



## Treasury's Process for Contracting for Professional Services under TARP

Special Inspector General for the Troubled Asset Relief Program



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April 14, 2011

**MEMORANDUM FOR:** Mr. Timothy Massad – Acting Assistant Secretary for  
Financial Stability, Department of the Treasury

**FROM:** Ms. Christy L. Romero – Acting Special Inspector General  
for the Troubled Asset Relief Program *by J. Romero*

**SUBJECT:** Treasury's Process for Contracting for Professional  
Services under the Troubled Asset Relief Program  
(SIGTARP-11-003)

We are providing this audit report for your information and use. It discusses the Department of the Treasury's ("Treasury") process for contracting for professional services under the Troubled Asset Relief Program ("TARP"). The Office of the Special Inspector General for the Troubled Asset Relief Program ("SIGTARP") is conducting this audit under the authority of Public Law 110-343, as amended, which also incorporates the duties and responsibilities of inspectors general under the Inspector General Act of 1978, as amended.

Treasury provided written comments to a draft of this report on April 7, 2011. The comments are addressed in the report, where applicable, and a copy of Treasury's response to this report is included in Appendix G – Management Comments. Names of individuals and proprietary contractor pricing information have been redacted in this final report.

We appreciate the courtesies extended to the staff. For additional information on this report, please contact Mr. Kurt Hyde, Deputy Special Inspector General for Audit and Evaluation ([kurt.hyde@treasury.gov](mailto:kurt.hyde@treasury.gov) / 202-622-4633), or Mr. Clayton Boyce, Acting Assistant Deputy Special Inspector General for Audit ([clayton.boyce@treasury.gov](mailto:clayton.boyce@treasury.gov) / 202-622-9257).



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This report has cleared SIGTARP’s Office of General Counsel disclosure review process and information determined to be restricted from public release has been redacted from this report.

Redaction Legend: **(b)(4)** – 5 U.S.C. § 552(b)(4), Trade Secrets, Commercial or Financial Information  
**(b)(6)** – 5 U.S.C. § 552(b)(6), Personal Information Affecting an Individual’s Privacy

## Introduction

The Office of the Special Inspector General for the Troubled Asset Relief Program (“SIGTARP”) began an audit of the Department of the Treasury’s (“Treasury”) process for contracting for professional services under the Troubled Asset Relief Program (“TARP”) in May 2010, as part of SIGTARP’s continuing oversight of TARP and in response to a request from Senator Tom Coburn, M.D. (SIGTARP Engagement Code 021.) SIGTARP interviewed Treasury officials in the Office of Financial Stability (“OFS”) and Treasury’s Procurement Services Division, reviewed relevant Treasury policies and procedures governing contracts, analyzed Treasury’s contracts with five law firms, and reviewed a sample of invoices for legal services (“fee bills”) from each of the firms. The five law firms are: (1) Cadwalader Wickersham & Taft LLP, (2) Locke Lord Bissell & Liddell LLP, (3) McKee Nelson LLP (which merged with, and is now, Bingham McCutchen LLP), (4) Simpson Thacher & Bartlett LLP, and (5) Venable LLP (“Venable”). As of December 31, 2010, OFS paid these five law firms more than \$27 million in legal fees.

This report discusses the results of SIGTARP’s audit of OFS’ contracting processes related to Venable and SIGTARP’s audit of fee bills submitted by Venable and paid by OFS. In addition, SIGTARP’s initial review of other law firms’ contracts and fee bills suggests that they too raise issues similar to those discussed in this report. SIGTARP is issuing this report so that OFS will have the opportunity to quickly strengthen its policies, controls, and contracts. SIGTARP conducted the audit between May 2010 and March 2011, and in accordance with generally accepted government auditing standards prescribed by the Comptroller General of the United States. For a discussion of the audit’s scope and methodology, see Appendix A.

Specifically, SIGTARP found weaknesses in the OFS contract for legal services with Venable, as well as the OFS policies for review of Venable’s fee bills. The OFS contract for legal services did not contain sufficiently detailed requirements or instructions on how Venable should prepare fee bills or how it should describe discrete tasks within each fee bill. Moreover, once OFS received the fee bills, the OFS Contracting Officer’s Technical Representatives (“COTRs”) were given no specific standards or instructions on how to review the fee bills for accuracy and reasonableness. Venable submitted, and OFS paid without questioning, fee bills that contained block billing, vague and inadequate descriptions of work, and administrative charges not allowed under the contract. As a result, in many instances OFS could not have adequately assessed the reasonableness of the fees.

SIGTARP likewise was unable to assess the reasonableness of Venable’s fees because of the billing methods allowed and the lack of adequate detail in many of the fee bills. As a result, SIGTARP questioned \$676,840 in fee billings (approximately two-thirds of the total value of the fee bills SIGTARP reviewed). That SIGTARP questioned these fee billings does not mean that the fees themselves were unreasonable, only that the information provided by Venable in the bills was insufficient to allow SIGTARP, or OFS, to fairly assess their reasonableness.

OFS’ current contracts and fee bill review practices create an unacceptable risk that Treasury, and therefore the American taxpayer, is overpaying for legal services. To improve controls over the review and payment of legal fee bills, SIGTARP recommends that OFS adopt the standards

used by the Federal Deposit Insurance Corporation (“FDIC”) or establish similarly detailed requirements regarding how law firms should prepare legal fee bills and then use a law firm’s compliance with these requirements as a basis for its review of those bills. SIGTARP also recommends that OFS establish policies that prescribe specific invoice review procedures for COTRs to follow in their review of legal fee bills. Lastly, SIGTARP recommends that OFS review previously paid legal fee bills to identify unreasonable or unallowable charges and seek reimbursement as appropriate. SIGTARP’s specific recommendations are discussed later in this report.

Following meetings to discuss SIGTARP’s preliminary findings and recommendations, OFS officials took actions to implement SIGTARP’s recommendations. SIGTARP acknowledges that the plans and actions OFS has taken to date are good first steps toward implementing SIGTARP’s recommendations. Specifically, OFS told SIGTARP that it implemented SIGTARP’s recommendations by sending to active legal services contractors instructions on submitting invoices, meeting with its COTRs to provide instructions on reviewing invoices, meeting with officials at FDIC to discuss adopting the best practices they use for reviewing legal fee bills, and reaching out to Venable to schedule a discussion of the findings in this report. These actions, along with others that OFS will need to take to fully implement SIGTARP’s recommendations, are positive changes for improving OFS’ review of legal fee bills and protecting taxpayer dollars. SIGTARP will continue to monitor OFS’ progress in implementing these recommendations.

## The OFS Contract and Task Orders with Venable Did Not Include Sufficiently Detailed Billing Requirements or Instructions

In response to an OFS solicitation issued February 17, 2009, Venable submitted a proposal dated February 20, 2009, detailing the firm's qualifications. That same day, OFS issued a contract to Venable for the law firm to provide expertise and guidance related to the Capital Purchase Program ("CPP"),<sup>1</sup> Capital Assistance Program ("CAP"),<sup>2</sup> and other legal tasks. Venable contracted primarily to prepare legal documentation for CPP and CAP and negotiate and close investment transactions related to those programs. The contract had a \$50,000 minimum value and a \$5 million maximum value, based on work that Venable would perform under individual task orders issued by OFS. Between February 20, 2009, and June 26, 2009, five task orders were issued under the Venable contract for work to be performed through February 2010. In total, Venable submitted 21 fee bills and was paid \$1,394,723 for its services. Appendix B lists Venable's task orders and modifications and shows the purpose, award date, and period of performance for each.

SIGTARP reviewed OFS solicitation TOFS-09-S-0001, issued February 17, 2009, and the contract awarded under the solicitation to Venable – contract TOFS-09-D-0002, dated February 20, 2009 – looking for detailed billing requirements or instructions regarding allowable costs and services and any guidance for Venable on how fee bills should be structured or how Venable attorneys and paralegals (collectively "timekeepers") should document their time. The Venable contract contained hourly rates for various labor categories for attorneys and paralegals, but SIGTARP did not find sufficiently detailed billing requirements or instructions regarding the fee bill structure or specific guidance on allowable costs and services. Instead, the contract incorporated only general payment information by reference to two Federal Acquisition Regulation ("FAR") clauses, discussed below.

The FAR is the primary regulation for use by all Federal executive agencies in their acquisition of supplies and services with appropriated funds. The FAR precludes agency acquisition regulations that unnecessarily repeat, paraphrase, or otherwise restate the FAR, limits agency acquisition regulations to those necessary to implement FAR policies and procedures within an agency, and provides for coordination, simplicity, and uniformity in the Federal acquisition process. The Emergency Economic Stabilization Act of 2008 ("EESA") – the statute that created TARP – allowed the Secretary of the Treasury to waive any provision of the FAR if the Secretary determined that "urgent and compelling circumstances make compliance with such provisions contrary to the public interest." Treasury has not, however, made use of this waiver

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<sup>1</sup> **Capital Purchase Program ("CPP").** Under CPP, Treasury directly purchased preferred stock or subordinated debentures in qualifying financial institutions. CPP was intended to provide funds to "stabilize and strengthen the U.S. financial system by increasing the capital base of an array of healthy, viable institutions, enabling them [to] lend to consumers and business[es]." Treasury invested \$204.9 billion in 707 institutions through CPP.

<sup>2</sup> **Capital Assistance Program ("CAP").** Treasury announced that it would provide capital under CAP to bank holding companies that needed to raise additional capital based on the results of Federal Reserve stress tests. On November 9, 2009, Treasury announced that CAP, originally intended to complement CPP, was closed without any investments being made under the program.

authority in its contracting for legal services, and the FAR therefore governs OFS' contracting procedures with respect to the Venable contract.

The FAR was referenced in the Venable contract, which states: "This contract incorporates one or more [FAR] clauses by reference, with the same force and effect as if they were given in full text." The following two FAR clauses dealing with payments to contractors were incorporated by reference into the Venable contract:

- FAR 52.232-1, **Payments**, which states in part:

The Government shall pay the Contractor, upon the submission of proper invoices or vouchers, the prices stipulated in this contract for supplies delivered and accepted or services rendered and accepted, less any deductions provided in this contract. Unless otherwise specified in this contract, payment shall be made on partial deliveries accepted by the Government if—

- (a) The amount due on the deliveries warrants it; or
- (b) The Contractor requests it and the amount due on the deliveries is at least \$1,000 or 50 percent of the total contract price.

- FAR 52.232-7, **Payments under Time-and-Materials and Labor-Hour Contracts**, provides general instructions on payment of invoices. The clause states in part:

The Government will pay the Contractor as follows upon the submission of vouchers approved by the Contracting Officer or the authorized representative:

- (a) *Hourly rate.* (1) *Hourly rate* means the rate(s) prescribed in the contract for payment for labor that meets the labor category qualifications of a labor category specified in the contract that are—
  - (i) Performed by the Contractor;
  - (ii) Performed by the subcontractors; or
  - (iii) Transferred between divisions, subsidiaries, or affiliates of the Contractor under a common control.
- (2) The amounts shall be computed by multiplying the appropriate hourly rates prescribed in the Schedule by the number of direct labor hours performed.
- (3) The hourly rates shall be paid for all labor performed on the contract that meets the labor qualifications specified in the contract. Labor hours incurred to perform tasks for which labor qualifications were specified in the contract will not be paid to the extent the work is performed by employees that do not meet the qualifications specified in the contract, unless specifically authorized by the Contracting Officer.
- (4) The hourly rates shall include wages, indirect costs, general and administrative expenses, and profit. Fractional parts of an hour shall be payable on a prorated basis.
- (5) Vouchers may be submitted once each month (or at more frequent intervals, if approved by the Contracting Officer), to the Contracting Officer or authorized representative. The Contractor shall substantiate vouchers (including any subcontractor hours reimbursed at the hourly rate in the schedule) by evidence of actual payment and by—
  - (i) Individual daily job timekeeping records;
  - (ii) Records that verify the employees meet the qualifications for the labor categories specified in the contract; or
  - (iii) Other substantiation approved by the Contracting Officer.

SIGTARP also examined the five OFS task orders<sup>3</sup> issued under the Venable contract, but none included any additional invoice or billing requirements. The task orders did include instructions on how to email fee bills to Treasury's vendor pay system for payment, but did not provide instructions on how the fee bills should be structured or how attorneys and paralegals should document and report their time for each activity.

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<sup>3</sup> Although five task orders were issued under the Venable contract, no work was performed under Task Order 4; thus, no fees were billed or paid under Task Order 4. In addition, Task Order 3 was a fixed-price task order that did not require specific instructions regarding allowable costs and services beyond the closing of the subject transaction.



## OFS Did Not Have Sufficiently Detailed Procedures for Reviewing Legal Fee Bills

Under FAR 1.602, only contracting officers are granted authority to enter into, administer, and terminate contracts on behalf of the Government. Contracting officers are also responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships. The Department of the Treasury Acquisition Regulation, which supplements the FAR, allows the contracting officer to delegate certain responsibilities to a COTR.<sup>4</sup>

Because OFS does not have procurement authority, a contracting officer in Treasury's Procurement Services Division solicits, negotiates, and awards contracts on behalf of OFS. For each contract, the contracting officer also appoints a COTR through a letter of designation, after the COTR is nominated by the program office, in this case OFS.<sup>5</sup> The letter of designation describes the authority as well as specific responsibilities of the COTR. Each contract identifies the responsible COTR. In all, one contracting officer and three OFS COTRs worked on the Venable contract.

Until September 2009 – after the award of both the Venable contract and the task orders – OFS used procedures issued by Treasury's Procurement Services Division ("Treasury's procedures"). Treasury's procedures state that the COTR is responsible for, among other items, "Reviewing contractor invoices and supporting documentation for certification," but include no specific instructions beyond that requirement.<sup>6</sup> Moreover, while Treasury's procedures address a broad

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<sup>4</sup>The Department of the Treasury Acquisition Regulation states: "Requisitioning offices must nominate to the contracting officer an individual to act as the contracting officer's technical representative in the administration and monitoring of a contract. Selection is to be based on the technical expertise and experience of the individual..." The COTRs' authorities and responsibilities are communicated to them in their COTR Designation Memorandum, which is prepared for each contract.

<sup>5</sup>As noted in the preceding footnote, the Department of the Treasury Acquisition Regulation requires Treasury program offices receiving support services through contracts to nominate a COTR.

<sup>6</sup>Treasury's standard operating procedure for invoice control, dated February 28, 1994, describes COTR responsibilities as follows:

The COTR is designated ... to furnish technical clarification, monitor contract performance and maintain an arm's length relationship with the contractor throughout the term of his appointment. The COTR's technical knowledge in the areas of performance covered by the contract allows him to function as the Government representative most capable of providing technical direction to the contractor. Generally, a COTR's responsibilities include:

- a. Controlling all Government technical interface with contractor personnel;
- b. Assuring that appropriate action is taken on technical correspondence pertaining to contract/delivery orders and ensuring that adequate files are maintained;
- c. Furnishing documentation on any request for change, deviation, or waiver to the contracting officer for action;
- d. Reviewing contractor invoices and supporting documentation for certification;
- e. Notifying the contracting officer of performance problems and recommending corrective action;
- f. Reviewing contract deliverables and accepting/rejecting them;
- g. Evaluating contractor proposals and developing Government estimates;
- h. Preparing contractor performance evaluations; and
- i. Accounting [for] and monitoring any Government furnished property (GFP).

array of procurement functions, such as tracking invoices and vouchers, they do not address precise activities required of COTRs in conducting reviews of legal fee bills or similar bills.

After September 2009, OFS established its own procedures. SIGTARP reviewed OFS "Contracting Officer Technical Representative (COTR) Nomination and File Organization Procedures" ("COTR procedures") and OFS "Administration Procedures" to determine whether these procedures are sufficient to ensure that payments are made only for invoices submitted by contractors that adequately and accurately reflect the work performed and that only include allowable costs. The COTR procedures state, in Section 4.3.1.2, Contract Performance Management, that COTR duties may include, "Reviewing contractor invoices to ensure costs are allocable to the contract, allowable pursuant to financial regulations, and reasonable." However, the procedures do not provide specifics on allowable and unallowable costs, services, and charges; nor are COTRs separately provided this information as a guide to perform reviews of the fee bills. The OFS procedures are similar to Treasury's procedures discussed earlier in that they do not provide specific instructions or guidelines that would serve as a basis for COTRs to review and question invoices.

Although the OFS COTR procedures make no reference to the FAR regarding what is allowable, the FAR governs the OFS contract with Venable. Under FAR 31.201-2, a cost is allowable only when it complies with all of the following five requirements. The cost must: (1) be reasonable (not exceed that which would be incurred by a prudent person in the conduct of a competitive business), (2) be allocable (incurred specifically for the contract), (3) meet standards promulgated by the Cost Accounting Standards Board or generally accepted accounting principles, (4) be within the terms of the contract, and (5) be within any limitations set forth by FAR Subpart 31.2, which prescribes the determination and proper treatment of costs in Government contracts with commercial organizations.

Three of the five task orders awarded to Venable were labor-hour<sup>7</sup> task orders. This type of contract provides for acquiring supplies or services on the basis of direct labor hours at specified, fixed hourly rates that include wages, overhead, general and administrative expenses, and profit. However, according to FAR 16.601(c)(1), "A time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, appropriate Government surveillance of contractor performance is required to give reasonable assurance that efficient methods and effective cost controls are being used." FAR 16.301-3(a) further prescribes that this type of cost-reimbursement contract "may be used only when – (1) The contractor's accounting system is adequate for determining costs applicable to the contract; and (2) Appropriate Government surveillance during performance will provide reasonable assurance that efficient methods and effective cost controls are used."

All three OFS COTRs interviewed by SIGTARP confirmed that there were no written standards for the invoice review process. The OFS COTRs told SIGTARP that they employ informal processes that begin when the contractor submits an invoice and status report that includes hours and dollars spent. The COTRs stated that they review all documentation for accuracy and

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<sup>7</sup> As defined in FAR 16.602, a labor-hour contract is a variation of the time-and-materials contract, differing only in that materials are not supplied by the contractor.

reasonableness and typically communicate with the various OFS business teams and others receiving a contractor's work to determine whether the time and information reported are accurate. They also review invoices submitted by other vendors for similar tasks and compare them to the invoice they are examining. The COTRs informed SIGTARP that when conducting their reviews of legal contracts in particular, they look for issues such as unauthorized attorneys working on the contract, double billing, or "other direct costs"<sup>8</sup> not covered by the contract such as automated legal research, long-distance telephone calls, and commercial messenger and delivery services. According to the COTRs, unless the contract states that other direct costs are reimbursable, they are not paid. The COTRs told SIGTARP they employed all of these informal processes when reviewing the Venable fee bills.

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<sup>8</sup>"Other direct costs" are contract-related expenses for anything other than direct labor charges.

## OFS Should Adopt Best Practices Used by Other Federal Entities to Review Legal Fee Bills

The OFS contract with Venable did not have sufficiently detailed billing requirements or instructions regarding allowable costs and services, and OFS policies do not prescribe specific invoice review procedures for COTRs. In conducting this audit of Venable's invoices, SIGTARP looked to:

- FAR clauses expressly incorporated in the OFS contract with Venable;
- general provisions in the FAR governing labor-hour contracts; and
- practices and standards – which SIGTARP considers best practices – used by other Federal entities, particularly the Federal Deposit Insurance Corporation's ("FDIC") *Outside Counsel Deskbook*, as well as the Department of Justice's United States Trustee Guidelines,<sup>9</sup> and local rules of court established by the Delaware Bankruptcy Court.<sup>10</sup>

FDIC appears to be particularly analogous. It has a long history of contracting with law firms to provide legal representation and advice to the agency to assist it in the management and liquidation of assets and liabilities from closed, insured banks. Outside counsel under contract to FDIC provide a broad range of services, including liquidation of failed insured depository institutions; bankruptcy and creditors' rights; collections; foreclosures; real estate and financial transactions including debt restructuring; general business and corporate law advice; professional, director, and officer liability issues; and other litigation. As of July 31, 2010, FDIC's website ([www.FDIC.gov](http://www.FDIC.gov)) listed more than 900 law firms on its "List of Counsel Available."

FDIC's *Outside Counsel Deskbook* directs, among other things, the billing practices of law firms working with FDIC. It includes:

- requirements for outside counsel to prepare a budget at the commencement of a matter and submit detailed fee bills on a regular basis in accordance with the budget;
- submission instructions, including requirements for monthly billing and for billing within 30 days of the last day of the contractor's billing cycle;
- descriptions and lists of billable and non-billable fees and expenses, including documented approval and receipts for non-overhead expenses; and

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<sup>9</sup>The Bankruptcy Reform Act of 1994 amended the responsibilities of the United States Trustees under 28 U.S.C. 586(a)(3)(A) to provide that, whenever they deem appropriate, United States Trustees will review applications for compensation and reimbursement of expenses under section 330 of the Bankruptcy Code, 11 U.S.C. 101, et seq., in accordance with procedural guidelines adopted by the Executive Office for United States Trustees. The guidelines are available at [http://www.justice.gov/ust/eo/rules\\_regulations/guidelines/docs/feeguide.htm](http://www.justice.gov/ust/eo/rules_regulations/guidelines/docs/feeguide.htm).

<sup>10</sup>Although SIGTARP assessed Rule 2016-2 (d) from the Local Rules for the United States Bankruptcy Court, District of Delaware, which became effective February 1, 2009, all bankruptcy courts have similar standards for fees, whether contained in local rules or not. The Delaware Bankruptcy Court is considered a leading bankruptcy court for standards because of the number of corporations registered in the state. The rule is available at <http://www.deb.uscourts.gov/LocalRules/LOCAL%20RULES%202009.pdf>.

- invoice format, including requirements and examples for:
  - detail and description of services or activities (time billed for each activity should be identified separately; “block billing” – the combination of different types of activities in one entry on the invoice – is prohibited, even if the same individual performed the activities, unless the total time charged is no more than 30 minutes);
  - time increments (billing in increments of greater than 0.1 hour – 6 minutes – is unacceptable);
  - itemization of expenses; and
  - travel reimbursements, similar to requirements in Government travel regulations.

SIGTARP's review of practices used by the United States Trustees and the Delaware Bankruptcy Court disclosed that they involve similar requirements for legal fee bills.<sup>11</sup> FDIC's *Outside Counsel Deskbook*, however, contains more detailed instructions, examples, and explanations. SIGTARP used FDIC's *Outside Counsel Deskbook* in its review of Venable's fee bills, in addition to the FAR clauses included in the OFS contract with Venable and other FAR provisions governing labor-hour contracts.

Using FDIC's *Outside Counsel Deskbook*, SIGTARP prepared a list of potential billing issues and then evaluated a sample of Venable's legal fee bills paid by OFS by comparing each individual hourly labor charge in the fee bills to the list of potential billing issues. SIGTARP's results, as discussed below, show how Treasury's contract language and review procedures cause it to fall short in comparison to the best practices identified by SIGTARP. All potential billing issues SIGTARP assessed are listed in Appendix D.

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<sup>11</sup> The Delaware Bankruptcy Court rule on compensation and expense reimbursement, which is particularly succinct, is included in Appendix C.

## SIGTARP Found Block Billing, Vague and Inadequate Descriptions of Work, and Administrative Charges – All of Which Should Have Been Questioned Before Payment

The OFS contract with Venable ultimately governs allowable services and costs. Recouping expenditures SIGTARP considers questionable or potentially inappropriate may be difficult, in part because the contract provides little or no guidance on such issues. If OFS had included specific, detailed provisions regarding billing methods and allowable services and costs in its contract with Venable, or had more effective internal procedures for reviewing legal fee bills, the billing methods SIGTARP observed should not have been allowed. But that is not to suggest that Venable violated the terms of its contract with OFS. Although many invoices were submitted with insufficient detail to assess their reasonableness, they were submitted in a manner permitted by OFS both because sufficiently detailed billing requirements or instructions were not included in the Venable contract and because the OFS COTRs did not question them during the review process. The following discussion and examples demonstrate differences between OFS' legal fee bill review processes and what SIGTARP considers best practices.

Based on the dollar values of individual Venable fee bills, SIGTARP judgmentally selected and analyzed 6 of the 21 fee bills submitted by Venable and paid by OFS. The 6 sampled fee bills represented about \$1 million of the total \$1.3 million billed by Venable (or 74% of total billings).

In an effort to assess the reasonableness of Venable's legal fees, SIGTARP compared descriptions of work performed in each individual time charge on the sampled fee bills to a list of potential billing issues. This list is in Appendix D.

SIGTARP questioned any item that:

- was not a professional service and was not directly attributable to achieving the contract or task order statement of work, such as preparing an invoice or researching case law for matters outside the scope of work;
- did not have sufficiently detailed descriptions of the task performed; or
- had descriptions of more than one task in the time entry, which is typically called lump billing or block billing.

After reviewing each charge, SIGTARP classified it as:

- “allowable,” when no exception to the FAR or SIGTARP's list of potential billing issues was noted;
- “unallowable,” when the cost was not allowed as prescribed by FAR 31.201-2<sup>12</sup> or fit the description of a charge included in SIGTARP's list of potential billing issues; or

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<sup>12</sup> As stated previously, a cost is “allowable” only when it complies with all of the following five requirements. The cost must: (1) be reasonable (not exceed that which would be incurred by a prudent person in the conduct of a competitive business), (2) be allocable (incurred specifically for the contract), (3) meet standards promulgated by the Cost Accounting Standards Board or generally accepted accounting principles, (4) be within the terms of the contract, and (5) be within any limitations set forth in FAR Subpart 31.2, which prescribes the determination and proper treatment of costs in Government contracts with commercial organizations.

- “unsupported,” when the description of work did not contain enough information for SIGTARP to determine whether the task met the five FAR requirements to be “allowable” or whether it fit the description of a charge included in SIGTARP’s list of potential billing issues.

SIGTARP’s audit of OFS’ review of Venable fee bills determined that the COTRs did not question any fees for labor on the sampled invoices or request any labor fee write-downs on these or any of the other Venable fee bills submitted. According to one of the three COTRs on the Venable contract, the COTRs would disapprove a charge as improper, for example, if it was performed outside the contract’s scope of work, such as work on a separate program, or was prohibited in the contract, or if it exceeded the overall funding ceiling for the contract. OFS told SIGTARP that the project attorney would typically review the fee bill hours for reasonableness, after which the COTR would approve the fee bill for payment. In some instances, Venable voluntarily reduced its fees before submitting the fee bill to OFS. On one fee bill, Venable noted that the invoice reflected Venable’s write-down of about \$14,000, based on adjustments to the amount of partner and associate hours, but the reason for the write-down was not explained further. SIGTARP noted that direct costs other than fees for labor (such as automated legal research, long-distance telephone calls, and commercial messenger and delivery services) were appropriately questioned by the COTRs and not paid. According to the COTRs, those costs were not included in the contract and therefore not allowed.

SIGTARP assessed the description of work performed in each of the 890 individual time charges in the 6 sampled Venable fee bills. The 890 charges comprised a total of [redacted-(b)(4)] timekeeper hours totaling \$1,027,049 in fees, of which SIGTARP questioned [redacted-(b)(4)] hours (64%) totaling \$676,840 (66%). Table 1 identifies the costs SIGTARP questioned for each sampled task order. Had OFS requested and received additional information from Venable, SIGTARP might well have categorized many of these questioned costs as allowable. SIGTARP’s rationale for questioning the charges is explained below.

TABLE 1

<b>QUESTIONED LEGAL FEES</b>			
<b>Task Order and Invoice Number</b>	<b>Invoice Total</b>	<b>Questioned Fees</b>	<b>Percentage of Costs Questioned</b>
Task Order 1: Invoice 04132009	\$411,190	\$190,679	46%
Task Order 1: Invoice 06202009 <sup>a</sup>	146,236	89,270	61%
Task Order 2: Invoice 04172009	316,739	298,597	94%
Task Order 2: Invoice 06192009	25,851	20,108	78%
Task Order 5: Invoice 12302009	74,491	46,956	63%
Task Order 5: Invoice 12332009	52,541	31,229	59%
<b>Total</b>	<b>\$1,027,049</b>	<b>\$676,840</b>	<b>66%</b>

Note: <sup>a</sup> This June 2009 invoice also included details of all time charges billed in May 2009, invoice 05182009. Therefore, SIGTARP reviewed \$86,514 in the June 2009 fee bill and \$59,722 in the May 2009 fee bill.

Source: SIGTARP analysis of data provided by Venable.

SIGTARP questioned most of the Venable charges reviewed because they were block billed, meaning that a single charge included descriptions of several different tasks without specifying the time required to complete each task, and together the tasks totaled more than 30 minutes.<sup>13</sup> While Treasury's contract with Venable did not specifically prohibit block billing, SIGTARP believes that the COTRs had the authority to reject invoices containing such billing based on FAR standards. Reasonableness of individual tasks, and, therefore, allowability under the FAR guidelines, cannot be determined when charges are block billed. That the COTRs did not use this authority under the FAR guidelines may have been a product of the lack of sufficiently detailed OFS procedures on reviewing fee bills. Because multiple tasks were included in block billed charges without actual completion times, SIGTARP was not able to determine which portions of these charges are appropriate and so questioned the entire amount. Venable would need to provide additional information for OFS and SIGTARP to determine whether these charges were reasonable and therefore allowable.

Examples of block billed charges SIGTARP found when auditing Venable's fee bills include:

- In two time entries, a Venable timekeeper billed a total of more than 20 hours, charging more than \$[amount redacted-(b)(4)], describing multiple tasks in each entry. The invoice stated:

03/23/09 PARTICIPATE IN CALL WITH ALL PARTICIPANTS TO REVIEW CITI PROGRAM STRUCTURE AND RELATED ISSUES; PARTICIPATE IN CALLS WITH GM AND CHRYSLER COUNSEL TO REVIEW SPECIFIC COMMENTS TO LOAN DOCUMENTS; WORK RE ANALYSIS AND REVIEW OF REQUESTED CHANGES; RELATED TELEPHONE CONFERENCES AND E-MAILS. (10.8 HOURS)

03/25/09 REVIEW AND REVISE SERVICING AGREEMENT, SUPPLIER PURCHASE AGREEMENT AND OEM PAYING SERVICES AGREEMENT; REVIEW OEM AND CITI COUNSEL COMMENTS ON DOCUMENTS; RELATED TELEPHONE CONFERENCES AND E-MAILS. (10.9 HOURS)

SIGTARP questioned these charges because it could not determine the reasonableness of the charges without separate timekeeping entries for each task. When asked, one COTR explained that he approved charges based on consultations with the OFS attorneys closest to the Venable attorneys performing the work. In response to a preliminary draft of this report, OFS told SIGTARP, "We disagree with your statement that the work done by the lawyers working on time sensitive and highly labor intensive task orders was not allocable to the contract. The law firm as well as the OFS project attorney review invoices to ensure the work is in scope and allocable under the FAR." This response only addresses whether the work falls within the scope of the task order, not the reasonableness of the time charged. Neither the COTR nor OFS attorneys could reasonably determine whether the time charged for each activity is reasonable because the activities are grouped together in one time entry.

- Another Venable timekeeper billed 13.7 hours in a single time entry for multiple tasks and charged more than \$[amount redacted-(b)(4)]. This same timekeeper used the exact same description on multiple days with similar amounts charged, for a total of nearly \$[amount redacted-(b)(4)]. The invoice stated:

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<sup>13</sup> Consistent with the FDIC *Outside Counsel Deskbook*, SIGTARP did not question block billed charges totaling 30 minutes or less.



03/22/09	REVIEW AND REVISE TRANSACTION DOCUMENTS; CONFERENCE CALLS; INTERNAL CONFERENCES. (6.2 hours)
03/23/09	REVIEW AND REVISE TRANSACTION DOCUMENTS; CONFERENCE CALLS; INTERNAL CONFERENCES. (12.8 HOURS)
03/24/09	REVIEW AND REVISE TRANSACTION DOCUMENTS; CONFERENCE CALLS; INTERNAL CONFERENCES. (9.8 HOURS)
03/25/09	REVIEW AND REVISE TRANSACTION DOCUMENTS; CONFERENCE CALLS; INTERNAL CONFERENCES. (11.4 HOURS)
03/26/09	REVIEW AND REVISE TRANSACTION DOCUMENTS; CONFERENCE CALLS; INTERNAL CONFERENCES. (13.7 HOURS)
03/27/09	REVIEW AND REVISE TRANSACTION DOCUMENTS; CONFERENCE CALLS; INTERNAL CONFERENCES. (11.2 HOURS)
03/29/09	REVIEW AND REVISE TRANSACTION DOCUMENTS; CONFERENCE CALLS; INTERNAL CONFERENCES. (6.2 HOURS)
03/30/09	REVIEW AND REVISE TRANSACTION DOCUMENTS; CONFERENCE CALLS; INTERNAL CONFERENCES. (10.8 HOURS)
03/31/09	REVIEW AND REVISE TRANSACTION DOCUMENTS; CONFERENCE CALLS; INTERNAL CONFERENCES. (10.2 HOURS)

Further, in reviewing the descriptions above, the COTR could not have reasonably determined with whom the conference calls and internal conferences were held and for what purpose, and whether the internal conferences were necessary for the level of persons involved, and not longer than necessary. That the descriptions were exactly the same for nine nearly consecutive days should have been a red flag to the reviewing official, who should have questioned the charges and obtained greater specificity. In addition, SIGTARP found instances where internal conferences were charged and the time charges among the attorneys involved for these same conferences varied – the COTR should have questioned these charges on their face, but would have had greater success in challenging them if the charges were not block billed.

The COTR who reviewed these charges stated that he did not have firsthand knowledge of the work performed and that he relied on the OFS attorneys who were working closely with Venable. In its response to a preliminary draft of this report, OFS stated that “the OFS attorney working with Venable had such firsthand knowledge [of this timekeeper’s work] and confirm[ed] that given the amount of drafting being done as well as negotiations, emails, and calls that the type of billing did not cause her any concerns.” Based on the way the time charges in question were block billed, neither the OFS attorneys nor the COTR could reasonably determine that the time spent on each activity was appropriate or reasonable, particularly since the bills were submitted weeks after the OFS attorney interaction occurred. Furthermore, it would be extremely difficult – if it is possible at all – for an OFS attorney working on multiple projects with multiple attorneys to determine weeks later with any specificity that the work performed in these vague, identical block billings was reasonable. After discussions with SIGTARP on a draft of this report and its recommendations, OFS has begun to implement SIGTARP’s recommendations to change its practices to conform to those best practices employed by FDIC and the bankruptcy courts.

SIGTARP also questioned administrative charges, such as preparing fee bills, reviewing the OFS contract and task orders, and addressing conflict of interest issues, primarily because it could not

determine the reasonableness of these charges. In addition, preparing fee bills is not a professional service and not directly attributable to achieving the contract or task order statement of work. As specified in the FAR, under labor-hour contracts, hourly rates already include wages, indirect costs, and general and administrative expenses. Regarding administrative charges, in its *Outside Counsel Deskbook*, FDIC requires that its contractors include in their hourly rates all costs of doing business including overhead, general and administrative costs, fringe benefits, and profit. The *Outside Counsel Deskbook* expressly prohibits fees for “[i]nvoice preparation, review, or for corrections to the invoice required by the FDIC oversight attorney or legal information technician.” It further states that FDIC will only pay reasonable costs for services rendered or supplies provided in the course of representation. OFS when reviewing Venable’s fee bills should have denied or limited these types of administrative charges. SIGTARP found and questioned many administrative charges, including:

- Venable timekeepers billed more than 17 hours to review the OFS contract, task order, and conflict of interest issues, as well as for tasks labeled “file organization” and “organizational work,” in the first five days of the contract. These charges totaled more than \$[amount redacted–(b)(4)]:

02/20/09 REVIEW OF CONTRACT AWARDED BY TREASURY; ANALYSIS OF INITIAL TASKS. (2.2 HOURS)

02/22/09 REVIEW OF TERMS OF OFS TREASURY/VENABLE AWARD/CONTRACT. (0.8 HOURS)

02/23/09 PHONE CONVS. WITH [name redacted–(b)(6)] AND OTHERS CONCERNING REQUIREMENTS UNDER TARP CONTRACT WITH DEPT. OF TREASURY; INITIAL REVIEW OF SOLICITATION, CONTRACT AND PROPOSAL TO IDENTIFY POTENTIAL AREAS OF CONCERN. (0.9 HOURS)

02/23/09 REVIEW TREASURY E-MAILS RE COMPLIANCE ISSUES; ASSEMBLE PRELIMINARY TEAM FOR PROJECTS. (1.0 HOURS)

02/23/09 ORGANIZATIONAL WORK RELATED TO TREASURY PROJECT; CALL FROM TREASURY RE CONFLICTS ISSUES AND MITIGATION PLAN; INTERNAL MEETINGS AND CONFERENCE CALL WITH [name redacted–(b)(6)] REGARDING ORGANIZATION OF THE PROJECT; REVIEW OF RELATED DOCUMENTS; ASSIGNMENT OF RESEARCH TASKS. (6.6 HOURS)

02/24/09 REVIEW TREASURY PROPOSAL; CONFERENCE CALL WITH [names redacted–(b)(6)]. (1.2 HOURS)

02/24/09 MEETING WITH VENABLE ATTORNEYS AND CONFERENCE CALL WITH [name redacted–(b)(6)] RE REVIEW OF TREASURY CONTRACT; COMPLIANCE ISSUES; REVIEW OF ISSUES; ASSIGNMENTS. (0.6 HOURS)

02/24/09 CALL FROM US TREASURY RE NEEDED REVISIONS TO CONTRACT; INTERNAL CALLS TO [name redacted–(b)(6)] AND OTHERS RE CONTRACTING REQUIREMENTS; FILE ORGANIZATION; CONFERENCE CALL WITH [name redacted–(b)(6)] AND VENABLE ATTORNEYS; IDENTIFICATION OF AND ASSIGNMENT OF INITIAL RESEARCH ASSIGNMENTS. (4.4 HOURS)

- Some Venable timekeepers charged for preparing fee bills, as well as for performing other administrative duties. On one invoice, these charges totaled more than \$[amount redacted–(b)(4)]:

04/07/09 ATTENTION TO WEEKLY REPORTING AND BILLING ISSUES. (1.7 HOURS)

04/13/09 REVIEW BILLING STATEMENT AND WEEKLY REPORT. (0.6 HOURS)

04/14/09 ATTENTION TO CONFLICTS ISSUES; WEEKLY REPORT PREPARATION. (1.2 HOURS)

04/21/09 ATTENTION TO WEEKLY REPORT AND ADMINISTRATIVE MATTERS. (2.0 HOURS)

04/23/09 TELEPHONE CONFERENCE WITH [name redacted-(b)(6)] RE TREASURY BILLING, CONFLICTS ISSUES; TELEPHONE CALL TO [name redacted-(b)(6)] RE ESTIMATE OF REMAINING WORK; DRAFT E-MAIL TO [name redacted-(b)(6)] RE ESTIMATE OF FUTURE COSTS TO COMPLETE PROJECT. (0.9 HOURS)

Regarding time billed to review one Venable contract, the OFS COTR commented that he did not know of anything prohibiting billing for that task. When asked about the charges related to invoice preparation, the COTR commented that, based on his understanding from Treasury's procurement staff, an invoice is considered a contract deliverable and there is no prohibition on billing for that type of activity. However, SIGTARP's review of the OFS contract and task orders disclosed that the invoice was not a deliverable. The only deliverable under each task order was the status report. Accordingly, under the existing OFS contract and task orders, charges for invoice preparation should not have been paid. Had OFS followed best practices as outlined in the FDIC *Outside Counsel Deskbook*, such charges would have been expressly prohibited.

Other OFS-approved charges had vague descriptions, were inconsistently billed, or included multiple tasks billed together so that a reviewer could not determine the amount of time spent on each task – and therefore whether the time spent was reasonable. These charges should have been challenged by OFS under FAR requirements. The FDIC *Outside Counsel Deskbook* notes that descriptions of tasks should be “brief and informative” and contrasts between a description of a time charge for “research,” which lacks detail, and one for “legal research on statute of limitations issues,” which provides more detail. Further, inadequate descriptions make it difficult for OFS to determine whether the charge is allowable pursuant to the FAR. The following example illustrates the need for adequate descriptions of all charges:

- One Venable timekeeper billed 8.5 hours, resulting in a charge of more than \$[amount redacted-(b)(4)], for an internal conference with other Venable employees, without further explanation or identification of a specific subject. The invoice stated:

03/14/09 CONFERENCE WITH [name redacted-(b)(6)] AND [name redacted-(b)(6)].  
(8.5 HOURS)

- The other Venable timekeepers referenced above recorded the time as follows:

03/14/09 CONFERENCES WITH [name redacted-(b)(6)], [name redacted-(b)(6)], [name redacted-(b)(6)], [name redacted-(b)(6)]; PREPARE TERM SHEETS. (7.7 HOURS)

03/14/09 REVIEW MODEL TRANSACTION DOCUMENTS; INTERNAL CONFERENCES; DRAFT TERM SHEET. (9.2 HOURS)

SIGTARP questioned the entire amount of each of these entries because the timekeepers did not provide enough detail for SIGTARP to determine whether the charges were reasonable. Based on these timekeepers' methods, it would be extremely difficult for a COTR reviewing an invoice to determine whether these charges were allowable or unallowable. One other issue is evident in this string of billings – the first timekeeper charged 8.5 hours for the conference; however, the second timekeeper charged less time, and possibly significantly less time, but SIGTARP could not determine how much because of the block billing. The third timekeeper may have charged less time as well, but because of the block billing, SIGTARP was unable to determine how much time the attorney allocated to each activity.

When asked about the 8.5 hour internal conference, the OFS COTR who approved that fee bill reiterated that he relied on the input of the OFS attorneys working most closely with the Venable team. He also commented that he reviewed the status reports to determine the volume of effort. However, another OFS COTR reviewed this charge during a meeting with SIGTARP and commented that she would have preferred to have seen more detail contained in the charge, although none of the OFS COTRs questioned any fees for labor on the sampled invoices. Further, OFS informed SIGTARP that OFS has no procedures concerning OFS attorneys reviewing fee bills, and OFS provided no documentation of any such review of legal fee bills. Furthermore, because the conferences were internal, no meaningful review or firsthand knowledge by OFS project attorneys of the relevance of this 8.5 hour conference is possible. Likewise, the volume of effort shown in the status report would have no bearing on or detailed information regarding internal conferences.

Table 2 presents the questionable and unsupported legal fees that SIGTARP identified and categorized by type of billing issue. In many instances, SIGTARP questioned charges for more than one reason, as noted in the table where columns have more than one description. SIGTARP used combined categories to eliminate double counting the value of questioned charges.

TABLE 2

<b>QUESTIONED LEGAL FEES BY CATEGORY</b>						
<b>Task Order and Invoice Number</b>	<b>Block Billed Only</b>	<b>Administrative Tasks Only</b>	<b>Inadequate Detail Only</b>	<b>Block Billed and Administrative Tasks</b>	<b>Block Billed and Inadequate Detail</b>	<b>Block Billed, Administrative Tasks, and Inadequate Detail</b>
Task Order 1: Invoice 04132009	\$139,025	\$9,853	\$3,835	\$25,336	\$12,630	\$0
Task Order 1: Invoice 06202009	37,695	9,735	1,316	3,658	35,449	1,416
Task Order 2: Invoice 04172009	150,685	270	6,633	648	140,360	0
Task Order 2: Invoice 06192009	16,436	378	0	3,294	0	0
Task Order 5: Invoice 12302009	44,506	172	0	0	2,278	0
Task Order 5: Invoice 12332009	28,448	230	481	1,150	920	0
<b>Subtotal</b>	<b>\$416,796</b>	<b>\$20,638</b>	<b>\$12,265</b>	<b>\$34,086</b>	<b>\$191,637</b>	<b>\$1,416</b>
<b>Total</b>						<b>\$676,840</b>

Notes: Numbers affected by rounding. The first three columns of questioned legal fees refer to fees SIGTARP questioned for the single reason listed. The last three columns refer to fees SIGTARP questioned for multiple reasons. Categories are combined to avoid duplication of questioned costs. Categories are explained in more detail in Appendix D.

Source: SIGTARP analysis of data provided by OFS

While Table 2 shows all billing issues SIGTARP identified in the sampled invoices, SIGTARP was not able to quantify an amount that it believes OFS improperly paid to Venable because of the lack of detail in the descriptions of work.

## Conclusions and Recommendations

SIGTARP's analysis of OFS' contracting process and fee bill review related to Venable as well as SIGTARP's initial analysis of fee bills and contracts of other law firms have disclosed areas where OFS can immediately improve its contracting policies and its controls over payment of outside legal fees. The need for improvement is particularly acute given that most of the OFS legal service contracts and task orders SIGTARP reviewed were labor-hour contracts, which, as the FAR explains, require "appropriate Government surveillance of contractor performance ... to give reasonable assurance that efficient methods and effective cost controls are being used."

First, OFS contracts for legal services do not adequately describe how to prepare fee bills or provide adequate information on what costs, services, or charges are allowable or unallowable. Although OFS legal services contracts incorporate several FAR clauses regarding general payment and allowable cost information, the mere reference to these clauses does not appear to have given sufficient guidance either to outside counsel preparing fee bills or OFS COTRs reviewing those bills to ensure that tax dollars are wisely and appropriately spent.

Second, OFS' procedures for reviewing fee bills offer insufficient guidance to OFS COTRs, resulting in inadequate and inconsistent review of legal fee bills. Those procedures regarding invoice review simply state that COTR duties may include "Reviewing contractor invoices to ensure costs are allocable to the contract, allowable pursuant to financial regulations, and reasonable." They do not provide specifics on allowable and unallowable costs, services, and charges; nor are OFS COTRs separately provided this information as a guide to perform reviews of the fee bills.

As a result, OFS COTRs did not question any hourly labor charges, including those with vague and inadequate descriptions of work and those that were block billed, even though those practices made assessing the reasonableness of the bills exceedingly difficult, if it was possible at all. In addition, the lack of detailed language in the OFS contract with Venable resulted in OFS COTRs routinely approving charges for tasks that could be considered administrative, and thus not reimbursable under a labor-hours contract. As specified in the FAR, under labor-hour contracts, hourly rates should already include wages, indirect costs, and general and administrative expenses. Nonetheless, SIGTARP noted numerous instances of charges for administrative tasks, such as Venable attorneys preparing and reviewing invoices, reviewing the contract, and reviewing task orders. At a minimum, these charges should have been challenged by the OFS COTRs, but SIGTARP saw no documented evidence to indicate that OFS questioned or rejected these administrative charges.

OFS' current practices create an unacceptable risk that Treasury, and therefore the American taxpayer, is overpaying for legal services. OFS should immediately provide its outside attorneys specific directions on how to prepare fee bills and how to describe discrete tasks within each fee bill. Further, OFS should provide its COTRs specific instructions and guidance on how to review legal fee bills for accuracy and reasonableness and incorporate those instructions into written policies. To that end, SIGTARP met with OFS to discuss a draft of this report and its recommendations, and OFS has already begun to take steps to improve its controls by adopting SIGTARP's recommendations. Although SIGTARP will need to assess OFS' corrective actions,

to date OFS has provided its outside counsel instructions on submitting invoices, met with and provided training to its COTRs to provide instructions on reviewing invoices, met with FDIC officials to discuss FDIC's practices for reviewing fee bills, and planned further follow-up actions with Venable regarding SIGTARP's findings. These actions, along with others that OFS will need to take to fully implement SIGTARP's recommendations, are positive changes for improving OFS' review of legal fee bills.

To improve controls over the review and payment of legal fees and related costs, SIGTARP makes the following recommendations. OFS should:

1. Adopt the legal fee bill submission standards contained in the Federal Deposit Insurance Corporation's *Outside Counsel Deskbook*, or establish similarly detailed requirements for how law firms should prepare legal fee bills and describe specific work performed in the bills, and which costs and fees are allowable and unallowable.
2. Include in OFS open legal service contracts detailed requirements for law firms on the preparation and submission of legal fee bills, or separately provide the instructions to law firms and modify OFS open contracts, making application of the instructions mandatory.
3. Adopt the legal fee bill review standards and procedures contained in the Federal Deposit Insurance Corporation's *Outside Counsel Deskbook*, or establish similarly specific instructions and guidance for OFS COTRs to use when reviewing legal fee bills, and incorporate those instructions and guidance into OFS written policies.
4. Review previously paid legal fee bills to identify unreasonable or unallowable charges, and seek reimbursement for those charges, as appropriate.

SIGTARP will continue to monitor OFS' progress in implementing these recommendations.

## Management Comments and SIGTARP's Response

Treasury provided comments on a draft of this report on March 30, 2011, and a written response to the draft report in a memorandum dated April 7, 2011. Treasury's memorandum is reproduced in full in Appendix G.

In its response, Treasury stated that based on numerous internal controls it has implemented, Treasury believes "...that OFS has implemented strong and effective processes in regard to all of its contracts, including those for legal services. We believe that our practices fully satisfy the requirements of the FAR, and we disagree with the...Report's suggestion that our practices have created an 'unacceptable risk' that Treasury is overpaying for legal services. Nonetheless, we also recognize that every internal process can be improved, and we are committed to developing the best possible internal controls to protect taxpayer resources."

SIGTARP continues to believe that OFS' legal fee bill review practices create an unacceptable risk that Treasury may be overpaying for legal services. Because OFS did not question legal fee bills that contained block billed charges, vague and inadequate descriptions of work performed, and charges for administrative functions not allowed under the contract, it could not have conclusively determined that amounts billed and paid were reasonable.

In response to recommendations 1 and 2, OFS stated that its staff reviewed FDIC's *Outside Counsel Deskbook*, met with members of the FDIC legal team who developed and implemented the deskbook, and reviewed local rules from the Delaware Bankruptcy Court. After its review, OFS adopted portions of each document for use as new submission and review standards, and distributed this new guidance to all law firms currently under contract to OFS. The new, more specific OFS guidance prescribing how legal fee bills should be prepared is included in this report as Appendix H. OFS stated that it will work with Treasury's Procurement Services Division to begin modifying base contracts for OFS legal services to include those standards as well.

For recommendation 3, OFS stated that it held training on its newly adopted guidance prescribing how legal fee bills should be prepared with COTRs and other staff involved in the review of legal fee bills, and that the COTRs will begin reviewing invoices in accordance with its new standards for periods starting with March 2011. OFS also stated that it will work to incorporate relevant portions of its training on the new legal fee bill review standards into written procedures.

Regarding recommendation 4, OFS stated that it is following up with Venable on SIGTARP's findings and, in accordance with applicable contract closeout procedures, each contract will be subject to further review by OFS. According to OFS, in the event questionable invoice amounts are identified during such closeouts, OFS intends to seek additional support or remittance, as appropriate.

## Appendix A – Scope and Methodology

SIGTARP performed this audit under authority of Public Law 110-343, as amended, which also incorporates the duties and responsibilities of inspectors general under the Inspector General Act of 1978, as amended. SIGTARP initiated this audit at the request of Senator Tom Coburn, M.D. The objective is to examine the processes used to ensure that invoices submitted by the contractors accurately reflect the work performed. This report presents the results of SIGTARP's audit of OFS' processes relating to Venable LLP and SIGTARP's audit of fee bills submitted by Venable and paid by OFS.

To determine how OFS established and implemented contracting procedures, SIGTARP interviewed procurement officials in OFS and Treasury's Procurement Services Division. SIGTARP reviewed relevant Treasury policies and procedures issued before OFS was created that were used by OFS until it issued its own policies. SIGTARP also reviewed the OFS contract with Venable to understand the services to be provided and any billing requirements.

To determine whether Treasury's policies and procedures were effective, SIGTARP reviewed a sample of invoices for legal services ("fee bills") submitted by Venable and paid by OFS. Audit fieldwork included interviews and tests of transactions in the offices of Venable LLP, including a walk-through of its billing practices and procedures and review of its timekeeping and billing policies. The scope of the audit covered all payments to Venable under its February 20, 2009, contract with OFS, which included 21 fee bills totaling \$1,394,723.50. SIGTARP judgmentally selected for audit 6 of the 21 fee bills. Selections were primarily based on large-dollar fee bills to increase audit coverage of contract expenditures.

SIGTARP conducted this performance audit in accordance with generally accepted government auditing standards prescribed by the Comptroller General of the United States. Those standards require that SIGTARP plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for findings and conclusions based on the audit objective. SIGTARP conducted this audit from May 2010 through March 2011. SIGTARP believes that the evidence obtained provides a reasonable basis for the findings and conclusions based on the audit objective.

### Limitations on Data

SIGTARP was unable to collect complete timekeeping information for the Venable attorneys providing legal services to OFS. The law firm asserted that disclosing descriptions of tasks performed for the firm's other clients would violate those clients' attorney-client privileges. Without this information, SIGTARP was not able to determine whether OFS was paying for duplicated or recycled attorney work products. In addition, entities performing work under contract to Treasury in support of TARP are required to disclose organizational conflicts of interest. Certifications regarding conflicts of interest are required from contractors ("self-certifications"), and OFS has indicated that it has no process for independently verifying self-certifications. Because contractors self-identify conflicts of interest, instances of non-compliance could have been omitted.



### Use of Computer-Processed Data

SIGTARP did not use OFS computer-processed data during this audit. Legal fee bills were not submitted electronically by law firms or processed electronically by OFS.

### Internal Controls

As part of this audit, SIGTARP reviewed Venable's internal control framework for collecting and reporting time charges. SIGTARP also examined OFS' controls for contract issuance and administration.

### Prior Coverage

There have been no audits performed assessing Treasury's process for contracting for professional services under the Troubled Asset Relief Program with the same or similar audit objective.

## Appendix B – Venable Contract, Task Orders, and Modifications

On February 20, 2009, OFS entered into a contract with Venable for the law firm to provide expertise and guidance in the development of equity and debt investment and co-investment programs, including the Capital Assistance Program (“CAP”) and the Capital Purchase Program (“CPP”), and other legal tasks. The contract had a \$5 million maximum value, and the scope of work included preparing legal documentation for the CAP and CPP programs, and negotiating and closing investment transactions related to those programs. Five task orders were issued under the Venable contract. The following table identifies Venable task orders and modifications, periods of performance, and the purpose of each task order and modification:

VENABLE CONTRACT, TASK ORDERS, AND MODIFICATIONS			
Number	Award Date	Period of Performance	Purpose
Contract TOFS-09-D-0002	02/20/09	02/20/09 – 08/19/09	Provide legal services for: (1) CAP documentation, (2) CPP mutual holding company documentation, (3) transactional work, and (4) other legal tasks.
Task Order 1	02/26/09	02/20/09 – 08/19/09	Develop CPP mutual holding company documentation.
Modification 1 to Task Order 1	05/29/09	02/20/09 – 08/19/09	Add funding to complete work under Task Order 1. The value increased by \$110,000, from \$500,000 to \$610,000.
Task Order 2	03/12/09	03/12/09 – 08/19/09	Provide expertise in structuring investments and transactions related to the Auto Industry Receivables Standby Purchase Program.
Modification 1 to Task Order 2	08/14/09	03/12/09 – 12/31/09	Extend period of performance of Task Order 2 by 4 months to December 31, 2009.
Task Order 3	06/03/09	06/03/09 – 08/19/09	Redemptions and repurchases under CPP. <sup>1</sup>
Modification 1 to Task Order 3	08/14/09	06/03/09 – 12/31/09	Extend period of performance of Task Order 3 by 4 months to December 31, 2009.
Task Order 4	06/22/09	02/20/09 – 08/19/09	CPP transaction closings. <sup>2</sup>
Modification 1 to Task Order 4	08/14/09	02/20/09 – 12/31/09	Extend period of performance of Task Order 4 by 4½ months to December 31, 2009.
Task Order 5	06/26/09	06/26/09 – 12/25/09	CPP documentation; legal advice and document review.
Modification 1 to Task Order 5	12/16/09	06/26/09 – 02/19/10	Extend period of performance by 2 months to February 19, 2010, and change COTR.

Notes: <sup>1</sup> Task Orders 3 and 4 were fixed-price task orders, while all other task orders under this contract were paid based on the number of labor hours expended.

<sup>2</sup> No work was performed under Task Order 4. The task order was issued for use in the event of a conflict of interest of other firms performing CPP transaction closings.

Source: SIGTARP analysis of the contracting officer's files provided by OFS.

## Appendix C – Local Rules for the United States Bankruptcy Court, District of Delaware

Local Rules for the United States Bankruptcy Court, District of Delaware, include a Motion for Compensation and Reimbursement of Expenses, Rule 2016-2, for professionals requesting approval for compensation and reimbursement of expenses in bankruptcy proceedings. The rule includes the following requirements:

- (d) Information Requirements Relating to Compensation Requests. Such motion shall include activity descriptions which shall be sufficiently detailed to allow the Court to determine whether all the time, or any portion thereof, is actual, reasonable and necessary and shall include the following:
- (i) All activity descriptions shall be divided into general project categories of time;
  - (ii) All motions shall include complete and detailed activity descriptions;
  - (iii) Each activity description shall include a time allotment;
  - (iv) Activities shall be billed in tenths of an hour (six (6) minutes);
  - (v) Each activity description shall include the type of activity (*e.g.*, phone call, research);
  - (vi) Each activity description shall include the subject matter (*e.g.*, exclusivity motion, section 341 meeting);
  - (vii) Activity descriptions shall not be lumped – each activity shall have a separate description and a time allotment;
  - (viii) Travel time during which no work is performed shall be separately described and may be billed at no more than 50% of regular hourly rates;
  - (ix) The activity descriptions shall individually identify all meetings and hearings, each participant, the subject(s) of the meeting or hearing and the participant's role; and
  - (x) Activity descriptions shall be presented chronologically or chronologically within each project category.
- (e) Information Requirements Relating to Expense Reimbursement Requests.
- (i) The motion shall contain an expense summary by category for the entire period of the request. Examples of such categories are computer-assisted legal research, photocopying, outgoing facsimile transmissions, airfare, meals and lodging.
  - (ii) Following the summary, the motion shall itemize each expense within each category, including the date the expense was incurred, the charge and the individual incurring the expense, if available.
  - (iii) The motion shall state the requested rate for copying charges (which shall not exceed \$.10 per page), computer-assisted legal research charges (which shall not be more than the actual cost) and outgoing facsimile transmission charges (which shall not exceed \$1.00 per page, with no charge for incoming facsimiles).
  - (iv) Receipts or other support for each disbursement or expense item for which reimbursement is sought must be retained and be available on request.

Source: Local Rules for the United States Bankruptcy Court, District of Delaware, Rule 2016-2, obtained from <http://www.deb.uscourts.gov/LocalRules/LOCAL%20RULES%202009.pdf>, pages 27 and 28.

## Appendix D – Potential Billing Issues

### POTENTIAL BILLING ISSUES<sup>3</sup>

<b>Fees for Labor</b>	<b>Description</b>	<b>SIGTARP Classification<sup>1</sup></b>
Administrative Tasks	Invoice preparation, review, or corrections to an invoice required by the OFS contracting officer's technical representative or Treasury's contracting officer.	Unallowable
Block Billing	Aggregating or lumping together multiple tasks in the same time charge, collectively totaling more than 0.5 hours.	Unsupported <sup>2</sup>
Clerical Fees	Hourly fees for time spent photocopying, sending facsimiles, etc.	Unallowable
Clerical Overtime	Secretarial or clerical overtime that has not been approved by the COTR.	Unallowable
Contract Review	Proposal/Task Order/Contract Review. (Administrative items added by SIGTARP.)	Unallowable
Excessive Conferences	Excessive intra-office conferences between attorneys or paralegals for the purpose of providing instruction or status.	Unsupported
Excessive Review	Excessive time spent in "file review."	Unsupported
Excessive Revision	Excessive time spent in "review and revision" of documents.	Unsupported
Excessive Staff	Excessive number of attorneys performing services on a matter.	Unsupported
Inadequate Description	Insufficient or incomplete description of tasks (for example: "research").	Unsupported
Labor Category	Charging attorney time for tasks that should be performed efficiently and effectively at less expense by a paralegal or secretary, or charging paralegal time for tasks that should be performed by clerical workers.	Unsupported
Labor Rate	Hours charged at a more senior attorney rate when a matter should be handled by a less senior attorney.	Unsupported
Training Time	Educational or development costs to become generally familiar with statutory and case law affecting Treasury.	Unallowable
Unapproved Staff	Services of billable individuals who have not been included on the approved rate schedule.	Unsupported
Unapproved Task	Legal work on matters as approved (work should be tied to Statement of Work).	Allowable
Value Billing	Value billing (billing based on the value of the information or service provided rather than billing based on time spent).	Unallowable
<b>Other Direct Costs</b>	<b>Description</b>	<b>SIGTARP Classification</b>
Commuting	Daily commuting expenses.	Unallowable
Copies	In-house photocopying charges at more than \$0.08 per copy.	Unallowable
Copying	Clerical time for photocopying, sending facsimiles, filing, etc.	Unallowable
Filing	Any costs relating to filing fees in U.S. District Courts or Courts of Appeal, which OFS is not required to pay (pursuant to 12 U.S.C. 1819(b)(4)).	Unallowable
Postage	Ordinary postage (other than express, messenger, etc.).	Unallowable
Research	Charges other than "actual time" charges for electronic research (Westlaw, Lexis, etc.).	Unallowable
Tax	Sales tax (except for lodging) or surcharges imposed by utilities or telephone services.	Unallowable
Training	Charging attorney time for preparing and presenting training to OFS.	Unallowable
Travel	Approved travel time at 50% of approved timekeeper rate.	Allowable

Notes: <sup>1</sup> Under FAR 31.201-2, a cost is "allowable" only when it complies with all of the following five requirements. The cost must: (1) be reasonable (not exceed that which would be incurred by a prudent person in the conduct of a competitive business), (2) be allocable (incurred specifically for the contract), (3) meet standards promulgated by the Cost Accounting Standards Board or generally accepted accounting principles, (4) be within the terms of the contract, and (5) be within any limitations set forth in FAR Subpart 31.2, which prescribes the determination and proper treatment of costs in Government contracts with commercial organizations.

<sup>2</sup> A cost is "unsupported" if, at the time of the audit, the cost is not supported by adequate documentation; for example, if the description of the associated task does not contain enough information to determine whether the task meets the five requirements to be "allowable," as shown in Note 1.

<sup>3</sup> Not all potential billing issues were identified during SIGTARP's review of Venable's fee bills.

Source: FDIC *Outside Counsel Deskbook*, with administrative tasks related to contract and task order review, and value billing, added by SIGTARP.

## Appendix E – Acronyms and Abbreviations

<b>Acronym</b>	<b>Definition</b>
CAP	Capital Assistance Program
CO	Contracting Officer
COTR	Contracting Officer's Technical Representative
CPP	Capital Purchase Program
EESA	Emergency Economic Stabilization Act of 2008
FAR	Federal Acquisition Regulation
FDIC	Federal Deposit Insurance Corporation
OFS	Office of Financial Stability
SIGTARP	Office of the Special Inspector General for the Troubled Asset Relief Program
TARP	Troubled Asset Relief Program

## Appendix F – Audit Team Members

This audit was conducted and the report was prepared under the direction of Kurt Hyde, Deputy Special Inspector General for Audit and Evaluation, and Clayton Boyce, Acting Assistant Deputy Special Inspector General for Audit, in the Office of the Special Inspector General for the Troubled Asset Relief Program. The staff members who conducted the audit and contributed to the report include Brenda James, Danial Olberding, Sarah Reed, Trevor Rudolph, and Leah DeWolf.

## Appendix G – Management Comments



ASSISTANT SECRETARY

DEPARTMENT OF THE TREASURY  
WASHINGTON, D.C. 20220

April 7, 2011

Christy L. Romero  
Acting Special Inspector General  
for the Troubled Asset Relief Program  
United States Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, D.C. 20220

RE: Response to SIGTARP's Interim Audit on Contracting for Professional Services

Dear Ms. Romero:

I am writing in response to your draft interim audit report entitled, *Treasury's Process for Contracting for Professional Services under the Troubled Asset Relief Program*, dated March 23, 2011 (the "Interim Report"). The Department of the Treasury ("Treasury") appreciates the efforts of the Office of the Special Inspector General ("SIGTARP") in preparing the Interim Report, and this letter provides Treasury's official response. Also, Treasury previously has provided to SIGTARP staff certain additional comments and factual corrections.

The Interim Report reviews the policies and practices of the Office of Financial Stability ("OFS") regarding its contracts with outside law firms. We agree this is an important issue, and OFS is committed to maintaining strong internal controls regarding all of its contracts. As the Interim Report acknowledges, the Federal Acquisition Regulation ("FAR") is the primary regulation that governs the acquisition of supplies and services by all Executive Branch agencies. Although the Emergency Economic Stabilization Act of 2008 ("EESA") explicitly authorizes the Secretary of the Treasury to waive the FAR to respond to the financial crisis, Treasury decided not to do so. Instead, Treasury implemented the extensive controls in the FAR for all of its Troubled Asset Relief Program ("TARP") contracts.

OFS has been subject to extensive oversight regarding its general contracting practices. The Government Accountability Office ("GAO") has monitored TARP contracting from the inception of the program, and it has repeatedly recognized our strengths in this area. For example, a GAO official recently testified before Congress: "One year after implementation, OFS had put in place an appropriate infrastructure to manage and monitor its network of . . . contractors, as well as a system to oversee conflicts of interest that may arise with . . . contractors seeking or performing work under TARP. OFS has continued to make management and oversight enhancements." Statement of Thomas J. McCool, *Troubled Asset Relief Program, Status of Programs and Implementation of GAO Recommendations* (March 17, 2011). Similarly, the Congressional Oversight Panel has stated that Treasury's "procedures follow well-established norms for monitoring contract performance."<sup>1</sup>

<sup>1</sup> See Congressional Oversight Panel, *Examining Treasury's Use of Financial Crisis Contracting Authority* (Oct. 14, 2010) ("October 14, 2010 Report") at 47, <http://cop.senate.gov/documents/cop-101410-report.pdf>.

In regard to legal services in particular, Treasury has implemented numerous internal controls that protect taxpayer resources. Contracting Officer Technical Representatives (“COTRs”) review invoices for certification, and they work directly with project attorneys to validate that the work performed is in scope, allocable to the contract, and allowable under the FAR. In making these determinations, COTRs and project attorneys consider a wide range of information—*e.g.*, their first-hand knowledge of the work performed under the applicable task orders; experience gained through management of similar task orders; and past professional experience performing similar legal work.

In addition, the COTRs generate monthly reports that detail the scope and cost of work performed. The reports include an analysis of the funding under the contract, the law firm’s invoiced expenses for the month, and incurred expenses to date. The COTRs also provide a quantitative and qualitative assessment of the firm’s performance in terms of quality, cost, timeliness, and business relations; and they identify potential conflicts of interest, subcontracts, and issues to be highlighted for management attention. Moreover, OFS maintains dedicated procurement support and program-side contract planning and administration staff. And finally, OFS has been able to negotiate significant discounts in legal billing rates from several of its legal services providers.<sup>2</sup>

For all these reasons, we believe that OFS has implemented strong and effective processes in regard to all of its contracts, including those for legal services. We believe that our practices fully satisfy the requirements of the FAR, and we disagree with the Interim Report’s suggestion that our practices have created an “unacceptable risk” that Treasury is overpaying for legal services. Nonetheless, we also recognize that every internal process can be improved, and we are committed to developing the best possible internal controls to protect taxpayer resources. Accordingly, we have reviewed SIGTARP’s recommendations carefully.

#### Recommendations

The Interim Report provides four recommendations, each aimed at improving OFS’s review and payment of legal fees and related costs:

1. Adopting the legal fee bill submission standards contained in the Federal Deposit Insurance Corporation’s (“FDIC’s”) *Outside Counsel Deskbook*, or establishing similarly detailed requirements for how law firms should prepare legal fee bills;
2. Including in OFS open legal service contracts detailed requirements for law firms on the preparation and submission of legal fee bills, or separately providing the instructions to law firms;
3. Establishing specific instructions and guidance for OFS COTRs to use when reviewing legal fee bills, and incorporating those instructions and guidance into OFS written policies; and

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<sup>2</sup> See, *e.g.*, October 14, 2010 Report at 32 n.117, <http://cop.senate.gov/documents/cop-101410-report.pdf>.



4. Reviewing previously paid legal fee bills to identify unreasonable or unallowable charges, and seeking reimbursement for those charges, as appropriate.

As the Interim Report acknowledges, OFS has already taken steps to implement these recommendations. For example, we reviewed the "best practices" identified in the Interim Report, including the local rules of court established by the Delaware Bankruptcy Court and the FDIC's *Outside Counsel Deskbook*. This review included conferring with FDIC officials to discuss lessons learned from their development and implementation of the *Deskbook*, including to what extent the *Deskbook's* procedures, which the FDIC refined over the past twenty years, are appropriate for an organization such as OFS, which was stood up during a time of crisis and is in the process of winding down.

As a result of this review, OFS adopted guidance detailing the additional specificity required in its legal fee bills, distributed this guidance to all law firms currently under contract, and provided instructions and training to COTRs and other staff involved in the review of these invoices. Going forward, OFS intends to modify its legal services contracts to incorporate this guidance. In addition, and in accordance with applicable contract close out procedures, each OFS legal services contract will be reviewed for questionable invoice amounts, and additional support or remittance will be sought as appropriate. These efforts are ongoing, and we will continue to update you on our progress.

Thank you once again for the opportunity to respond to the draft Interim Report. We look forward to continuing to work with SIGTARP as we move forward.

Sincerely,



Timothy G. Massad  
Assistant Secretary for Financial Stability

## Appendix H – New OFS Guidance to Its Outside Counsel on Legal Fee Bill Submission and Format

**From:** [name redacted-(b)(6)]  
**Sent:** Thursday, March 03, 2011 11:26 AM  
**Subject:** Additional Guidance re Invoice Submission and Formatting Instructions

Dear OFS Contractor:

In an effort to standardize the procedures for all contractors in the submission of proper legal services invoices, listed below is guidance regarding invoice submission, invoice format and other direct costs. This guidance should be considered as supplementary only to your base contract and individual task orders, which shall supersede anything contained herein to the contrary. Please ensure that your March 2011 billing and all billing going forward conforms to the following standards:

### **A. Invoice Submission Instructions**

Please refer to your base contract regarding invoicing and payment instructions. In addition, please use the following guidance in the preparation and submission of monthly invoices:

1. Invoices should include your firm name, your DUNS number and the date.
2. Invoices should be issued separately for each task order under your base contract. Please indicate the contract and task order number as well as the invoice number on the cover page of each invoice. Any Purchase Requisition number assigned to the task order by Treasury should also be listed. [COTRs to supply PR numbers to contractors as needed).
3. Invoices should be submitted for each calendar month.
4. Review bill prior to submission to ensure that it is within the labor hour categories and hourly rate maximums required by the task order and that only allowable expenses are charged as described in the task order and the other direct cost section of the base contract if such costs have been awarded in the task order.
5. Do not bill for a service or cost that is customarily included in the normal overhead or administrative expense of running a law firm (monthly bill preparation often falls in this category).

### **B. Invoice Formatting and Instructions**

In general, each entry shall include activity descriptions that are sufficiently detailed to allow the COTR to determine whether all the time, or any portion thereof, is actual, reasonable, and necessary and shall include the following:

1. All activity descriptions shall be divided into general project categories of time.
2. All entries shall include complete and detailed activity descriptions without the use of acronyms.
3. Each activity description shall include a time allotment.
4. Activities shall be billed in increments of one-tenth of an hour (six minutes).
5. Each activity description shall include the type of activity (e.g., phone call, research).
6. Each activity description shall include the subject matter where task orders have multiple subjects.
7. Activity descriptions shall not be lumped or block-billed, i.e., each activity shall have a separate description and a time allotment.
8. The activity descriptions shall individually identify all meetings and hearings, other key attendees in the firm or at Treasury, the subject(s) of the meeting or hearing, and the participant's role.
9. Activity descriptions shall be presented chronologically, or chronologically within each project category.
10. All travel shall be approved in writing by the Contracting Officer or Contracting Officer Technical Representative prior to the occurrence of the travel.

### **C. Other Direct Costs:**

For task orders that provide for other direct costs, please refer to your base contract regarding allowable and non-allowable costs and travel reimbursement procedures.

## SIGTARP Hotline

If you are aware of fraud, waste, abuse, mismanagement or misrepresentations affiliated with the Troubled Asset Relief Program, please contact the SIGTARP Hotline.

By Online Form: [www.SIGTARP.gov](http://www.SIGTARP.gov)

By *Phone*: Call toll free: (877) SIG-2009

By *Fax*: (202) 622-4559

By *Mail*:

**Hotline: Office of the Special Inspector General  
for the Troubled Asset Relief Program**

1801 L Street, NW, 4<sup>th</sup> Floor  
Washington, D.C. 20220

## Press Inquiries

If you have any inquiries, please contact our Press Office:

Kristine Belisle  
Director of Communications  
[Kris.Belisle@treasury.gov](mailto:Kris.Belisle@treasury.gov)  
202-927-8940

## Legislative Affairs

For Congressional inquiries, please contact our Legislative Affairs Office:

Lori Hayman  
Director of Legislative Affairs  
[Lori.Hayman@treasury.gov](mailto:Lori.Hayman@treasury.gov)  
202-927-8941

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