Executive Summary*

The Troubled Asset Relief Program (TARP) is a public program in design and purpose: created by Congress, paid for by taxpayers, and intended to stabilize the American economy. Yet private companies today perform many of the TARP's most critical functions, operating under 96 different contracts and agreements worth a total of $436.7 million. These private businesses do not take an oath of office, nor do they stand for election. They may have conflicts of interests, are not directly responsible to the public, and are not subject to the same disclosure requirements as government actors. As such, it is critical that Treasury scrupulously oversee its contractors and agents.

The TARP employs private agents through two means: procurement contracts, which are utilized across the federal government and are governed by the Federal Acquisition Regulations (FAR), and financial agency agreements, which are used only by Treasury and which allow businesses to perform inherently governmental functions on behalf of the United States. Under the law authorizing the TARP, Treasury has extraordinary discretion in using both instruments. For example, the law explicitly allowed Treasury to waive any provision of the FAR, and it arguably allowed Treasury to hire financial agents for a broader range of duties than previously permitted. Such broad authority helped Treasury to establish the TARP in great haste during a moment of crisis, but this expansive discretion must necessarily be accompanied by strict oversight.

In general, Treasury has taken significant steps to ensure that it has used private contractors appropriately, and indeed some experts have praised Treasury for going above and beyond the usual standards for government contracting. Treasury provided for competitive bidding for most of its contracts, and it has established several layers of controls to monitor contractor performance and to prevent conflicts of interest. Further, despite the pressing needs of the financial crisis, Treasury complied with the FAR, although it could have waived its provisions.

This praise must be viewed in context, however. The government contracting process is notoriously nontransparent, and although Treasury appears to have performed well on a comparative basis, significant transparency concerns remain. For example, contractors and agents are immune to requests under the Freedom of Information Act. Contractors may hire subcontractors, and those subcontracts are not disclosed to the public. Important aspects of a contractor's work may be buried in work orders that are never published in any form. Further, Treasury publishes no information on the performance of contractors during the life of the

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contract. In short, as work moves farther and farther from Treasury's direct control, it becomes less and less transparent and thus impedes accountability.

The contracting process has also created confusion about the role of small businesses in administering the TARP. In one case, Treasury awarded a contract to a "small disadvantaged business," which in turn delegated roughly 80 percent of the contract to a "large business." Thus, although on the surface it appears that the contract is being performed by a small business, in actuality a large business is essentially responsible for performance. Additionally, the Panel is concerned by the lack of outreach by Treasury to find qualified minority-owned businesses to participate in the TARP. Although several minority-owned businesses have received TARP financial agency agreements, only one prime TARP contract has been awarded to a minority-owned business.

The largest TARP financial agency agreements were those with Fannie Mae and Freddie Mac to provide administration and compliance services for Treasury's foreclosure mitigation programs. As described in detail in the case study accompanying this report, these agreements raise significant concerns. Both Fannie Mae and Freddie Mac have a history of profound corporate mismanagement, and both companies would have collapsed in 2008 were it not for government intervention. Further, both companies have fallen short in aspects of their performance, as Fannie Mae recently made a significant data error in reporting on mortgage redefaults and Freddie Mac has had difficulty meeting its assigned deadlines.

The largest TARP contracts have gone to law firms, investment management firms, and audit firms. The nature of these firms' relationship to the financial system inevitably gives rise to a wide range of potential conflict issues, including the potential for conflicts of interest with these firms' other clients, self-interested behavior in the management of TARP contracts, and the misappropriation of sensitive market information. Treasury has taken these concerns seriously and performs regular reviews to prevent or mitigate any potential conflicts of interest, but the process relies primarily on contractors and agents to self-disclose their potential conflicts. As a result, the public has only limited assurance that all potential conflicts have been disclosed and addressed. Treasury should develop an independent mechanism for monitoring conflicts that makes it less reliant on contractors and agents for information.

Concerns about private contracting are of particular significance given the scale of the involvement of contractors and agents in the TARP. Fannie Mae alone currently has 600 employees working to fulfill its TARP commitments. By comparison, Treasury has only 220 staffers working on all TARP programs combined. In other words, the vast majority of people working on the TARP today receive their paychecks from private companies, not the federal government. Although Treasury deserves credit for its efforts toward improving the contracting process, given the extensive involvement of private actors in a program of critical public significance, further improvements can and should be made.