will management of the TARP recipients support the government’s slate of proposed directors and thus disenfranchise the remaining shareholders under the proxy rules?
- If Treasury plans to sell its common stock to the public what are the appropriate benchmarks that will trigger such sales?
- Should Treasury sell its shares in the market (whereby the TARP recipients will not share in the proceeds, but the TARP advances will be repaid) or should Treasury agree to retain its stock and permit the TARP recipients to sell newly issued shares to third-parties (whereby the TARP recipients will retain the proceeds from the offering, but the TARP advances will remain outstanding)?