

CONGRESSIONAL OVERSIGHT PANEL

MARCH OVERSIGHT REPORT *

THE FINAL REPORT OF THE
CONGRESSIONAL OVERSIGHT PANEL



MARCH 16, 2011.—Ordered to be printed

*Submitted under Section 125(b)(1) of Title 1 of the Emergency Economic
Stabilization Act of 2008, Pub. L. No. 110-343

CONGRESSIONAL OVERSIGHT PANEL MARCH OVERSIGHT REPORT

CONGRESSIONAL OVERSIGHT PANEL

MARCH OVERSIGHT REPORT*

THE FINAL REPORT OF THE
CONGRESSIONAL OVERSIGHT PANEL



MARCH 16, 2011.—Ordered to be printed

*Submitted under Section 125(b)(1) of Title 1 of the Emergency Economic
Stabilization Act of 2008, Pub. L. No. 110-343

U.S. GOVERNMENT PRINTING OFFICE

64-832

WASHINGTON : 2011

CONGRESSIONAL OVERSIGHT PANEL

PANEL MEMBERS

SEN. TED KAUFMAN, *Chairman*

RICHARD H. NEIMAN

DAMON SILVERS

J. MARK McWATTERS

KENNETH TROSKE

CONTENTS

	Page
Glossary of Terms	vi
Executive Summary	1
Section One:	
I. Introduction	5
A. Key Events of the Financial Crisis	6
1. Events Leading up to Enactment of EESA	6
2. Initial TARP Investments in the Largest Institutions	13
B. Overview of Government Efforts	15
1. Federal Reserve	15
2. FDIC	18
3. Treasury Department	19
4. Coordinated Action	21
II. Banks	25
A. Capital Infusions and Bank Balance Sheets	25
1. Summary of COP Reports and Findings	25
2. Panel Recommendations and Updates	31
3. Lessons Learned	46
B. Guarantees and Contingent Payments	48
1. Background	49
2. Summary of COP Report and Findings	50
3. Panel Recommendations and Updates	50
4. Lessons Learned	51
C. Global Context and International Effects of the TARP	52
1. Background	52
2. Summary of COP Report and Findings	53
3. Panel Recommendations and Updates	54
4. Lessons Learned	55
III. Credit Markets: Small Business and Consumer Lending	55
A. Background	55
1. Small Business Lending	55
2. Consumer Lending	58
3. Government Efforts to Stimulate Small Business and Consumer Lending	59
B. Summary of COP Reports and Findings	63
C. Panel Recommendations and Updates	64
1. Current State of Commercial and Industrial Lending	64
2. Consideration of Alternatives	65
3. Small Business Lending Fund	66
D. Lessons Learned	67
IV. Foreclosure Mitigation	68
A. Background	68
B. Summary of COP Reports and Findings	72
C. Panel Recommendations and Program Updates	75
1. Transparency	76

IV

	Page
IV. Foreclosure Mitigation—Continued	
C. Panel Recommendations and Program Updates—Continued	
2. Compliance	78
3. Goals	78
4. Streamlining	79
5. Program Structure	80
6. Document Irregularities	83
D. Data Updates	84
1. Treasury's Foreclosure Mitigation Programs	84
2. Housing Market	88
E. Lessons Learned	93
V. Automotive Industry Assistance	95
A. Background	95
1. Initial Treasury Action	96
2. Additional Initiatives and Actions	98
B. Summary of COP Reports and Findings	99
C. Panel Recommendations and Updates	103
1. Transparency	103
2. Accountability	103
3. Improved Balance among Treasury's Roles	105
4. Continued Oversight	105
5. Updates	105
D. Lessons Learned	106
VI. AIG	107
A. Background	107
1. Government Assistance	109
B. Summary of COP Report and Findings	114
1. AIG Changed a Fundamental Market Relationship	114
2. The Powerful Role of Credit Rating Agencies	115
3. The Options Available to the Government	115
4. The Government's Authorities in a Financial Crisis	116
5. Conflicts	116
C. Panel Recommendations	117
1. Government Exit Strategy/Equity Market Risk Mitigation	117
2. Status of COP Recommendations	118
D. Updates	118
1. Recent Developments	118
2. Outlook	125
E. Lessons Learned	129
VII. Administration of the TARP	130
A. Treasury's Use of Its Contracting Authority	130
1. Background	130
2. Summary of COP Report and Findings	131
3. Panel Recommendations and Updates	133
4. Lessons Learned	135
B. Executive Compensation Restrictions in the TARP	135
1. Background	135
2. Summary of COP Report and Findings	139
3. Panel Recommendations and Updates	140
4. Lessons Learned	141
VIII. General TARP Assessment	141
A. Summary of COP Reports and Findings	142
B. Panel Recommendations	144
C. Financial Status of the TARP	145
IX. Conclusions and Lessons Learned	151

	Page
IX. Conclusions and Lessons Learned—Continued	
A. “Too Big to Fail” and Moral Hazard	153
B. Stigma	155
C. Transparency, Data Collection, and Accountability	156
D. Other Obstacles Encountered by the TARP	158
E. On the Role of Oversight	160
Annex I: Federal Financial Stability Efforts	162
Annex II: Additional CPP Data	165
Annex III: Endnotes	172
Section Two: Oversight Activities	180
Section Three: About the Congressional Oversight Panel	
A. Members	181
B. Reports	182
C. Hearings	187
D. Staff	188
E. Budget	188
Appendices:	
APPENDIX I: LETTER TO SECRETARY TIMOTHY GEITHNER FROM CHAIRMAN TED KAUFMAN RE: REDESIGN OF WEBSITE, DATED MARCH 7, 2011	190
APPENDIX II: LETTER TO CHAIRMAN TED KAUFMAN FROM ACTING ASSISTANT SECRETARY TIMOTHY MASSAD RE: REDESIGN OF WEBSITE, DATED MARCH 14, 2011	194

Glossary of Terms

ABS	asset-backed securities
AGP	Asset Guarantee Program
AIA	American International Assurance Company, Limited
AIFP	Automobile Industry Financing Program
AIG	American International Group
AIGFP	AIG Financial Products
AIGIP/SSFI Program	American International Group Investment Program/ Systemically Significant Failing Institutions Program
ALICO	American Life Insurance Company
AMLF	Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility
ARRA	American Recovery and Reinvestment Act
ASSP	Auto Supplier Support Program
BHC	bank holding company
C&I loans	commercial and industrial loans
CAP	Capital Assistance Program
CBO	Congressional Budget Office
CDCI	Community Development Capital Initiative
new Chrysler	Chrysler Group LLC; Chrysler post bankruptcy
Chrysler Holding LLC	Chrysler Holding Limited Liability Company
CMBS	commercial mortgage-backed securities
CPFF	Commercial Paper Funding Facility
CPP	Capital Purchase Program
CRE	commercial real estate
DGP	Debt Guarantee Program
Dodd-Frank Act	Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010
EESA	Emergency Economic Stabilization Act of 2008
FDIC	Federal Deposit Insurance Corporation
FHA	Federal Housing Administration
FHFA	Federal Housing Finance Agency
FOMC	Federal Open Market Committee
FRB	Federal Reserve Board
FRBNY	Federal Reserve Bank of New York
GAO	Government Accountability Office
GDP	gross domestic product
new GM	General Motors Company; GM post bankruptcy
GM	General Motors Corporation
GMAC	General Motors Acceptance Corporation; now Ally Financial
GMAC/Ally Financial	Ally Financial
GSE	government sponsored enterprise
GSE MBS Purchase Program	Government Sponsored Enterprises' Mortgage Backed Securities Purchase Program
HAMP	Home Affordable Modification Program
IFR-COI	Interim Final Rule on TARP Conflicts of Interest
IFR-Comp	Interim Final Rule on TARP Standards for Compensation and Corporate Governance
IPO	initial public offering
IRR	internal rate of return
LIBOR	London Interbank Offered Rate
LIBOR-OIS spread	measures the difference between the LIBOR and the OIS
LLC	limited liability company

Glossary of Terms

MBS	Mortgage Backed Securities Purchase
MMF	Money Market Fund
OIS	Overnight Indexed Swaps rate
OMB	Office of Management and Budget
PDCF	Primary Dealer Credit Facility
PPIP	Public-Private Investment Program
RCF	revolving credit facility
RMBS	residential mortgage-backed security
SBA	Small Business Administration
SBA 504	a loan program of the Small Business Administration
SBA 7(a)	a loan program of the Small Business Administration
SBLF	Small Business Lending Fund program
SCAP	Supervisory Capital Assessment Program (the “stress tests”)
SEC	U.S. Securities and Exchange Commission
SIGTARP	Special Inspector General for the Troubled Asset Relief Program
SPA	Securities Purchase Agreement
SPV	special purpose vehicle
SSFI program	Systemically Significant Failing Institutions program (solely for AIG)
TAF	Term Auction Facility
TAG	Transaction Account Guarantee
TALF	Term Asset-Backed Securities Loan Facility
TALF LLC	Term Asset-Backed Securities Loan Facility Limited Liability Company
TARP	Troubled Asset Relief Program
TGPMMF	Temporary Guarantee Program for Money Market Funds
TIP	Targeted Investment Program
TLGP	Temporary Liquidity Guarantee Program
Trust	AIG Credit Facility Trust
TSLF	Term Securities Lending Facility

MARCH OVERSIGHT REPORT

MARCH 16, 2011.—Ordered to be printed

EXECUTIVE SUMMARY*

On October 3, 2008, in response to rapidly deteriorating financial market conditions, Congress and the President created the Troubled Asset Relief Program (TARP) to “immediately provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States.” The same law also established the Congressional Oversight Panel and charged it with providing public accountability for Treasury’s use of its TARP authority. By statute, the Panel terminates six months after the expiration of TARP authority, which ended on October 3, 2010. Thus, the Panel’s work concludes with this report.

For its final report, the Panel summarizes and updates its comprehensive body of oversight work. The report describes the financial crisis and the broad array of federal initiatives undertaken in response. The Panel also provides a summary of its key findings and recommendations, along with updates since the Panel’s prior work.

In order to evaluate the TARP’s impact, one must first recall the extreme fear and uncertainty that infected the financial system in late 2008. The stock market had endured triple-digit swings. Major financial institutions, including Bear Stearns, Fannie Mae, Freddie Mac, and Lehman Brothers, had collapsed, sowing panic throughout the financial markets. The economy was hemorrhaging jobs, and foreclosures were escalating with no end in sight. Federal Reserve Chairman Ben Bernanke has said that the nation was on course for “a cataclysm that could have rivaled or surpassed the Great Depression.”

*The Panel adopted this report with a 5–0 vote on March 15, 2011.

It is now clear that, although America has endured a wrenching recession, it has not experienced a second Great Depression. The TARP does not deserve full credit for this outcome, but it provided critical support to markets at a moment of profound uncertainty. It achieved this effect in part by providing capital to banks but, more significantly, by demonstrating that the United States would take any action necessary to prevent the collapse of its financial system.

The Cost of the TARP. The Congressional Budget Office (CBO) today estimates that the TARP will cost taxpayers \$25 billion—an enormous sum, but vastly less than the \$356 billion that CBO initially estimated. Although this much-reduced cost estimate is encouraging, it does not necessarily validate Treasury’s administration of the TARP. Treasury deserves credit for lowering costs through its diligent management of TARP assets and, in particular, its careful restructuring of AIG, Chrysler, and GM. However, a separate reason for the TARP’s falling cost is that Treasury’s foreclosure prevention programs, which could have cost \$50 billion, have largely failed to get off the ground. Viewed from this perspective, the TARP will cost less than expected in part because it will accomplish far less than envisioned for American homeowners. In addition, non-TARP government programs, including efforts by the FDIC and the Federal Reserve, have shifted some of the costs of the financial rescue away from the TARP’s balance sheet. Further, accounting for the TARP from today’s vantage point—at a time when the financial system has made great strides toward recovery—obscures the risk that existed in the depths of the financial crisis. At one point, the federal government guaranteed or insured \$4.4 trillion in face value of financial assets. If the financial system had suffered another shock on the road to recovery, taxpayers would have faced staggering losses.

“Too Big to Fail.” The Panel has always emphasized that the TARP’s cost cannot be measured merely in dollars. Other costs include its distortion of the financial marketplace through its implicit guarantee of “too big to fail” banks. At the height of the financial crisis, 18 very large financial institutions received \$208.6 billion in TARP funding almost overnight, in many cases without having to apply for funding or to demonstrate an ability to repay taxpayers. In light of these events, it is not surprising that markets have assumed that “too big to fail” banks are safer than their “small enough to fail” counterparts. Credit rating agencies continue to adjust the credit ratings of very large banks to reflect their implicit government guarantee. Smaller banks receive no such adjustment, and as a result, they pay more to borrow relative to very large banks.

By protecting very large banks from insolvency and collapse, the TARP also created moral hazard: very large financial institutions may now rationally decide to take inflated risks because they expect that, if their gamble fails, taxpayers will bear the loss. Ironically, these inflated risks may create even greater systemic risk and increase the likelihood of future crises and bailouts.

In addition, Treasury’s intervention in the automotive industry, rescuing companies that were not banks and were not particularly interconnected within the financial system, extended the “too big to fail” guarantee and its associated moral hazard to non-financial

firms. The implication may seem to be that any company in America can receive a government backstop, so long as its collapse would cost enough jobs or deal enough economic damage.

Stigma. As the TARP evolved, Treasury found its options increasingly constrained by public anger about the program. The TARP is now widely perceived as having restored stability to the financial sector by bailing out Wall Street banks and domestic automotive manufacturers while doing little for the 13.9 million workers who are unemployed, the 2.4 million homeowners who are at immediate risk of foreclosure, or the countless families otherwise struggling to make ends meet. As a result of this perception, the TARP is now burdened by a public “stigma.”

Because the TARP was designed for an inherently unpopular purpose—rescuing Wall Street banks from the consequences of their own actions—stigmatization was likely inevitable. Treasury’s implementation of the program has, however, made this stigma worse. For example, many senior managers of TARP-recipient banks maintained their jobs and their high salaries, and although shareholders suffered dilution of their stock, they were not wiped out. To the public, this may appear to be evidence that Wall Street banks and bankers can retain their profits in boom years but shift their losses to taxpayers during a bust—an arrangement that undermines the market discipline necessary to a free economy.

Transparency, Data Collection, and Accountability. Beginning with its very first report, the Panel has expressed concerns about the lack of transparency in the TARP. In perhaps the most profound violation of the principle of transparency, Treasury decided in the TARP’s earliest days to push tens of billions of dollars out the door to very large financial institutions without requiring banks to reveal how the money was used. As a result, the public will never know to what purpose its money was put.

In some cases, public understanding of the TARP has suffered not because Treasury refused to reveal useful information but because relevant data were never collected in the first place. Without adequate data collection, Treasury has flown blind; it has lacked the information needed to spot trends, determine which programs are succeeding and which are failing, and make necessary changes. A related concern is Treasury’s failure to articulate clear goals for many of its TARP programs or to update its goals as programs have evolved. For example, when the President announced the Home Affordable Modification Program in early 2009, he asserted that it would prevent three to four million foreclosures. The program now appears on track to help only 700,000 to 800,000 homeowners, yet Treasury has never formally announced a new target. Absent meaningful goals, the public has no meaningful way to hold Treasury accountable, and Treasury has no clear target to strive toward in its own deliberations.

On the Role of Oversight. Between the efforts of the Congressional Oversight Panel, SIGTARP, the GAO, the U.S. Congress, and many journalists and private citizens, the TARP has become one of the most thoroughly scrutinized government programs in U.S. history. Such close scrutiny inevitably begets criticism, and in the case of the TARP—a program born out of ugly necessity—the criticism was always likely to be harsh. After all, in the midst of a crisis, perfect solutions do not exist; every possible action carries

regrettable consequences, and even the best decisions will be subject to critiques and second-guessing.

Yet there can be no question that oversight has improved the TARP and increased taxpayer returns. For example, in July 2009, the Panel reported that Treasury's method for selling stock options gained through the CPP appeared to be recovering only 66 percent of the warrants' estimated worth. Due in part to pressure generated by the Panel's work, Treasury changed its approach, and subsequent sales recovered 103 cents on the dollar, contributing to \$8.6 billion in returns to taxpayers. Other substantial improvements in the TARP—such as Treasury's heightened focus on the threat to HAMP posed by second liens, the increased transparency of the TARP contracting process, and the greater disclosure of TARP-related data—are all partly the result of pressure exerted by the Panel and other oversight bodies.

Thus, an enduring lesson of the TARP is that extraordinary government programs can benefit from, and indeed may require, extraordinary oversight. This lesson remains relevant in the context of the government's extraordinary actions in the 2008 financial crisis: The public will continue to benefit from intensive, coordinated efforts by public and private organizations to oversee Treasury, the FDIC, the Federal Reserve, and other government actors. Careful, skeptical review of the government's actions and their consequences—even when this review is uncomfortable—is an indispensable step toward preserving the public trust and ensuring the effective use of taxpayer money.

SECTION ONE

I. Introduction

In response to rapidly deteriorating financial market conditions, Congress passed and the President signed into law the Emergency Economic Stabilization Act of 2008 (EESA) on October 3, 2008, creating the Troubled Asset Relief Program (TARP). The Act was intended to “immediately provide authority and facilities that the Secretary of the Treasury can use to restore liquidity and stability to the financial system of the United States” and “to ensure that such authority and such facilities are used in a manner that protects home values, college funds, retirement accounts, and life savings; preserves homeownership and promotes jobs and economic growth; maximizes overall returns to the taxpayers of the United States; and provides public accountability for the exercise of such authority.”

In order to provide the intended public accountability, EESA designated multiple oversight bodies. In particular, Section 125 established the Congressional Oversight Panel (the Panel) and charged it with reviewing the current state of the financial markets and regulatory system. In addition to one special report on regulatory reform, the Act required monthly reports, including oversight of “the use by the Secretary of authority under this Act, including with respect to the use of contracting authority and administration of the program; the impact of purchases made under the Act on the financial markets and financial institutions; the extent to which the information made available on transactions under the program has contributed to market transparency; and the effectiveness of foreclosure mitigation efforts, and the effectiveness of the program from the standpoint of minimizing long-term costs to the taxpayers and maximizing the benefits for taxpayers.” In meeting this mandate the Panel has issued 27 monthly oversight reports, as well as the special report on regulatory reform and a subsequently required special report on farm credit.

Under EESA, the Panel terminates six months after the expiration of TARP authority, which ended on October 3, 2010. Thus, the Panel’s work will conclude with this report. For its final report the Panel summarizes and revisits its comprehensive body of monthly oversight work. To provide a context for understanding and evaluating the TARP, the report first describes the major events of the financial crisis in the fall of 2008 and the economic conditions prevailing during the crisis and response, as well as the broad array of federal initiatives undertaken to promote financial stability and liquidity as a result of the crisis. For each area in which it has done oversight work, the Panel then provides a summary of its key findings and recommendations, along with an update since the Panel’s prior work and the current status of the Panel’s recommendations.

The Panel’s body of work reveals a number of clear and consistent themes. In closing, the report summarizes these key “lessons learned” in order to guide policymakers as they continue to unwind the TARP, but more important, to inform policymakers should they find it necessary to respond to financial crises in the future.

A. Key Events of the Financial Crisis

1. Events Leading up to Enactment of EESA¹

The first tremors of the impending financial crisis and the severe recession that followed were seen in the American housing market. During the years from 2000 until 2007 home prices more than doubled and the amount of mortgage debt outstanding increased nearly 80 percent.² The rapid appreciation in home prices, which increased every month from January 2000 to their peak in April 2006, helped fuel housing speculation and a boom in mortgage refinancing and home equity loans.³

The Housing Bubble Bursts

In late 2006, home prices began to decline and delinquencies on home mortgages, particularly those taken out by subprime borrowers, began to rise significantly.⁴ Figure 1 illustrates the dramatic increase in subprime mortgage delinquencies, which reached 13.3 percent by the end of 2006, and the corresponding beginning of a relative decline in home values that continues to this day.⁵

¹ For a more expansive listing of the events prior to and during the financial crisis, see Federal Reserve Bank of St. Louis, *The Financial Crisis: A Timeline of Events and Policy Actions* (online at timeline.stlouisfed.org/) (accessed Mar. 3, 2011).

² The S&P Case/Shiller home price index, a measure of home values in the United States, reached its peak level of 206.5 in April 2006, representing a 105 percent increase from January 2000. Standard & Poor's, *S&P/Case-Shiller Home Price Index* (Instrument Used: Home Price Index Levels, Seasonally adjusted, Composite 20-city Index) (online at www.standardandpoors.com/indices/sp-case-shiller-home-price-indices/en/us/?indexId=spusacashpidff-p-us-) (accessed Mar. 11, 2011) (hereinafter "S&P/Case-Shiller Home Price Index"). An alternative measure of home prices, the Federal Housing Finance Agency's quarterly Purchase Only Index increased for 49 consecutive quarters beginning in the first quarter of 1995 until the second quarter of 2007. Federal Housing Finance Agency, *Purchase Only Indexes: U.S. Summary Through Q4 2010* (Instrument Used: HPI % Change Over Previous Quarter) (online at www.fhfa.gov/Default.aspx?Page=87) (accessed Mar. 11, 2011).

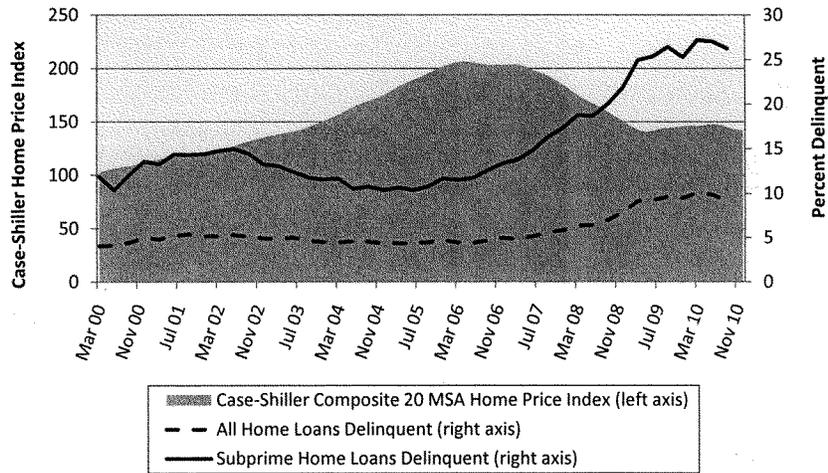
Total mortgage debt outstanding for one to four family homes increased from \$4.8 trillion at the end of 1999 to \$10.4 trillion in the beginning of 2007. Board of Governors of the Federal Reserve System, *Statistical Supplement to the Federal Reserve Bulletin: Mortgage Debt Outstanding* (Jan. 2004) (online at www.federalreserve.gov/pubs/supplement/2004/01/table1_54.htm); Board of Governors of the Federal Reserve System, *Mortgage Debt Outstanding* (Dec. 2010) (online at www.federalreserve.gov/econresdata/releases/mortoutstand/current.htm).

³ From 2001 to 2005, Americans extracted an average of \$646.3 billion of equity from their homes each year. In the ten years prior, the average amount of equity extracted per year was \$272.0 billion. Board of Governors of the Federal Reserve System, *Sources and Uses of Equity Extracted from Homes*, at 21 (Mar. 2007) (online at www.econ.jku.at/members/Riese/files/SS08/239315/topic2_wealth_effect/greenspan_kennedy.pdf).

⁴ S&P Case Shiller index reached its peak of 206.5 in April 2006. Also, delinquencies as a percentage of loans rose from 4.39 percent at the end of Q2 2006 to 5.12 percent at the end of Q2 2007. Mortgage Bankers Association, *National Delinquency Survey—2010 4th Quarter*, at 4 (Feb. 17, 2011) (hereinafter "National Delinquency Survey—2010 4th Quarter").

⁵ Case-Shiller values are indexed to 100 in January 2000. As of December 2010, national home prices, as measured by the S&P Case-Shiller Home Price Index, have declined 30.2 percent since January 2007 and declined 9.1 percent since the enactment of EESA in October 2008. S&P/Case-Shiller Home Price Index, *supra* note 2. Subprime delinquencies reached their highest level during the first quarter of 2010 when delinquencies reached 27.2 percent. National Delinquency Survey—2010 4th Quarter, *supra* note 4, at 4.

FIGURE 1: PERCENTAGE OF DELINQUENT HOME LOANS BY TYPE AS COMPARED TO HOME PRICES⁶



The subprime mortgage crisis grew in 2007, and during the period from April to the end of August the credit rating agencies downgraded hundreds of bonds backed by such mortgages. Later that summer, Bear Stearns closed two mortgage-backed securities (MBS) focused hedge funds, and two of the largest subprime mortgage originators and securitizers—New Century Financial and American Home Mortgage—filed for bankruptcy.⁷ On August 9, 2007, BNP Paribas, the largest bank in France, suspended redemptions in three investment funds due to their exposure to the U.S. subprime mortgage market.⁸ These events contributed to the significant stress in the housing and mortgage finance market which then began to spread into the broader financial sector.

Beginning of the Financial Crisis

The uncertainty and fear that gripped the financial markets during this period can be seen in critical credit market indicators such as the closely watched LIBOR–OIS spread. This spread measures the difference between the London Interbank Offered Rate (LIBOR), which shows quarterly borrowing costs for banks, and the Overnight Indexed Swaps rate (OIS), which measures the cost of extremely short-term borrowing by financial institutions. An increase in the LIBOR–OIS spread indicates that market participants have growing fears about whether major financial institu-

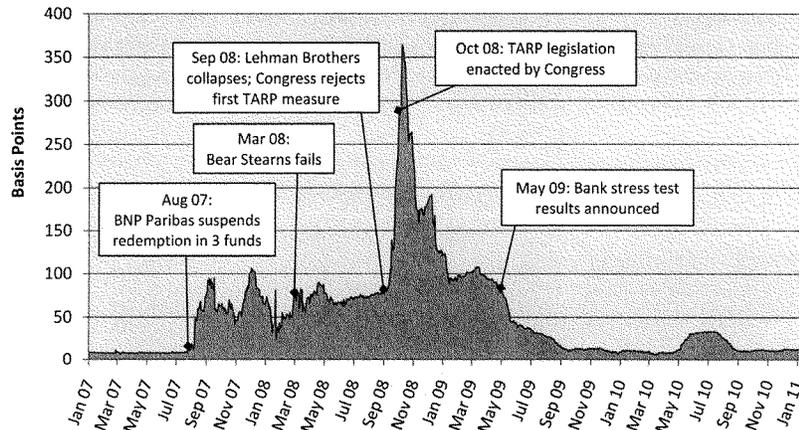
⁶National Delinquency Survey—2010 4th Quarter, *supra* note 4, at 4; S&P/Case-Shiller Home Price Index, *supra* note 2.

⁷U.S. Securities and Exchange Commission, *American Home Mortgage Investment Corp. Files for Chapter 11 Bankruptcy* (Aug. 6, 2007) (online at www.sec.gov/Archives/edgar/data/1256536/000091412107001892/am9746838-99_1.txt); U.S. Securities and Exchange Commission, *New Century Financial Corporation Files for Chapter 11; Announces Agreement to Sell Servicing Operations* (Apr. 2, 2007) (online at www.sec.gov/Archives/edgar/data/1287286/000129993307002129/exhibit1.htm).

⁸Viral V. Acharya and Ouarda Merrouche, *Precautionary Hoarding of Liquidity and Inter-Bank Markets: Evidence from the Sub-prime Crisis*, at 2 (July 3, 2009) (online at pages.stern.nyu.edu/~sternfin/vacharya/public_html/acharya_merrouche.pdf).

tions will be able to deliver on their obligations.⁹ Figure 2 illustrates the spikes in the LIBOR–OIS spread as key events in the ensuing financial crisis unfolded.

FIGURE 2: LIBOR–OIS SPREAD AND SELECTED EVENTS¹⁰



For the first seven months of 2007, the LIBOR–OIS spread averaged 8.7 basis points, reflecting relative calm in the financial markets. Following the announcement by BNP Paribas on August 9, 2007, however, this measure increased nearly 200 percent, settling at 39.9 basis points.¹¹ On the same date, the rate for overnight commercial paper, a mechanism of short-term credit for enterprises, increased to levels not seen since early 2001.¹² The summer of 2007 ended with the Federal Open Market Committee (FOMC) of the Federal Reserve System concluding that financial market conditions had worsened, credit availability had decreased, and “downside risks to growth [had] increased appreciably.”¹³

Initial Government and Industry Responses

Among the first direct actions taken by governments to stem the effects of the growing financial crisis was the creation by the British Government of a liquidity facility to support Northern Rock, the fifth largest bank in the United Kingdom.¹⁴ In the United States,

⁹ Federal Reserve Bank of St. Louis, *What the Libor-OIS Spread Says* (2009) (online at research.stlouisfed.org/publications/es/09/ES0924.pdf).

¹⁰ SNL Financial (accessed Mar. 1, 2011).

¹¹ SNL Financial (accessed Mar. 1, 2011).

¹² The interest rate for overnight AA Asset-backed Commercial Paper increased from 5.39 percent on August 8, 2007 to 5.75 percent on August 9, 2007. This was the highest level this measure reached since its January 31, 2001 level of 5.78 percent. The interest rate for overnight financial AA Financial Commercial Paper increased from 5.31 percent on August 8, 2007 to 5.39 percent on August 9, 2007. This was the highest level this measure reached since its March 30, 2001 level of 5.44 percent. Board of Governors of the Federal Reserve System, *Data Download Program: Commercial Paper* (Instruments Used: Rates; Overnight AA Asset-backed Commercial Paper, Overnight AA Financial Commercial Paper) (online at www.federalreserve.gov/datadownload/Choose.aspx?rel=CP) (accessed Mar. 1, 2011).

¹³ Board of Governors of the Federal Reserve System, *FOMC Statement* (Aug. 17, 2007) (online at www.federalreserve.gov/newsevents/press/monetary/20070817b.htm).

¹⁴ HM Treasury, *Liquidity Support Facility for Northern Rock plc* (Sept. 14, 2007) (online at webarchive.nationalarchives.gov.uk/+/www.hm-treasury.gov.uk/press_94_07.htm).

the Board of Governors of the Federal Reserve System, or Federal Reserve Board (FRB or Federal Reserve) lowered its target interest rate twice in the fall of 2007, signaling the Federal Reserve's growing concern regarding the tightening credit markets and worsening housing conditions.¹⁵ On October 10, 2007, the HOPE NOW Alliance—a private sector initiative promoted by Treasury and the Department of Housing and Urban Development and aimed at bringing together mortgage market participants to encourage counseling and other foreclosure mitigation options—was announced.¹⁶ Finally, on October 15, 2007, a consortium of banks agreed, after discussions facilitated by Treasury, to create a pooling mechanism to facilitate liquidity in the asset-backed commercial paper market.¹⁷ Within a couple of months, however, the leading banks involved in this effort—Bank of America, JPMorgan Chase, and Citigroup—announced that the initiative had collapsed.¹⁸

The Financial Crisis Widens

As housing fundamentals continued to weaken and financial fear spread, some of the nation's largest financial firms began to teeter on the edge of failure. On January 11, 2008, Bank of America announced its purchase of a major mortgage originator, Countrywide Financial.¹⁹ Then on March 14, the Federal Reserve intervened to rescue Bear Stearns by helping to arrange for and assisting with its purchase by JPMorgan.²⁰ During this period the impacts of the crisis in the housing and financial sectors began to be felt in the broader economy. The nation's gross domestic product (GDP), a measure of this country's economic activity, suffered its first quarterly decline since 2001 in the first quarter of 2008. Following a

¹⁵ On September 18, 2007, the FOMC reduced its target for the federal funds rate from 5.25 percent to 4.75 percent. In conjunction with that decision, the Federal Reserve stated that, "the tightening of credit conditions has the potential to intensify the housing correction and to restrain economic growth more generally. Today's action is intended to help forestall some of the adverse effects on the broader economy that might otherwise arise from the disruptions in financial markets and to promote moderate growth over time." Board of Governors of the Federal Reserve System, *FOMC Statement and Board Approval of Discount Rate Requests of the Federal Reserve Banks of Boston, New York, Cleveland, St. Louis, Minneapolis, Kansas City, and San Francisco* (Sept. 18, 2007) (online at www.federalreserve.gov/newsevents/press/monetary/20070918a.htm) (hereinafter "FOMC Statement and Board Approval of Discount Rate Requests"). On October 31, 2007, the FOMC reduced its target for the federal funds rate from 4.75 percent to 4.25 percent. Board of Governors of the Federal Reserve System, *FOMC Statement and Board Approval of Discount Rate Requests of the Federal Reserve Banks of Boston, New York, Cleveland, St. Louis, Minneapolis, Kansas City, and San Francisco* (Oct. 31, 2007) (online at www.federalreserve.gov/newsevents/press/monetary/20071031a.htm).

¹⁶ HOPE NOW Alliance, *HOPE NOW Alliance Created to Help Distressed Homeowners* (Oct. 10, 2007) (online at www.fsround.org/hope_now/pdfs/AllianceRelease.pdf).

¹⁷ Bank of America Corporation, *Global Banks Announce Plans for Major Liquidity Facility to Bolster Asset-Backed Commercial Paper Markets* (Oct. 15, 2007) (online at mediaroom.bankofamerica.com/phoenix.zhtml?c=234503&p=irol-newsArticle&ID=1389929&highlight=).

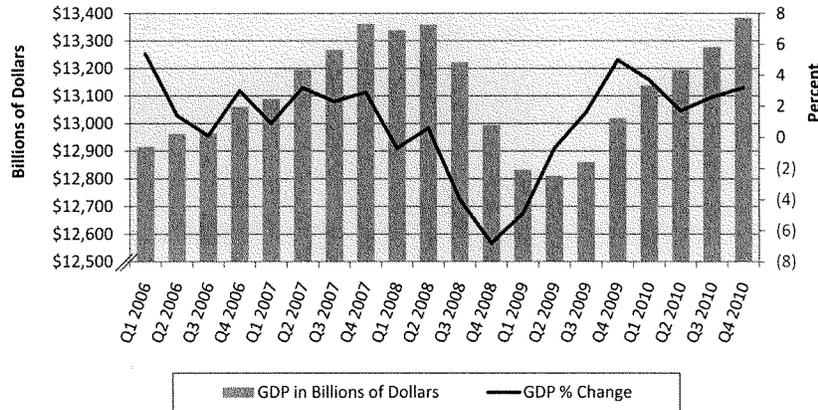
¹⁸ Bank of America Corporation, *Consortium Provides Update on Master Liquidity Enhancement Conduit* (Dec. 21, 2007) (online at mediaroom.bankofamerica.com/phoenix.zhtml?c=234503&p=irol-newsArticle&ID=1389982&highlight=).

¹⁹ See Bank of America Corporation, *Bank of America Agrees to Purchase Countrywide Financial Corp.* (Jan. 11, 2008) (online at mediaroom.bankofamerica.com/phoenix.zhtml?c=234503&p=irol-newsArticle&ID=1389986&highlight=). This purchase followed a \$2 billion investment by Bank of America in Countrywide in return for 16 percent of the company on August 22, 2007. See Bank of America Corporation, *Bank of America Makes Investment in Countrywide Financial* (Aug. 22, 2007) (online at mediaroom.bankofamerica.com/phoenix.zhtml?c=234503&p=irol-newsArticle&ID=1389904&highlight=).

²⁰ For further details on the purchase of Bear Stearns by JPMorgan, as well as the government assistance provided to facilitate the agreement, see Section I.B.1, *infra*.

slight increase of 0.6 percent in the next quarter, GDP contracted for four consecutive quarters through June 2009.²¹

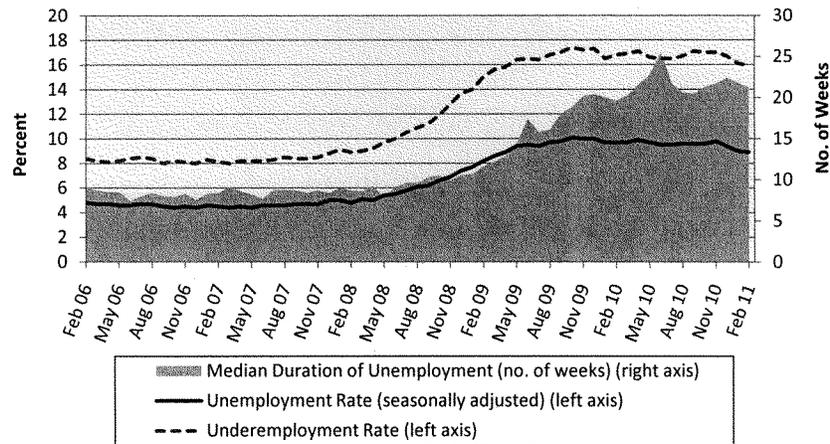
FIGURE 3: GDP SINCE 2006²²



Similarly, unemployment rose sharply in 2008 and early 2009. The unemployment rate rose from a low of 4.6 percent in January 2007 to 6.2 percent by September 2008 and 10.1 percent by October 2009. Figure 4 shows not only the rise in the unemployment rate, but also the concurrent increase in the median duration of unemployment, and the sharp increase in underemployment, a measure that includes people who are unemployed as well as those who are working fewer hours than they want to work and those who have become discouraged and stopped looking for a job.

²¹The National Bureau of Economic Research, the body responsible for determining when shifts in the U.S. business cycle occur, stated on September 20, 2010 that the most recent recession—commonly referred to as the “Great Recession”—began in December 2007 and ended in June 2009, a period corresponding to the decline in GDP mentioned here. National Bureau of Economic Research, *US Business Cycle Expansions and Contractions* (online at www.nber.org/cycles/cyclesmain.html) (accessed Mar. 3, 2011) (hereinafter “NBER: US Business Cycle”). Bureau of Economic Analysis, *Gross Domestic Product* (Instruments used: Current-dollar and “real” GDP, Percent change from preceding period) (online at www.bea.gov/national/index.htm) (accessed Mar. 3, 2011) (hereinafter “Gross Domestic Product”).

²²Amounts are in constant 2005 dollars. Gross Domestic Product, *supra* note 21.

FIGURE 4: UNEMPLOYMENT, UNDEREMPLOYMENT, AND DURATION OF UNEMPLOYMENT²³

Second Half of 2008 Brings Extraordinary Government Intervention

As the effects of the crisis spread to the wider market, the summer of 2008 brought further concerns about financial institutions which specialized in mortgage finance. IndyMac Bank, one of the nation's largest savings and loans and the second largest mortgage lender in the country, came under pressure as fear spread about its potential insolvency. Over an eleven day period, depositors withdrew over \$1.3 billion of the \$19 billion it held in deposits and the institution was subsequently taken over by the Federal Deposit Insurance Corporation (FDIC).²⁴ Also in July 2008, the Federal Reserve and Treasury took coordinated action to provide increased credit support to Fannie Mae and Freddie Mac, two critical players in the secondary mortgage market which had begun experiencing difficulty in financing their operations.²⁵ Then on July 30, the Housing and Economic Recovery Act of 2008 (HERA) was signed into law. Among its provisions, HERA reorganized the government sponsored enterprise's (GSE) regulatory framework, placing them under the supervision of the newly created Federal Housing Fi-

²³ Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey: Unemployment Rate* (online at data.bls.gov/pdq/SurveyOutputServlet?data_tool=latest_numbers&series_id=LNS14000000) (accessed Mar. 4, 2011) (hereinafter "BLS: Unemployment Rate"); Bureau of Labor Statistics, *Alternative Measures of Labor Underutilization* (Instrument Used: U-6) (online at www.bls.gov/news.release/empst.t15.htm) (accessed Mar. 4, 2011); Federal Reserve Bank of St. Louis, *Median Duration of Unemployment* (online at research.stlouisfed.org/fred2/series/UEMPMED) (accessed Mar. 4, 2011).

²⁴ Office of Thrift Supervision, *OTS Closes IndyMac Bank and Transfers Operations to FDIC* (July 11, 2008) (online at www.ots.treas.gov/index.cfm?p=PressReleases&ContentRecord_id=37f10b00-1e0b-8562-ebdd-d5d38f67934c&ContentType_id=4c12f337-b5b6-4c87-b45c-838958422bf3&MonthDisplay=7&YearDisplay=2008).

²⁵ U.S. Department of the Treasury, *Paulson Announces GSE Initiatives* (July 13, 2008) (online at www.treasury.gov/press-center/press-releases/Pages/hp1079.aspx). Also, the Federal Reserve announced that it would supplement the Treasury credit line by providing its own credit line if necessary. Board of Governors of the Federal Reserve System, *Board Grants Federal Reserve Bank of New York the Authority to Lend to Fannie Mae and Freddie Mac Should Such Lending Prove Necessary* (July 13, 2008) (online at www.federalreserve.gov/newsevents/press/other/20080713a.htm).

nance Agency (FHFA) and providing Treasury with the ability to invest taxpayer funds in Fannie Mae and Freddie Mac.²⁶

In September, the housing bubble, the liquidity crunch, and the financial crisis culminated in a string of unprecedented events and government interventions that took place over a 19-day stretch. During this period, Fannie Mae and Freddie Mac were placed into conservatorship, Lehman Brothers filed for bankruptcy, the Federal Reserve initiated an \$85 billion government rescue of American International Group (AIG), Treasury announced a temporary guarantee of the \$3.7 trillion money market funds (MMFs), and the FDIC steered Washington Mutual through the largest bank failure in U.S. history.²⁷ By the beginning of October 2008, the value of the stock market had declined by nearly 20 percent from its level in January of that year, losing 10 percent in September alone.²⁸ Figure 2 illustrates the effect these events had on the credit markets. The LIBOR–OIS spread reached a record high of 364 basis points, or 3.64 percentage points, in October 2008.²⁹

As a result of these events and the continuing rapid deterioration in the condition of the credit markets, Chairman of the Board of Governors of the Federal Reserve System Ben S. Bernanke and Secretary of the Treasury Henry M. Paulson, Jr. concluded on September 18th that their only realistic option to contain the rapidly spreading financial crisis was to convince Congress to authorize an overwhelming fiscal response by the federal government. On September 20th, Treasury sent Congress a three-page legislative proposal giving Treasury the authority to spend up to \$700 billion to purchase “troubled assets,” particularly “residential and commercial mortgage-related assets.”³⁰

Over the following two weeks, the proposal was defeated once in the House of Representatives and subsequently modified and expanded prior to being signed into law on October 3, 2008. The law—EESA—authorized the Treasury Secretary to purchase not only mortgage-related securities under the TARP, but also “any other financial instrument” the purchase of which the Secretary determined to be “necessary to promote financial market stability.”³¹ Although the federal government has intervened to rescue financial institutions and prevent bank runs on several previous occasions in

²⁶*Housing and Economic Recovery Act of 2008*, Pub. L. No. 110–289, §§ 1101, 1117 (2008) (codified at 12 U.S.C. §§ 4511, 1716 *et seq.*, 1451 *et seq.*).

²⁷Treasury took Fannie Mae and Freddie Mac into conservatorship on September 7, 2008. Lehman Brothers failed on September 14. The next day, Bank of America announced it was buying Merrill Lynch. The day after that, the government announced its bailout of AIG. Also, on September 16, the assets of a money-market mutual fund fell below \$1 per share, exposing investors to losses, an occurrence known as “breaking the buck” that had not happened in the industry for 14 years. On September 20, the Federal Reserve announced that it was allowing Goldman Sachs and Morgan Stanley, the nation’s only two remaining large investment banks, to become bank holding companies, giving them access to a key source of low-cost borrowing from the Federal Reserve. On September 25, the FDIC took Washington Mutual, the nation’s largest savings and loan, into receivership and sold many of its assets to JPMorgan Chase. Congressional Oversight Panel, *December Oversight Report: Taking Stock: What Has the Troubled Asset Relief Program Achieved?*, at 11 (Dec. 9, 2009) (online at cop.senate.gov/documents/cop-120909-report.pdf) (hereinafter “2009 December Oversight Report”). The size of the money market funds (MMFs) was \$3.66 trillion in June 2009. Institutional Money Market Funds Association, *Frequently Asked Questions* (online at www.immfa.org/about/faq/default.asp) (accessed Mar. 3, 2011) (hereinafter “IMMFA: Frequently Asked Questions”).

²⁸The value of the S&P 500 Index is used here as a proxy for the broader market. SNL Financial (accessed Mar. 3, 2011).

²⁹SNL Financial (accessed Mar. 3, 2011).

³⁰2009 December Oversight Report, *supra* note 27, at 16.

³¹2009 December Oversight Report, *supra* note 27, at 16.

U.S. history, the scale and breadth of the financial rescue authorized in EESA was unprecedented.³²

Secretary Paulson and Chairman Bernanke had initially proposed using TARP funds to buy troubled assets on the books of the largest U.S. financial institutions; however, they soon decided that this was impractical given the need for quick action and the difficulty of structuring an auction process for purchasing such assets.³³ On October 14, 2008, Secretary Paulson met with the heads of the nine largest U.S. banks to Washington and told them that Treasury would instead make direct capital injections into each of their institutions.³⁴

2. Initial TARP Investments in the Largest Institutions

The nine institutions that were the recipients of the initial round of TARP investments included the four largest U.S. commercial banks (JPMorgan, Bank of America, Citigroup, and Wells Fargo), the three largest investment banks (Goldman Sachs, Morgan Stanley, and Merrill Lynch), and the two largest custodian banks (State Street and BNY Mellon). At that time, these banks held \$10.3 trillion in assets, representing more than 75 percent of all the assets in the American banking system.³⁵ On October 28, 2008, Treasury purchased \$125 billion of preferred stock in these nine institutions and by the end of 2008, Treasury had invested approximately \$177.6 billion in banks through the Capital Purchase Program (CPP).³⁶

³²For example, the savings and loan crisis of the late 1980s and early 1990s was the last significant previous disruption in financial markets that involved government intervention. At the time, the total cost of government assistance provided over the course of this crisis was estimated at \$160 billion (\$230 billion in 2005 dollars). Federal Deposit Insurance Corporation, *The Cost of the Savings and Loan Crisis: Truth and Consequences*, at 29 (Dec. 2000) (online at www.fdic.gov/bank/analytical/banking/2000dec/brv13n2_2.pdf). Dollars adjusted for inflation using the Gross Domestic Product Implicit Price Deflator. Federal Reserve Bank of St. Louis, *Gross Domestic Product: Implicit Price Deflator* (online at research.stlouisfed.org/fred2/data/GDPDEF.txt) (accessed Mar. 1, 2011).

³³Less than two weeks after EESA was signed into law, Secretary Paulson announced that Treasury would “purchase equity stakes in a wide array of banks and thrifts.” U.S. Department of the Treasury, *Statement by Secretary Henry M. Paulson, Jr. on Actions to Protect the U.S. Economy* (Oct. 14, 2008) (online at www.treasury.gov/press-center/press-releases/Pages/hp1205.aspx) (hereinafter “Statement by Secretary Paulson on Actions to Protect the U.S. Economy”).

In response to questions posed by this Panel regarding the shift from asset purchases to injecting capital, Treasury stated: “Given such market conditions, Secretary Paulson and Chairman Bernanke recognized that Treasury needed to use the authority and flexibility granted under the EESA as aggressively as possible to help stabilize the financial system. They determined the fastest, most direct way was to increase capital in the system by buying equity in healthy banks of all sizes. Illiquid asset purchases, in contrast, require much longer to execute.” U.S. Department of the Treasury, *Responses to Questions of the First Report of the Congressional Oversight Panel for Economic Stabilization*, at 56 (Dec. 30, 2008) (online at cop.senate.gov/documents/cop-010909-report.pdf).

³⁴2009 December Oversight Report, *supra* note 27, at 17–18.

³⁵Amount of assets held by each of these institutions was as of the third quarter 2008. Total amount of assets in the banking system were accessed through the FDIC’s Quarterly Banking profile as of the third quarter 2008. SNL Financial (accessed Mar. 3, 2011); Federal Deposit Insurance Corporation, *Quarterly Banking Profile: Balance Sheet—Excel* (online at www2.fdic.gov/qbp/timeseries/BalanceSheet.xls) (accessed Mar. 3, 2011).

³⁶On October 14, 2008, then Secretary Paulson stated that the nine initial Troubled Asset Relief Program (TARP) recipients “are healthy institutions, and they have taken this step for the good of the U.S. economy. As these healthy institutions increase their capital base, they will be able to increase their funding to U.S. consumers and businesses.” Statement by Secretary Paulson on Actions to Protect the U.S. Economy, *supra* note 33; U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for Period Ending March 8, 2011* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/Documents/TARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf) (hereinafter “Treasury Transactions Report”).

In addition to the initial capital investments made in the nation's largest banks, Treasury undertook additional steps to ensure the stability of Citigroup and Bank of America in November and December 2008 by purchasing an additional \$20 billion of preferred shares from both institutions under the Targeted Investment Program (TIP), a program that was utilized only for those two banks.³⁷ Furthermore, in November, Treasury, in conjunction with the Federal Reserve and the FDIC, put together a hastily crafted \$301 billion guarantee of Citigroup assets.³⁸ A similar guarantee of \$118 billion of Bank of America assets was announced as well, although it was never legally finalized.³⁹

Also in November, the federal government supplemented the original \$85 billion loan to AIG and initiated a second round of assistance to AIG in which the TARP purchased \$40 billion of preferred equity and the Federal Reserve provided \$44 billion to create two special purpose vehicles (SPVs) to take ownership of certain AIG financial assets.⁴⁰ Treasury also made its first investments in the automotive industry in late 2008 with loans and preferred stock purchases for General Motors, GMAC, Chrysler, and Chrysler Financial. By the end of January 2009, TARP assistance outstanding amounted to \$301 billion with over 75 percent having been provided to only a few firms: the nation's biggest banks, the automotive industry, and AIG.⁴¹

³⁷U.S. Department of the Treasury, *Joint Statement by Treasury, Federal Reserve and the FDIC on Citigroup* (Nov. 23, 2008) (online at www.treasury.gov/press-center/press-releases/Pages/hp1287.aspx) (hereinafter "Statement by Treasury, Federal Reserve and the FDIC on Citigroup"); Treasury Transactions Report, *supra* note 36; Board of Governors of the Federal Reserve System, *Regulatory Reform: Citigroup* (online at www.federalreserve.gov/newsevents/reform_citi.htm) (accessed Mar. 11, 2011); Board of Governors of the Federal Reserve System, *Regulatory Reform: Bank of America* (online at www.federalreserve.gov/newsevents/reform_boa.htm) (accessed Mar. 11, 2011) (hereinafter "Regulatory Reform: Bank of America").

³⁸On November 23, 2008, the Treasury, Federal Reserve, and FDIC announced in a joint statement that they would provide further assistance to Citigroup in the form of an asset guarantee and an additional \$20 billion preferred investment. The funds were disbursed to Citigroup on December 31, 2010 under a program first introduced on that day named the Targeted Investment Program (TIP). Similarly, the asset guarantee announced in November was not a part of a specific TARP initiative until the agreement was finalized on January 16, 2010 under the newly designated Asset Guarantee Program (AGP). Statement by Treasury, Federal Reserve and the FDIC on Citigroup, *supra* note 37; Treasury Transactions Report, *supra* note 36.

³⁹Regulatory Reform: Bank of America, *supra* note 37; U.S. Department of the Treasury, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and Bank of America Corporation, *Termination Agreement*, at 1-2 (Sept. 21, 2009) (online at www.treasury.gov/initiatives/financial-stability/investment-programs/agg/Documents/BofA%20-%20Termination%20Agreement%20-%20executed.pdf) (hereinafter "BofA Termination Agreement").

⁴⁰Two Special Purpose Vehicles (SPVs), Maiden Lane II and Maiden Lane III, were created on December 12, 2008 as part of the federal government's restructuring of its original assistance to AIG. These facilities were funded with loans from the Federal Reserve of \$19.5 and \$24.3 billion respectively. Board of Governors of the Federal Reserve System, *Regulatory Reform: American International Group (AIG), Maiden Lane II and III* (online at www.federalreserve.gov/newsevents/reform_aig.htm) (accessed Mar. 11, 2011) (hereinafter "Fed Regulatory Reform: AIG, Maiden Lane II and III"). These TARP funds were later supplemented with a commitment of an additional \$30 billion TARP commitment to AIG in April 2009. Treasury Transactions Report, *supra* note 36, at 21.

⁴¹In total, \$301 billion was outstanding under the TARP with \$195.3 billion outstanding under the Capital Purchase Program (CPP), \$40 billion outstanding under the TIP, \$20.8 billion outstanding under the automotive portion of the program, \$40 billion outstanding to AIG, and \$5 billion in funds committed to the Citigroup asset guarantee. All but \$70.3 billion of the \$301 billion outstanding was provided to thirteen institutions: Citigroup, Bank of America, JPMorgan, Wells Fargo, Goldman Sachs, Merrill Lynch, Morgan Stanley, Bank of New York, State Street, General Motors, GMAC, Chrysler, and Chrysler Financial. U.S. Department of the Treasury, *Troubled Asset Relief Program Transaction Report for Period Ending January 30, 2009* (Feb. 2, 2009) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/Documents/TARPTransactions/transaction_report_02-02-09.pdf) (hereinafter "Treasury Transactions Report—January 2009").

It was in this climate that the Panel began its oversight work. The unprecedented financial crisis and the corresponding government intervention left many questions. What steps would be taken to ensure accountability from TARP recipients? How would Treasury make certain that its actions were transparent and that the taxpayer be fairly compensated for the risk they were taking? What steps would Treasury take to stem the tide of foreclosures that was having a debilitating effect on American families and neighborhoods? The Panel laid out these central concerns in its first two reports and, throughout its existence, has consistently used its oversight authorities to focus attention on these questions.

B. Overview of Government Efforts

In response to the financial crisis, Congress, the Federal Reserve, Treasury, and the FDIC worked both independently and in concert with other agencies to implement a variety of policies and initiatives aimed at ensuring financial stability. In addition to the direct expenditures Treasury made through the TARP, the federal government also engaged in a broad array of programs directed at stabilizing the economy. Many of these programs explicitly augmented Treasury's TARP initiatives, like asset guarantees for Citigroup and Bank of America, or relied on cooperation, such as the Federal Reserve and Treasury working in tandem to create programs such as the Term Asset-Backed Securities Loan Facility (TALF). Other programs, like the Federal Reserve's extension of credit through its section 13(3) facilities and SPVs or the FDIC's Temporary Liquidity Guarantee Program (TLGP), stood independent of the TARP and sought to accomplish different, but related, goals. Given that all of these programs provided support to the largest banks, they had an interactive effect and clearly affected the performance of each separate program. Figure 6 illustrates the interconnectedness of certain financial stability programs.

1. Federal Reserve

The policy response to the financial crisis ran the gamut from the use of traditional monetary policy to the creation of unprecedented credit and liquidity measures. From September 2007 to December 2008, the Federal Reserve steadily lowered the federal funds rate from 5.25 percent to its December 2008 target of 0 to 0.25 percent.⁴² Furthermore, in August 2007 the Federal Reserve lowered the interest rate it charged banks for loans through its discount window above the federal funds target rate to 50 basis points.⁴³ It

⁴²FOMC Statement and Board Approval of Discount Rate Requests, *supra* note 15; Board of Governors of the Federal Reserve System, *FOMC Statement and Board Approval of Discount Rate Requests of Federal Reserve Banks of New York, Cleveland, Richmond, Atlanta, Minneapolis, and San Francisco* (Dec. 16, 2008) (online at www.federalreserve.gov/newsevents/press/monetary/20081216b.htm).

⁴³Its level prior to the reduction was 100 basis points above the federal funds target rate. Board of Governors of the Federal Reserve System, *Federal Reserve Board Discount Rate Action* (Aug. 17, 2007) (online at www.federalreserve.gov/newsevents/press/monetary/20070817a.htm). The Federal Reserve subsequently lowered this interest rate to 25 basis points above the federal funds target rate in March 2008. *See, e.g.*, Board of Governors of the Federal Reserve System, *FOMC Statement and Board Approval of Discount Rate Requests of the Federal Reserve Banks of Boston, New York, and San Francisco* (Mar. 18, 2008) (online at www.federalreserve.gov/newsevents/press/monetary/20080318a.htm). The discount window "functions as a safety valve in relieving pressures in reserve markets; extensions of credit can help relieve liquidity strains

Continued

also expanded the list of securities banks could post to draw down these loans through the discount window. While the discount window is an important monetary tool in normal economic conditions, there were two problems that limited its effectiveness in late 2007: (1) There was a fear in the market that companies accessing the discount window would have a stigma attached to them,⁴⁴ and (2) only banks could access the discount window.

The Federal Reserve took actions to solve both of these issues. First, the Term Auction Facility (TAF) was created in order to allow banks to access funding anonymously through a bidding process. Second, the Federal Reserve created a number of new programs under section 13(3) of the Federal Reserve Act aimed at expanding access to liquidity beyond banks.⁴⁵ These programs included:

- The Commercial Paper Funding Facility (CPFF)—a facility for corporations to roll over their maturing commercial paper debt. At its maximum, nearly \$350 billion was outstanding under the facility.⁴⁶
- Support for Primary Dealers through the Primary Dealer Credit Facility (PDCF), an overnight loan facility for Primary Dealers, and the Term Securities Lending Facility (TSLF), a program that loaned Primary Dealers relatively liquid securities such as U.S. Treasury bonds in exchange for less liquid securities such as residential mortgage-backed security (RMBS).⁴⁷
- Support for the money market mutual funds through the Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility (AMLF).⁴⁸ During the crisis, withdrawals from money market mutual funds caused the funds to sell the asset-backed commercial paper they held at discounted levels to meet liquidity needs. Under the AMLF, the Federal Reserve provided loans to allow eligible institutions to purchase asset-

in a depository institution and in the banking system as a whole. The Window also helps ensure the basic stability of the payment system more generally by supplying liquidity during times of systemic stress.” Board of Governors of the Federal Reserve System, *The Federal Reserve Discount Window* (Feb. 19, 2010) (online at www.frbdiscowindow.org/discowindowbook.cfm?hdrID=14&dtlID=43).

⁴⁴Chairman Bernanke stated that, “In August 2007 . . . banks were reluctant to rely on discount window credit to address their funding needs. The banks’ concern was that their recourse to the discount window, if it became known, might lead market participants to infer weakness—the so-called stigma problem.” Federal Reserve Bank of New York, *Stigma in Financial Markets: Evidence from Liquidity Auctions and Discount Window Borrowing During the Crisis*, at 1 (Jan. 2011) (online at www.newyorkfed.org/research/staff_reports/sr483.pdf).

⁴⁵Board of Governors of the Federal Reserve System, *Regulatory Reform: Usage of Federal Reserve Credit and Liquidity Facilities* (online at www.federalreserve.gov/newsevents/reform_transaction.htm) (accessed Mar. 11, 2011).

⁴⁶Board of Governors of the Federal Reserve System, *Regulatory Reform: Commercial Paper Funding Facility* (online at www.federalreserve.gov/newsevents/reform_cpff.htm) (accessed Mar. 11, 2011) (hereinafter “Fed Regulatory Reform: Commercial Paper Funding Facility”); Board of Governors of the Federal Reserve System, *Loans to CPFF LLC* (Instrument Used: CPFF commercial paper holdings, net) (online at www.federalreserve.gov/newsevents/files/cpff.xls) (accessed Mar. 11, 2011).

⁴⁷Primary Dealers are banks and securities firms that serve as counterparties for FRBNY in the management of its open market operations. Fed Regulatory Reform: Commercial Paper Funding Facility, *supra* note 46; Board of Governors of the Federal Reserve System, *Regulatory Reform: Glossary of Terms* (online at www.federalreserve.gov/newsevents/reform_glossary.htm#primarydealers) (accessed Mar. 11, 2011).

⁴⁸The Federal Reserve also introduced the Money Market Investor Funding Facility on October 21, 2008. However, this facility was never used and closed on October 30, 2009. See Board of Governors of the Federal Reserve System, *Regulatory Reform: Money Market Investor Funding Facility* (online at www.federalreserve.gov/newsevents/reform_mmiff.htm) (accessed Mar. 11, 2011).

backed commercial paper, thereby fostering liquidity in the market.

- Support for the securitization market through the TALF. Under the TALF, the Federal Reserve provided holders of eligible asset-backed securities (ABS) with loans, using the ABS as collateral. The intent of the program was to use TALF borrowers as conduits for enhanced liquidity by providing loans to those entities that served as issuers and sponsors of ABS.

At its height, \$1.7 trillion was outstanding under the Federal Reserve's liquidity facilities.⁴⁹

As noted earlier, in March 2008, the financial condition of Bear Stearns, an investment bank with assets of \$400 billion, began to worsen rapidly and the Federal Reserve intervened to facilitate the purchase of Bear Stearns by JPMorgan Chase.⁵⁰ The Federal Reserve did so by creating a limited liability company (LLC) named Maiden Lane that acquired a portion of Bear Stearns' assets.⁵¹ The Federal Reserve Bank of New York (FRBNY) extended approximately \$30 billion of credit to the Maiden Lane vehicle to purchase the securities.⁵²

The Federal Reserve also undertook considerable asset purchases in response to the crisis. Between November 2008 and March 2010, the Federal Reserve purchased \$1.25 trillion of MBS with government agency guarantees in an attempt to drive down mortgage

⁴⁹To offset some of the impact of the Federal Reserve's liquidity programs, Treasury announced on September 17, 2008, the Supplementary Financing Program—a program expected to be temporary in nature but that would allow Treasury to auction bills to various financial institutions with relationships with the Federal Reserve. The program consisted of a series of Treasury bill auctions, separate and distinct from Treasury's standard borrowing operations. The proceeds from these auctions were maintained in a Treasury account held at the Federal Reserve Bank of New York. As a result, funds would flow from a particular bank's account with the Fed to Treasury's account with the Fed. The program was created in order to help the Federal Reserve manage the significant increase in the size of its balance sheet due to its newly created liquidity programs. U.S. Department of the Treasury, *Treasury Announces Supplementary Financing Program* (Sept. 17, 2008) (online at www.treasury.gov/press-center/press-releases/Pages/hp1144.aspx); Federal Reserve Bank of Cleveland, *The Supplemental Financing Program* (Sept. 28, 2009) (online at www.clevelandfed.org/research/trends/2009/1009/03monpol.cfm).

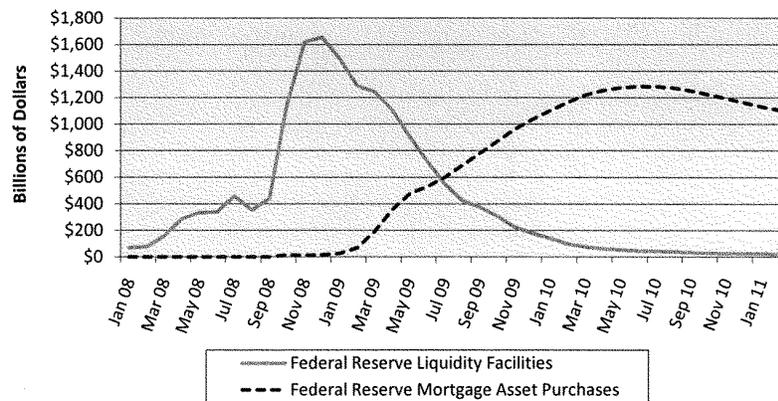
⁵⁰Bear Stearns was unable to fulfill its liquidity needs, and in response, the Federal Reserve authorized a \$12.9 billion loan to the company. Although the loan was repaid in full with interest, continued pressure on the firm made it clear that without either a large infusion of capital or a sale, the firm would likely fail. Board of Governors of the Federal Reserve System, *Regulatory Reform: Bear Stearns, JPMorgan Chase, and Maiden Lane LLC* (online at www.federalreserve.gov/newsevents/reform_bearstearns.htm) (accessed Mar. 11, 2011) (hereinafter "Fed Regulatory Reform: Bear Stearns, JPMorgan Chase, and Maiden Lane LLC").

⁵¹The Maiden Lane facilities were named for the street behind the FRBNY building in Manhattan, New York. As of March 3, 2011, the net portfolio holdings of the Maiden Lane vehicles are \$26.1 billion while the amount due to FRBNY, including accrued interest, is \$24.7 billion. Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1)* (Mar. 3, 2011) (online at www.federalreserve.gov/releases/h41/20110303/); Fed Regulatory Reform: Bear Stearns, JPMorgan Chase, and Maiden Lane LLC, *supra* note 50.

⁵²The Federal Reserve Act of 1913 provides for the central bank to take broad action in the face of financial or economic crisis. Section 13, paragraph 3 of the Act states that "[i]n unusual and exigent circumstances, the Board of Governors of the Federal Reserve System" may lend to any individuals, partnerships or corporations, given that certain conditions are met. On March 16, 2008, the Federal Reserve Board announced that it would use its authority under section 13(3) of the Federal Reserve Act to help facilitate the acquisition of Bear Stearns by JPMorgan Chase. The Federal Reserve provided this assistance by creating a Limited Liability Company (LLC) named Maiden Lane that then received a \$28.8 billion loan from FRBNY to purchase troubled assets from Bear Stearns. Subsequently, in September 2008, the Federal Reserve used its authority under section 13(3) of the Act to assist AIG. This assistance came in the form of a \$85 billion credit facility for AIG and the creation as well as funding of two more Maiden Lane SPVs dedicated to purchasing troubled assets from the company. Federal Reserve Bank of Minneapolis, *The History of a Powerful Paragraph* (June 2008) (online at www.minneapolisfed.org/publications_papers/pub_display.cfm?id=3485); Federal Reserve Bank of New York, *Maiden Lane Transactions: Introduction* (online at www.newyorkfed.org/markets/maidenlane.html) (accessed Mar. 8, 2011).

rates and by doing so provided additional liquidity to financial institutions, including TARP participants.⁵³ The Federal Reserve also purchased nearly \$175 billion of GSE debt.⁵⁴ As Figure 5 below illustrates, the purchase of agency MBS and GSE debt steadily increased as the liquidity facilities established at the height of the crisis were wound down, thus signaling a shift from crisis response to economic stimulus.

FIGURE 5: FEDERAL RESERVE LIQUIDITY FACILITIES AS COMPARED TO ASSET PURCHASES⁵⁵



2. FDIC

In keeping with its mission to “maintain stability and public confidence in the nation’s financial system,” the FDIC undertook a number of measures in response to the financial crisis.⁵⁶ The FDIC experienced significant losses to its Deposit Insurance Fund during the crisis due to the high number of bank failures. From the third quarter of 2008 through 2010, 318 banks failed in the United States with total assets of \$631.7 billion.⁵⁷ During that same pe-

⁵³ See Congressional Oversight Panel, *September Oversight Report: Assessing the TARP on the Eve of Its Expiration*, at 99–100 (Sept. 16, 2010) (online at cop.senate.gov/documents/cop-091610-report.pdf) (hereinafter “2010 September Oversight Report”); Board of Governors of the Federal Reserve System, *Data Download Program* (Instrument Used: Mortgage-Backed Securities Held by the Federal Reserve) (online at www.federalreserve.gov/datadownload/) (accessed Mar. 3, 2011).

⁵⁴ At its height, on March 31, 2010, the Federal Reserve owned \$169 billion of GSE debt. Board of Governors of the Federal Reserve System, *Data Download Program* (Instrument Used: Federal agency debt securities: week average) (online at www.federalreserve.gov/datadownload/) (accessed Mar. 3, 2011).

⁵⁵ Federal Reserve Liquidity Facilities are comprised of Term auction credit, Secondary credit, Seasonal credit, Term Asset-Backed Securities Loan Facility, Other credit extensions, Net portfolio holdings of Commercial Paper Funding Facility LLC, Central bank liquidity swaps, Primary dealer and other broker-dealer credit, Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility, Term facility. The Federal Reserve Mortgage Asset Purchases are comprised of federal agency debt securities and mortgage-backed securities held by the Federal Reserve. Board of Governors of the Federal Reserve System, *Data Download Program* (online at www.federalreserve.gov/datadownload/) (accessed Mar. 3, 2011).

⁵⁶ Federal Deposit Insurance Corporation, *FDIC Mission, Vision, and Values* (online at www.fdic.gov/about/mission/index.html) (accessed Mar. 3, 2011).

⁵⁷ This figure includes the \$307 billion of assets Washington Mutual held when it was seized by regulators on September 25, 2008. The institution’s banking assets were purchased by JPMorgan Chase the following day in a deal facilitated by the FDIC. Federal Deposit Insurance Corporation, *Failures and Assistance Transactions* (online at www2.fdic.gov/hsob/SelectRpt.asp?EntryTyp=30) (accessed Mar. 4, 2011); Federal Deposit Insurance Corporation,

riod, the FDIC set aside provisions for deposit insurance fund losses totaling \$185.7 billion.⁵⁸ In addition, the enactment of EESA in October 2008 raised the basic limit on federal deposit insurance coverage from \$100,000 per borrower to \$250,000.⁵⁹

The FDIC created its TLGP less than two weeks after the enactment of EESA, under the authority of the Federal Deposit Insurance Act. The TLGP had two parts. First, the Debt Guarantee Program (DGP) portion of the TLGP guarantees debt issued by banks. Second, the Transaction Account Guarantee Program (TAG) guaranteed certain noninterest-bearing transaction accounts at insured depository institutions.⁶⁰ Though it covered all depository accounts, the TAG program was intended to benefit business payment processing accounts, such as payroll accounts. The FDIC currently guarantees approximately \$264.6 billion in outstanding financial institution obligations, and at its maximum \$345.8 billion was guaranteed under the program.⁶¹ Through both the TLGP and the expansion of deposit insurance, the FDIC provided significant additional support for the banking system at the peak of the crisis.

3. Treasury Department

In addition to the TARP, Treasury undertook several other highly important initiatives in response to the financial crisis. On September 7, 2008, Treasury announced that it would purchase government sponsored enterprises' mortgage backed securities (GSE MBS) in an attempt to promote both market stability and lower interest rates.⁶² At its maximum, Treasury owned \$220.8 billion in MBS under this program.⁶³ Furthermore, on September 29, 2008, Treasury announced a temporary guarantee for MMFs. While the total size of the money market at that point in time was \$3.7 trillion, no losses were incurred and the program was closed on Sep-

JPMorgan Chase Acquires Banking Operations of Washington Mutual (Sept. 25, 2008) (online at www.fdic.gov/news/news/press/2008/pr08085.html).

⁵⁸This figure only reflects information provided through the third quarter of 2010. Federal Deposit Insurance Corporation, *DIF Income Statement* (Instrument Used: Provision for insurance losses, Q3 2008 through Q3 2010) (online at www.fdic.gov/about/strategic/corporate/index.html) (hereinafter "FDIC: DIF Income Statement").

⁵⁹Federal Deposit Insurance Corporation, *Emergency Economic Stabilization Act of 2008 Temporarily Increases Basic FDIC Insurance Coverage from \$100,000 to \$250,000 Per Depositor* (Oct. 7, 2008) (online at www.fdic.gov/news/news/press/2008/pr08093.html).

⁶⁰Congressional Oversight Panel, *November Oversight Report: Guarantees and Contingent Payments in TARP and Related Programs*, at 38 (Nov. 6, 2009) (online at cop.senate.gov/documents/cop-110609-report.pdf) (hereinafter "2009 November Oversight Report").

⁶¹The maximum amount outstanding under this program was in May 2009. The current amount outstanding is as of January 31, 2011. Federal Deposit Insurance Corporation, *Monthly Reports Related to the Temporary Liquidity Guarantee Program* (Instrument Used: Debt Issuance Under Guarantee Program) (accessed Mar. 3, 2011) (online at www.fdic.gov/regulations/resources/tlgp/reports.html) (hereinafter "FDIC: Monthly Reports Related to the TLGP").

⁶²U.S. Department of the Treasury, *Fact Sheet: GSE Mortgage Backed Securities Purchase Program* (Sept. 7, 2008) (online at www.treasury.gov/press-center/press-releases/Documents/mbs_factsheet_090708.pdf).

⁶³U.S. Department of the Treasury, *Agency MBS Purchase Program* (Instrument Used: Trades by Month) (www.treasury.gov/resource-center/data-chart-center/Documents/Final%20Trades%20by%20month.pdf). As of February 2011, Treasury has received \$84.0 billion in principal repayments and \$16.7 billion in interest payments from the securities it holds as part of this program. U.S. Department of the Treasury, *MBS Purchase Program Principal and Interest Received* (online at www.treasury.gov/resource-center/data-chart-center/Documents/February%202011%20MBS%20Principal%20and%20Interest%20Monthly%20Breakout.pdf) (accessed Mar. 11, 2011).

tember 18, 2009, with Treasury having earned \$1.2 billion in participation fees.⁶⁴

In early September 2008, the FHFA, using authority it had been provided in law only six weeks earlier, placed the two large GSEs, Fannie Mae and Freddie Mac, in conservatorship, and Treasury agreed to provide capital infusions to these mortgage giants.⁶⁵ At that time, these two GSEs owned or guaranteed approximately \$5.3 trillion in mortgage assets.⁶⁶ The FHFA placed Fannie Mae and Freddie Mac into conservatorship on September 7, 2008, in order to preserve each company's assets and to restore them to sound and solvent condition. Secretary Paulson announced Treasury's intention to make capital injections (through the purchase of preferred interests) in the GSEs in order to preserve their positive net worth.⁶⁷ Due to these coordinated actions, Treasury had guaranteed the GSE's debts, and FHFA had all the powers of the management, board, and shareholders of the enterprises.⁶⁸ In sum, these actions had the effect of changing the previously implicit government guarantee of these institutions into an explicit government guarantee.

Initially, Treasury acquired \$1 billion in preferred stock from both Fannie Mae and Freddie Mac. Subsequently both entities drew upon this assistance by providing preferred stock with a dividend rate of 10 percent (double the initial dividend rate for participation in the CPP) in exchange for cash investments from Treasury. Furthermore, Treasury received warrants to purchase common stock in the GSEs, representing 79.9 percent of the common ownership when exercised.⁶⁹ The preliminary ceiling for the amount of preferred stock Treasury would purchase was \$100 billion for each of the GSEs.⁷⁰ In February 2009, the ceiling for preferred stock purchases was raised to \$200 billion for each GSE, and in December 2009, Treasury removed the cap on possible purchases entirely.⁷¹ As of February 2011, the GSEs had drawn \$153.9 billion

⁶⁴The size of the MMFs was \$3.66 trillion in June 2009. IMMFA: Frequently Asked Questions, *supra* note 27; U.S. Department of the Treasury, *Treasury Announces Expiration of Guarantee Program for Money Market Funds* (Sept. 18, 2009) (online at www.treasury.gov/press-center/press-releases/Pages/tg293.aspx) (hereinafter "Treasury's Guarantee Program for Money Market Funds Expires").

⁶⁵Conservatorship is the legal process by which an entity establishes control and oversight of a company to put it in a sound and solvent condition. Congressional Budget Office, *CBO's Budgetary Treatment of Fannie Mae and Freddie Mac* (Jan. 2010) (online at www.cbo.gov/ftpdocs/108xx/doc10878/01-13-FannieFreddie.pdf) (hereinafter "CBO: Fannie Mae and Freddie Mac").

⁶⁶At the end of the third quarter 2008, Fannie Mae's mortgage credit exposure was \$3.1 trillion, and Freddie Mac's exposure was \$2.2 trillion. Federal National Mortgage Association, *Form 10-Q for the Quarterly Period Ended September 30, 2008*, at 110–111 (Instrument Used: Mortgage credit book of business) (Nov. 10, 2008) (online at www.sec.gov/Archives/edgar/data/3110522/000095013308003686/w71392e10vq.htm#131); Federal Home Loan Mortgage Corporation, *Form 10-Q for the Quarterly Period Ended September 30, 2008*, at 99 (Instrument Used: Total mortgage portfolio) (Nov. 14, 2008) (online at www.sec.gov/Archives/edgar/data/1026214/000102621408000043/f65508e10vq.htm).

⁶⁷U.S. Department of the Treasury, *Fact Sheet: Treasury Senior Preferred Stock Purchase Agreement* (Sept. 7, 2008) (online at www.treasury.gov/press-center/press-releases/Documents/pspa_factsheet_090708%20.pdf) (hereinafter "Treasury Fact Sheet on Senior Preferred Stock").

⁶⁸House Financial Services, Subcommittee on Capital Markets, Insurance, and Government-Sponsored Enterprises, Written Testimony of Edward J. DeMarco, acting director, Federal Housing Finance Agency, *The Future of Housing Finance: A Progress Update on the GSEs*, at 2 (Sept. 15, 2010) (online at financialservices.house.gov/Media/file/hearings/111/DeMarco091510.pdf).

⁶⁹Treasury Fact Sheet on Senior Preferred Stock, *supra* note 67.

⁷⁰Treasury Fact Sheet on Senior Preferred Stock, *supra* note 67.

⁷¹U.S. Department of the Treasury, *Statement by Secretary Tim Geithner on Treasury's Commitment to Fannie Mae and Freddie Mac* (Feb. 2, 2009) (online at www.treasury.gov/press-center/press-releases/Pages/tg32.aspx); U.S. Department of the Treasury, *Treasury Issues*

under the Treasury preferred facility and paid \$20.2 billion in dividends.⁷² Earlier, in January 2010, the Congressional Budget Office (CBO) had estimated the total cost to the government for assistance to Fannie Mae and Freddie Mac to be \$389 billion, a figure which included “the recognition of substantial losses on the entire outstanding stock of mortgages held or guaranteed by Fannie Mae and Freddie Mac” at the time the estimate was made in August 2009.⁷³

From a larger perspective, TARP-assisted institutions were also among the many beneficiaries of the federal government’s rescue of the GSEs themselves. Given the large holdings of GSE securities at the largest TARP-assisted institutions, the federal government’s rescue of Fannie Mae and Freddie Mac effectively served to prevent additional major losses at these institutions. As noted above, one result of the federal government’s intervention to place Fannie Mae and Freddie Mac in conservatorship in September 2008 was that their MBS and debt issues now enjoyed the effective guarantee of the federal government.⁷⁴ By first making explicit the federal support for these GSE securities and subsequently buying up to \$1.25 trillion of the same securities, Treasury and the Federal Reserve effectively provided substantial economic benefit to the TARP-assisted banks that went well beyond the amounts reflected in the accounting for the TARP itself.

4. Coordinated Action

As mentioned above, there were a number of initiatives that called for cooperative action between government actors. Figure 6 below illustrates this interaction. For example, the TALF was a cooperative program between Treasury and the Federal Reserve in which the TARP took a first-loss position on any losses associated with TALF loans, originally up to \$20 billion, with the Federal Reserve responsible for losses above that level.⁷⁵ Similarly, Citigroup and Bank of America benefitted from an asset guarantee in which Treasury, the FDIC, and the Federal Reserve all accepted risk liability for losses above a certain level.⁷⁶ Additionally, as discussed in Section VI of this report, AIG was the beneficiary of a coordi-

Update on Status of Support for Housing Programs (Dec. 24, 2009) (online at www.treasury.gov/press-center/press-releases/Pages/2009122415345924543.aspx) (hereinafter “Treasury Update on Housing Programs”).

⁷² This figure excludes the \$2 billion in preferred stock given to Treasury by the GSEs upon the creation of these facilities. Fannie Mae had drawn \$90.2 billion and Freddie Mac had drawn \$63.7 billion under their respective facilities. Thus far, Fannie Mae has paid \$10.2 billion and Freddie Mac has paid \$10.0 billion in dividends for their draws from the preferred facilities. Federal Housing Finance Agency, *Treasury and Federal Reserve Purchase Programs for GSE and Mortgage-Related Securities*, at 2–3 (Feb. 25, 2011) (online at www.fhfa.gov/webfiles/19854/TreasFED02252011%20pdf%20-%20Adobe%20Acrobat%20Pro.pdf) (hereinafter “Treasury & Federal Reserve Purchase Programs for GSE and Mortgage-Related Securities”).

⁷³ CBO: Fannie Mae and Freddie Mac, *supra* note 65, at 8–9.

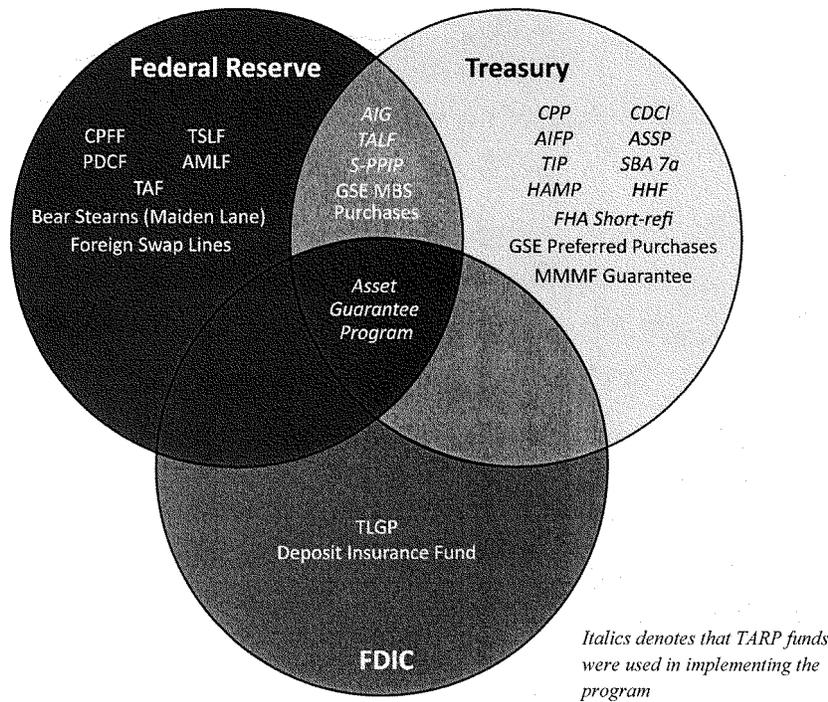
⁷⁴ Absent government intervention, the GSEs would have been unable to honor their MBS guarantees, and therefore the value of these MBS securities would have plummeted. Treasury Update on Housing Programs, *supra* note 71.

⁷⁵ The TARP is currently only responsible for losses up to \$4.3 billion. Treasury Transactions Report—January 2009, *supra* note 41.

⁷⁶ Although Treasury, the Federal Reserve, and the FDIC negotiated with Bank of America regarding a Guarantee similar to the one provided to Citigroup, the parties never reached an agreement. In September 2009, Bank of America agreed to pay each of the prospective guarantors a fee as though the guarantee had been in place during the negotiations period. This agreement resulted in payments of \$276 million to Treasury, \$57 million to the Federal Reserve, and \$92 million to the FDIC. BofA Termination Agreement, *supra* note 39, at 1–2.

nated effort between the TARP and the Federal Reserve, with \$182 billion of funds being committed at the height of assistance.

FIGURE 6: GOVERNMENT RESPONSE TO FINANCIAL CRISIS BY ORGANIZATION ⁷⁷



Finally, the Federal Reserve, the FDIC, and the Comptroller of the Currency released the Supervisory Capital Assessment Program (SCAP), more commonly known as the “stress tests,” on May 7, 2009. This forward-looking analysis was intended to determine whether or not the nation’s 19 largest bank holding companies (BHCs) could withstand adverse economic conditions.⁷⁸ Under the SCAP, only one institution, GMAC/Ally Financial, was found to be in need of additional government-provided capital, which was provided under the automotive portion of the TARP. The review, however, did note that roughly half of the firms needed to take steps, including raising capital, to be more adequately prepared for possible losses.⁷⁹

⁷⁷This figure does not reflect that Fannie Mae and Freddie Mac were placed into conservatorship by their regulator, the Federal Housing Finance Agency, on September 7, 2008. Federal Housing Finance Agency, *Statement of FHFA Director James B. Lockhart* (Sept. 7, 2008) (online at www.fhfa.gov/webfiles/23/FHFASstatement9708final.pdf); Congressional Research Service, *Government Interventions in Response to Financial Turmoil* (Dec. 16, 2010).

⁷⁸Board of Governors of the Federal Reserve System, *Federal Reserve, OCC, and FDIC Release Results of the Supervisory Capital Assessment Program* (May 7, 2009) (online at www.federalreserve.gov/newsevents/press/bcreg/20090507a.htm).

⁷⁹Board of Governors of the Federal Reserve System, *Federal Reserve Board Makes Announcement Regarding the Supervisory Capital Assessment Program (SCAP)* (Nov. 9, 2009) (online at www.federalreserve.gov/newsevents/press/bcreg/20091109a.htm) (hereinafter “Federal Reserve Announcement on the Supervisory Capital Assessment Program”).

FIGURE 7: TOTAL FEDERAL GOVERNMENT EXPOSURE TO SCAP BANK HOLDING COMPANIES
 [Dollars in billions]

	TARP ⁱ				FDIC			Federal Reserve				Total Federal Exposure
	CPP	AGP	TIP	AIFP	TLP Debt Issuance ⁱⁱ	AGP ⁱⁱⁱ	Liquidity Programs ^{iv}					
							PDCF	CPFF	TAF	TSLF ^{vii}	AGP ^v	
Bank of America	\$25.0	\$5.0	\$20.0	—	\$68.6	\$5.0	\$14.9	\$88.0	\$13.1	\$87.2	\$336.1	
Citigroup	25.0	5.0	20.0	—	66.4	\$10.0	24.9	25.0	34.0	244.5	476.2	
JPMorgan Chase	25.0	—	—	—	40.6	—	—	48.0	13.0	—	129.6	
Wells Fargo	25.0	—	—	—	9.7	—	—	72.5	—	—	107.2	
American Express	3.4	—	—	—	5.9	—	4.5	—	—	—	13.8	
Bank of New York Mellon	3.0	—	—	—	0.6	—	—	—	—	—	3.6	
BB&T Financial	3.1	—	—	—	—	—	—	8.5	—	—	11.6	
Capital One Financial	3.6	—	—	—	—	—	—	—	—	—	3.6	
Regions Financial	3.5	—	—	—	3.8	—	—	13.0	—	—	20.3	
KeyCorp	2.5	—	—	—	1.9	—	—	9.5	—	—	13.9	
State Street	2.0	—	—	—	4.1	—	8.5	10.0	—	—	24.6	
SunTrust	4.9	—	—	—	3.6	—	—	3.5	—	—	11.9	
PNC Financial Services	7.6	—	—	—	3.9	—	0.4	2.0	—	—	13.9	
Goldman Sachs	10.0	—	—	—	28.6	—	*	—	34.5	—	89.6	
Morgan Stanley	10.0	—	—	—	24.5	—	4.3	—	36.0	—	135.0	
US Bancorp	6.6	—	—	—	3.9	—	—	—	—	—	10.5	
Fifth Third Bancorp	3.4	—	—	—	—	—	0.3	7.3	—	—	11.0	
Ally Financial/GMAC	—	—	—	17.2	7.4	—	7.9	5.0	—	—	37.5	
MetLife ^{viii}	—	—	—	—	0.4	—	1.6	2.8	—	—	4.8	
Total	\$163.5	\$10.0	\$40.0	\$17.2	\$273.8	\$15.0	\$67.4	\$295.1	\$130.6	\$331.7	\$1,454.6	

*Amount less than \$50 million.
 See endnote references in Annex III: Endnotes

In conjunction with its oversight mandate, the Panel has done its own accounting of the total resources that the federal government has devoted to stabilizing the economy through the programs and initiatives outlined above. A complete accounting of the government's current maximum exposure from these financial stability efforts can be found in Annex I.

FIGURE 8: GOVERNMENT EXPOSURE TO FINANCIAL STABILITY EFFORTS⁸⁰

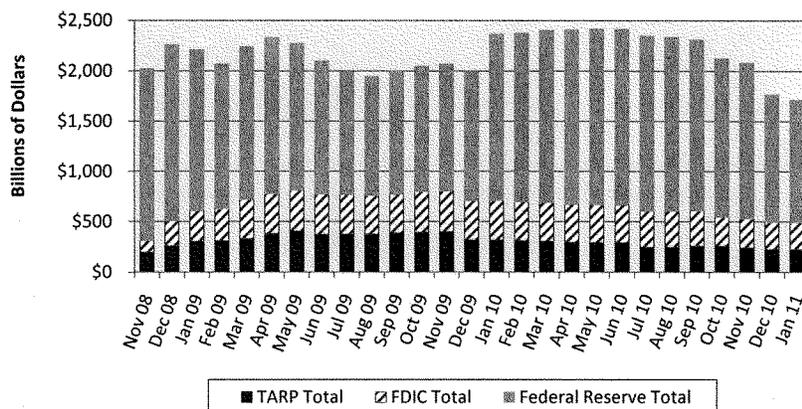


Figure 8⁸¹ above shows the actual monthly amounts outstanding for all three agencies' (TARP, FDIC, and the Federal Reserve) sta-

⁸⁰ At its peak, the Federal Reserve had purchased \$1.1 trillion of Fannie Mae and Freddie Mac MBS. These MBS are guaranteed by Fannie Mae and Freddie Mac and those two institutions in turn have been placed into conservatorship and had the entirety of their debts guaranteed by Treasury. Hence, while this graph represents the federal government's financial exposure to the MBS held by the Federal Reserve as part of the Federal Reserve's balance sheet, there is an open question as to what agency of the federal government is ultimately bearing the risk entailed in holding these securities. In a May 2010 Report, as part of a larger review of the Federal Reserve's actions during the financial crisis, CBO concluded that "Direct Purchases of Securities" (including MBS) of the Federal Reserve that had been made up to that time did not expose the federal government to any subsidy cost. This analysis was done on a risk-adjusted basis and implies that there was no risk of loss to the Federal Reserve from these MBS purchases. Treasury & Federal Reserve Purchase Programs for GSE and Mortgage-Related Securities, *supra* note 72, at 2-3; Congressional Budget Office, *The Budgetary Impact and Subsidy Costs of the Federal Reserve's Actions During the Financial Crisis* (May 2010) (www.cbo.gov/doc.cfm?index=11524&zzz=40793).

⁸¹ The Federal Reserve total is comprised of the following: Term auction credit, Secondary credit, Seasonal credit, Term Asset-Backed Securities Loan Facility, Other credit extensions, Net portfolio holdings of Commercial Paper Funding Facility LLC, Central bank liquidity swaps, Primary dealer and other broker-dealer credit, Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility, Term facility, federal agency debt securities, mortgage-backed securities held by the Federal Reserve, Credit extended to American International Group, Inc., Net portfolio holdings of Maiden Lane II LLC, Net portfolio holdings of Maiden Lane III LLC, and Preferred interests in AIA Aurora LLC and ALICO Holdings LLC. Board of Governors of the Federal Reserve System, Data Download Program: *Factors Affecting Reserve Balances (H.4.1)* (Instrument Used: Weekly Average) (Mar. 3, 2011) (online at www.federalreserve.gov/releases/h41/20110203/). The TARP total uses the amounts outstanding at the end of each month as reported on Treasury's Monthly 105(a) Reports to Congress. The total amount committed under the HAMP and the SSFI/AIGIP is used rather than the outstanding amount in order to reflect more accurately the TARP's assistance. U.S. Department of the Treasury, *Monthly 105(a) Reports to Congress* (Dec. 5, 2008-Feb. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/105/Pages/default.aspx). The FDIC total is comprised of the amounts outstanding under the Temporary Liquidity Guarantee Program (TLGP), the quarterly amounts outstanding on the Deposit Insurance Fund's balance sheet for "liabilities due to resolutions" and "contingent liabilities: future failures," and the FDIC's exposure to the Bank of America and Citigroup asset guarantees. This figure represents the FDIC's actual balance sheet holdings for "liabilities due to resolutions" and "contingent liabilities: future failures" in the third and fourth quarters of 2008; the first, second, third, and fourth quarters of 2009; and the

bilization efforts since November 2008. At its height, \$2.4 trillion was outstanding under the financial rescue programs conducted by these agencies. While significant, TARP funds outstanding never represented more than 19 percent of the total government stability efforts.

II. Banks

A. Capital Infusions and Bank Balance Sheets

1. Summary of COP Reports and Findings

Since banks are the principal actors in most financial systems and were at the center of many of Treasury's TARP interventions, a substantial majority of the Panel's reports addressed the banking sector in some fashion.⁸² The six reports discussed in this section (II.A), however, predominantly addressed issues arising out of one of Treasury's central strategies for the banking sector during the crisis: Treasury's (and, as applicable, the Federal Reserve's) focus on the health of bank balance sheets and Treasury's attempts to foster bank stability through capital infusions in the form of equity investments.⁸³ The questions that the Panel raised in its first two reports, including the means for ensuring accountability and transparency from TARP recipients (such as the tracking of TARP funds) and the methods for the taxpayer to be fairly compensated for the risk they were taking, run solidly through the Panel's reports on banks.

a. Treasury as Investor and Recovery for the Taxpayer

The Panel's reports on the banking sector have consistently focused on returns to the taxpayer from Treasury's investments and the valuation of the assets received by Treasury for the equity investments it made. Prior to the first CPP repayments, the Panel addressed the problem of valuation broadly and published a report assessing Treasury's investment to determine whether the taxpayers had received a fair deal.⁸⁴ The February 2009 report provided a financial valuation and legal analysis of the terms of Treasury's investment in the participating financial institutions and concluded that, partially because all investments were made on the same terms, Treasury paid substantially more for the assets it purchased under the TARP than their then-current market value.⁸⁵ While a legal analysis of the program concluded that one-size-fits-

first, second, and third quarters of 2010. FDIC: DIF Income Statement, *supra* note 58; FDIC: Monthly Reports Related to the TLGP, *supra* note 61.

⁸² For example, reports on small business lending and foreclosures and housing have important implications for banks' health and the stability of the financial system in general.

⁸³ In Sections II.B and II.C, *infra*, this report discusses additional types of Treasury actions intended to foster bank stability.

⁸⁴ Congressional Oversight Panel, *February Oversight Report: Valuing Treasury's Acquisitions*, at 2–11 (Feb. 6, 2009) (online at cop.senate.gov/documents/cop-020609-report.pdf) (hereinafter "2009 February Oversight Report").

⁸⁵ The Duff & Phelps analysis was done for the ten largest TARP transactions and compared the amount of the government's investment with the value of the preferred stock and the warrants it received in return in each transaction. Since these were not publicly traded securities, the valuation had to make a variety of assumptions and make comparisons with a specific set of private deals. The study concluded that every time Treasury spent \$100, it took back assets that were worth, on average, \$66. This difference would equal a \$78 billion shortfall for the \$254 billion spent on these deals. See Section II.A.2 below for further analysis.

all terms aided speed and participation rates for the program,⁸⁶ the program design meant that Treasury could not address differences in credit quality or risk among institutions, or differences in their need for capital, by varying the terms of each investment. Insofar as the standard terms were set for strong institutions, they may have been too lenient for weaker institutions.⁸⁷ In its April 2009 report, the Panel continued to emphasize the need for a clear and well-explained strategy and transparent execution for Treasury's TARP investments to improve public confidence in the program,⁸⁸ and broadly discussed valuations for the distressed assets in the financial sector and their relationship to government options.⁸⁹

FIGURE 9: ESTIMATED VALUE AND SUBSIDY RATES OF CERTAIN TARP INVESTMENTS AS OF COP'S FEBRUARY 2009 REPORT⁹⁰

Purchase Program Participant	Valuation Date	Face Value	Total Estimated Value		
			Value	Subsidy	
				Percent	\$
Capital Purchase Program:					
Bank of America Corporation	10/14/08	\$15.0	\$12.5	17%	\$2.6
Citigroup, Inc.	10/14/08	25.0	15.5	38%	9.5
JPMorgan Chase & Co.	10/14/08	25.0	20.6	18%	4.4
Morgan Stanley	10/14/08	10.0	5.8	42%	4.2
Goldman Sachs Group	10/14/08	10.0	7.5	25%	2.5
PNC Financial Services	10/24/08	7.6	5.5	27%	2.1
U.S. Bancorp	11/3/08	6.6	6.3	5%	0.3
Wells Fargo & Company	10/14/08	25.0	23.2	7%	1.8
Subtotal		124.2	96.9	22%	27.3
311 Other Transactions		70.0	54.6	22%	15.4
SSFI & TIP:					
American International Group, Inc.	11/10/08	40.0	14.8	63%	25.2
Citigroup, Inc.	11/24/08	20.0	10.0	50%	10.0
Subtotal		60.0	24.8	59%	35.2
Total		\$254.2	\$176.2	31%	\$78.0

In June 2009, Treasury permitted (with the Federal Reserve's approval), ten of the nation's largest BHCs—representing more than one-third of the nation's banking assets—to repay the financial assistance they received in October 2008.⁹¹ The Panel's July 2009 report on TARP repayments (including the repurchase of

⁸⁶The legal analysis study, performed by Timothy Massad and Catherina Celosse, found that the standardized documentation used by Treasury likely contributed to Treasury's ability to obtain speed of execution and wide participation, both important program goals. 2009 February Oversight Report, *supra* note 84, at 40–50. At the time of this report, Mr. Massad was a corporate lawyer at a New York-based law firm. He took a leave of absence from the law firm in order to serve as special advisor to the Panel on a pro bono basis. Ms. Celosse acted as counsel for the Panel.

⁸⁷The Panel's ongoing concerns with respect to Treasury's "one size fits all" approach are discussed further in Section II.A.2 below.

⁸⁸Congressional Oversight Panel, *April Oversight Report: Assessing Treasury's Strategy: Six Months of TARP*, at 7 (Apr. 7, 2009) (online at cop.senate.gov/documents/cop-040709-report.pdf) (hereinafter "2009 April Oversight Report").

⁸⁹*Id.* at 75–76.

⁹⁰2009 February Oversight Report, *supra* note 84, at 7. Note that Merrill Lynch was not included in the Duff & Phelps analysis because it did not exist as a standalone entity by February 2009.

⁹¹CPP recipients may only repay their funds if their regulator determines that the repayment will not jeopardize the entity's capital position, and thus repayments must be approved.

stock warrants) accordingly focused on whether the taxpayer was receiving maximum benefit from its investment in the TARP.⁹²

As part of its analysis, the Panel determined that because the warrants that accompanied the CPP funds represented the only opportunity for the taxpayer to participate directly in the increase in the share prices of banks made possible by public money, the price at which the warrants were sold was critical. As of July 2, 2009, 11 small banks had repurchased their warrants from Treasury for a total amount that the Panel estimated to be only 66 percent of its best estimate of their market value.⁹³ However, at the time of this valuation, Treasury was just beginning its warrant repurchase program, and the Panel acknowledged that the prices paid might not be representative of future repurchases. Building on its February 2009 report, the Panel's July 2009 report analyzed the contractual constraints governing Treasury's TARP investments in the banks.⁹⁴ As in prior reports, the Panel emphasized that it was critical that Treasury make the repayment process—the reason for its decisions, the way it arrived at its figures, and the exit strategy from or future use of the TARP—absolutely transparent.

b. Stability of the Banking System

The health—or possible lack thereof—of a variety of banks, small and large, lay at the center of the financial crisis and significantly informed Treasury's approach under the TARP. Thus, in a number of reports, the Panel focused on actions Treasury took to assess the health of financial institutions participating in the TARP, the impact of those actions on financial stability in general, and whether they contributed to market transparency. The Panel particularly focused on these issues in its June 2009 and August 2009 reports on the Federal Reserve's and Treasury's "stress tests" and on the impact of troubled assets on bank balance sheets, respectively.

As described above in Section I, in the first quarter of 2009 Treasury and the Federal Reserve announced that they would conduct stress tests of the 19 largest BHCs in the country, the vast majority of which were TARP recipients and which received the lion's share of the CPP funds. Upon completion of the stress tests in May 2009, BHCs found to be in need of an additional capital buffer were given six months to raise the necessary capital. Accordingly, the Panel's June 2009 report examined the first stress tests conducted by banking regulators on these BHCs.⁹⁵ The report focused on how effectively Treasury and the Federal Reserve conducted the stress tests, specifically reviewing the government's eco-

⁹² Congressional Oversight Panel, *July Oversight Report: TARP Repayments, Including the Repurchase of Stock Warrants*, at 3–4 (July 10, 2009) (online at cop.senate.gov/documents/cop-071009-report.pdf) (hereinafter "2009 July Oversight Report"). The Panel noted, however, that its own valuations did not include the liquidity discounts and other adjustments contemplated by Treasury.

⁹³ *Id.* at 7.

⁹⁴ *Id.* at 23.

⁹⁵ Congressional Oversight Panel, *June Oversight Report: Stress Testing and Shoring Up Bank Capital*, at 3–5 (June 9, 2009) (online at cop.senate.gov/documents/cop-060909-report.pdf) (hereinafter "2009 June Oversight Report"). Treasury and the Federal Reserve Board had announced in early February 2009 that they would conduct comprehensive and simultaneous reviews of the nation's largest BHCs—those with more than \$100 billion in assets—to determine their ability to remain well capitalized if the recession were to lead to deeper than expected losses. The effort, called the Supervisory Capital Assessment Program (SCAP), has been referred to more informally as the "stress tests."

conomic assumptions, their methods of calculating bank capitalization, their release of information to the public, and whether the stress tests should be repeated in the future.⁹⁶

The Panel asked independent experts to review and evaluate the stress tests. These experts found the economic modeling used to conduct them to be generally soundly conceived and conservative based on the limited information available to them.⁹⁷ However, the experts cautioned that the stress tests did not model BHC performance under “worst case” scenarios, and as a result did not project the capital necessary to prevent banks from being stressed to near the breaking point. Most important, the expert study stated that the primary issue with the stress test process was the program’s lack of “transparency to outsiders and replicability of its results.”⁹⁸ In the report, the Panel concluded that while the stress tests had a positive short-term effect on the markets, they did not address the question as to whether the values shown on bank balance sheets for certain classes of assets were too high; by restricting themselves to a two-year timeframe, their conclusions did not take into account the possibility that the asset values assumed (particularly for so-called troubled assets), may overvalue bank assets to the extent that those liabilities result in losses after 2010.⁹⁹ Thus, although the release of these stress test results had a positive effect on the market, it was not clear that the banks were fully healthy.

In its August 2009 report, the Panel revisited bank balance sheets in analyzing the potential risks troubled assets may present in the future and assessed Treasury’s strategy for removing these assets from bank balance sheets.¹⁰⁰ In this context, the Panel has noted that a continuing uncertainty in the financial markets was whether the troubled assets that remain on banks’ balance sheets could again become the trigger for instability.¹⁰¹ The Panel found that ten months after the TARP was signed into law, substantial troubled assets remained on banks’ balance sheets but that it was difficult to assess the full scope of the problem because of insufficient disclosure by the banks. In light of this finding, the Panel analyzed Treasury’s program to remove these assets from banks’ balance sheets, which was the Public-Private Investment Program (PPIP), and concluded that there was much uncertainty as to whether the PPIP would jump-start the market for troubled securities.¹⁰² The Panel concluded that the future performance of the

⁹⁶To help make these assessments of the stress tests and review the stress test methodology, the Panel engaged two internationally renowned experts in risk analysis, University of California at Berkeley Professors Eric Talley and Johan Walden.

⁹⁷2009 June Oversight Report, *supra* note 95, at 50.

⁹⁸2009 June Oversight Report, *supra* note 95, at 43.

⁹⁹2009 June Oversight Report, *supra* note 95, at 50.

¹⁰⁰Congressional Oversight Panel, *August Oversight Report: The Continued Risk of Troubled Assets*, at 6 (Aug. 11, 2009) (online at cop.senate.gov/documents/cop-081109-report.pdf) (hereinafter “2009 August Oversight Report”).

¹⁰¹*Id.* at 62.

¹⁰²For details regarding the Public-Private Investment Program (PPIP), see U.S. Department of the Treasury, *Legacy Securities Public-Private Investment Program: Program Update—Quarter Ended December 31, 2010*, at 3 (Jan. 24, 2011) (online at www.treasury.gov/initiatives/financial-stability/investment-programs/ppip/s-ppip/Documents/ppip-%2012-10%20vFinal.pdf) (hereinafter “Treasury’s Legacy Securities Public-Private Investment Program: Program Update”). The PPIP, announced on March 23, 2009, was designed to allow banks and other financial institutions to shore up their capital by removing troubled assets from their balance sheets by creating public-private investment funds financed by private investors, whose capital contributions were to be matched dollar-for-dollar by Treasury using TARP funds. Treasury initially pledged up to

economy and the performance of the underlying loans, as well as the method of valuation of the assets, were critical to the continued operation of the banks.

The August 2009 report also addressed differences between smaller and larger banks, discussed more fully below: in particular, the Panel was concerned about the impact of troubled assets on small banks, whose troubled assets are generally whole loans that could not be sold under the PPIP's terms.¹⁰³ In addition, the report noted that small banks were and remain far more exposed to commercial real estate (CRE) loans and, unlike the larger financial institutions, are not stress tested by Treasury and the Federal Reserve.

c. Ongoing Risks for Smaller Banks

One of the recurring themes in the Panel's reports has been the different effects of Treasury's TARP programs on banks of different sizes. Smaller and larger banks have different types of exposures and focus on different assets in the banking sector. Accordingly, one-size-fits-all programs do not always have comparable effects on smaller and larger banks.

As an example, smaller banks lend to CRE ventures at much greater rates than larger banks. Smaller banks are therefore significantly exposed to one of the sectors in the economy that has been very hard-hit during and since the crisis. In this context, the Panel examined the effects of CRE loans on smaller banks in detail in its February 2010 report. The Panel expressed concern that a wave of CRE loan losses over the next four years could jeopardize the stability of many banks, particularly community banks.¹⁰⁴ CRE loans made over the last decade—for retail properties, office space, industrial facilities, hotels and apartments—totaling \$1.4 trillion will require refinancing in the period 2011 through 2014. The report noted that nearly half of those CRE loans are “underwater,” meaning the borrower owes more on the loan than the underlying property is worth. While these problems have no single cause, the loans made at the peak of the real estate market are most likely to fail.

In its evaluation of the effect of CRE exposures, the Panel stated that “a significant wave of commercial mortgage defaults would trigger economic damage that could touch the lives of nearly every American.” The failure of commercial properties creates a downward spiral of economic contraction: job losses; deteriorating store fronts, office buildings and apartments; as well as the failure of the banks serving those communities. Acknowledging that not every bank can or should be saved, the Panel noted that because commu-

\$30 billion for the PPIP, but the fund managers did not raise sufficient private sector capital for Treasury's combination of matching funds and debt financing to reach that amount. Therefore, Treasury's total obligation is limited to \$22.4 billion (which includes \$22.1 billion for active public-private investment funds and \$356.3 million disbursed to TCW, which has been repaid). For an update on the PPIP as of December 31, 2010, *see id.* at 5.

¹⁰³As noted in the discussion of the Panel's small business lending report, Section III.A.3.d, *infra*, the PPIP can therefore be assumed to have had very little effect on small business lending since it had little effect on the balance sheets of the banks that are disproportionately engaged in such lending.

¹⁰⁴Congressional Oversight Panel, *February Oversight Report: Commercial Real Estate Losses and the Risk to Financial Stability*, at 2 (Feb. 10, 2010) (online at cop.senate.gov/documents/cop-021110-report.pdf) (hereinafter “2010 February Oversight Report”).

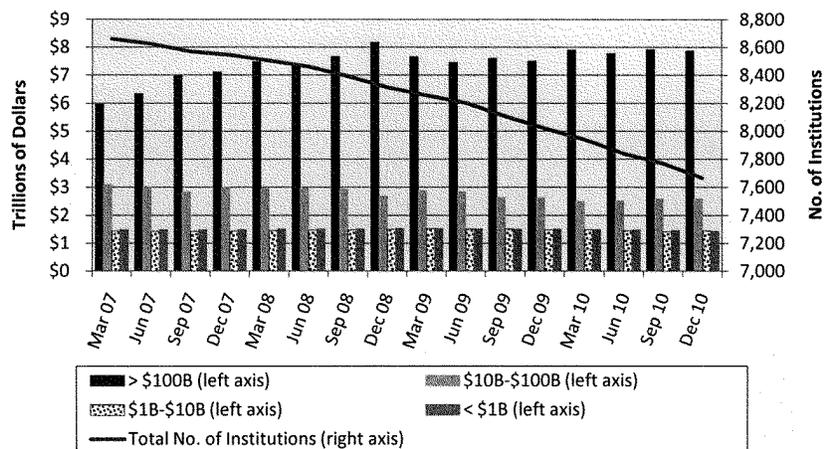
nity banks play a critical role in financing the small businesses that could help the American economy create new jobs, their widespread failure could disrupt local communities, undermine the economic recovery, and extend an already painful recession.

In July 2010, continuing its examination of stresses on smaller banks, and emphasizing problems with one-size-fits-all programs, the Panel published a comprehensive report on small banks in the CPP and addressed issues beyond the continued risk posed by CRE assets. The Panel's main conclusion was that because of the CPP's "one-size-fits-all" repayment terms, large banks had been much better served by the program than smaller institutions. In fact, the Panel concluded that small banks might find it difficult or impossible to exit the program, particularly if the banking sector remained weak.¹⁰⁵ As discussed earlier, Treasury provided capital to banks participating in the CPP under a single set of repayment terms designed at the outset of the program. Of the 19 American banks with more than \$100 billion in assets, 17 participated in the CPP, receiving 81 percent of the total CPP funds. Money was made available to many of these large banks in only a matter of weeks, in some cases even before the banks applied for the funds. As of July 2010, 76 percent of these large banks had already repaid taxpayers, and the healthier banks were reporting record profits. However, the July 2010 report noted that by contrast, of the 7,891 banks with assets of less than \$100 billion, only 690 received funds from CPP, and less than 10 percent of those banks had repaid their loans. Those banks experienced a longer and more stringent evaluation to receive the funds, and many are still struggling to meet their obligations to the taxpayer.¹⁰⁶ The Panel also stated that the CPP could have the potential to contribute to an already ongoing trend towards concentration in the financial sector and analyzed the potential negative consequences of such a trend.¹⁰⁷

¹⁰⁵ Congressional Oversight Panel, *July Oversight Report: Small Banks in the Capital Purchase Program*, at 3 (July 14, 2010) (online at cop.senate.gov/documents/cop-071410-report.pdf) (hereinafter "2010 July Oversight Report").

¹⁰⁶ *Id.* at 3.

¹⁰⁷ *Id.* at 56 ("This increase in concentration could potentially have the ancillary, and likely unpopular, effect of reducing competition and giving the remaining banks a freer hand in setting terms for their depositors, possibly resulting in higher fees and more restrictions on account holders. Individuals and families with smaller accounts may receive diminished customer service, and smaller businesses are likely to suffer as well. Moreover, the limited systemic effect of small banks belies the critical role they can play in local economies.").

FIGURE 10: CONCENTRATION OF BANK ASSETS, BY SIZE (2007–2010)¹⁰⁸

In its conclusions, the Panel questioned whether the participation of small banks in the CPP had advanced Treasury’s broader aims for the program. These CPP-participant small banks comprised too small a share of the banking sector to be systemically significant, and therefore their participation was and remains unlikely to contribute to financial stability. In addition, the Panel stated that there was very little evidence to suggest that the CPP led small banks to increase lending, which was the other initial goal of the program.¹⁰⁹ According to the Panel’s May 2010 report on small businesses, the inability of smaller banks to provide credit was also problematic because between 2008 and 2009 Wall Street banks’ small business loan portfolios fell by 9.0 percent, more than double the 4.1 percent decline in their entire lending portfolios.¹¹⁰

2. Panel Recommendations and Updates

Over the course of the last two years, in evaluating Treasury’s capital infusion programs and approaches to bank balance sheets, the Panel has provided Treasury with a series of specific recommendations targeted towards particular programs. These recommendations are detailed below, and as individual and detailed as they may be, the recommendations share common themes. The Panel’s recommendations have constantly included calls for greater

¹⁰⁸Data compiled using the FDIC’s Statistics on Depository Institutions. Four asset categories were created in order to facilitate a snapshot of the industry at the end of each financial quarter. Federal Deposit Insurance Corporation, *Statistics on Depository Institutions* (Instrument: Total Assets) (online at www3.fdic.gov/sdi/) (accessed Mar. 3, 2011).

¹⁰⁹See Section III for additional discussions on the consequences of these ongoing problems for small businesses and the economy.

¹¹⁰Congressional Oversight Panel, *May Oversight Report: The Small Business Credit Crunch and the Impact of the TARP*, at 3 (May 13, 2010) (online at cop.senate.gov/documents/cop-051310-report.pdf) (hereinafter “2010 May Oversight Report”). In addition, the Panel noted in its July report that “neither Treasury nor federal financial regulators have pushed big banks to deploy their TARP funds in lending to consumers, small businesses, and smaller banks to ‘unfreeze’ the financial markets the way they have pushed small banks. This may be in part because the larger institutions have largely exited, and therefore are not subject to the public pressure arising from the lingering credit crunch.” 2010 July Oversight Report, *supra* note 105, at 48.

transparency and accountability as well as suggested program changes that would improve the government's financial stabilization effort and protect the taxpayer's investments in the banking sector.¹¹¹

a. Risk Assessments/Stress Tests

Accurately assessing the economic viability of the banks was critical to instilling public trust in our financial markets. Accordingly, the Panel recommended several steps that were geared towards reducing the risk of the banks' returning to instability and improving market confidence. In both the June 2009 and August 2009 reports, the Panel advocated that Treasury and the Federal Reserve repeat the stress tests if the adverse scenario assumptions (unemployment, GDP, and housing prices) of the original stress tests had been exceeded.¹¹² Specifically, the Panel noted the possibility that the actual unemployment rate average for 2009 would exceed the one used in the more adverse scenario.¹¹³ The Panel also suggested that stress testing should be a regular feature of the 19 largest BHCs' examination cycle as long as an appreciable amount of troubled assets remain on their books, economic conditions do not substantially improve, or both.¹¹⁴ In addition, the Panel stated that between supervisory stress tests, the 19 stress-tested BHCs should be required to run internal stress tests, according to supervisory guidance, and to submit those results as part of their ongoing supervisory examinations.¹¹⁵ Finally, the Panel encouraged regulators to use stress tests on an ad hoc basis for all banks or BHCs as circumstances, including the banks' business mix, dictated.¹¹⁶

Although the stress tests are being repeated,¹¹⁷ not all of the Panel's concerns regarding bank stability have been assuaged. For instance, neither Treasury nor the banking regulators have made stress testing a regular part of the bank examination process yet, although under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act) the Federal Reserve must

¹¹¹ In connection with its evaluation of Treasury's investments in banks, the Panel has also expressed continuing concerns with moral hazard associated with the TARP investments, which are detailed in Section IX, below.

¹¹² 2009 June Oversight Report, *supra* note 95, at 48–49; 2009 August Oversight Report, *supra* note 100, at 61–62.

¹¹³ The adverse economic assumptions for the unemployment rate were 8.9 percent for 2009 and 10.3 percent for 2010. The actual unemployment rates for those years were 9.3 percent for 2009 and 9.6 percent for 2010. 2009 June Oversight Report, *supra* note 95, at 5, 17; BLS: Unemployment Rate, *supra* note 23. After the June 2009 report, the Panel questioned Secretary Geithner at a hearing and engaged in correspondence with him regarding the assumptions (including the unemployment assumptions) and the relative weight of the assumptions used in the stress tests without, however, receiving substantial additional clarity. See Congressional Oversight Panel, Testimony of Timothy F. Geithner, secretary, U.S. Department of the Treasury, *Transcript: COP Hearing with Treasury Secretary Timothy Geithner*, at 33 (Sept. 10, 2009) (online at cop.senate.gov/documents/transcript-091009-geithner.pdf); Letter from Elizabeth Warren, chair, Congressional Oversight Panel to Timothy F. Geithner, secretary, U.S. Department of the Treasury (Sept. 15, 2009) (online at cop.senate.gov/documents/cop-100909-report-correspondence.pdf); Letter from Timothy F. Geithner, secretary, U.S. Department of the Treasury to Elizabeth Warren, chair, Congressional Oversight Panel (Dec. 10, 2009) (online at cop.senate.gov/documents/cop-011410-report-correspondence.pdf).

¹¹⁴ 2009 June Oversight Report, *supra* note 95, at 48–49.

¹¹⁵ 2009 June Oversight Report, *supra* note 95, at 48–49.

¹¹⁶ 2009 June Oversight Report, *supra* note 95, at 48–49.

¹¹⁷ Board of Governors of the Federal Reserve System, *Revised Temporary Addendum to SR Letter 09-4: Dividend Increases and Other Capital Distributions for the 19 Supervisory Capital Assessment Program Bank Holding Companies* (Nov. 17, 2010) (online at www.federalreserve.gov/newsevents/press/bcreg/bcreg20101117b1.pdf) (hereinafter "Fed Addendum to SR Letter 09-4").

conduct and publish a summary of the results of annual stress tests for systemically important financial institutions.¹¹⁸ Furthermore, Secretary of the Treasury Timothy F. Geithner has stated that he expects public disclosure of stress testing will become a regular part of bank supervision.¹¹⁹ The Dodd-Frank Act has also made broader changes to the regulatory landscape, including requiring that regulators establish minimum capital leverage levels for the banks and other relevant financial institutions.¹²⁰

b. Program Changes

For several of its program-centered recommendations, the Panel focused on stresses particular to smaller banks. In the August 2009 report, the Panel noted that Treasury must be prepared to turn its attention to small banks in crafting solutions to the growing problem of troubled whole loans. As discussed above, those banks also face special risks with respect to problems in the CRE loan sector. The Panel believed that Treasury should implement programs to ensure the viability of smaller banks. One such example was for Treasury and the banking regulators to extend the methodology and capital buffering involved in the stress tests to the nation's smaller banks on a forward-looking basis.¹²¹

Similarly, in the July 2010 report, the Panel's recommendations focused on the potentially long timeframe and the increased uncertainty of CPP investments in smaller banks.¹²² Banks with more

¹¹⁸ 12 U.S.C. § 5365(i). The Federal Reserve has yet to implement this regulation or to release information on the extent to which it will disclose the results of the latest round of stress tests or those tests which will be performed in accordance with the Dodd-Frank Act Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act). The Federal Reserve lists the stress requirements under the Dodd-Frank Act as initiative that it plans to implement between April and June of 2011. See Board of Governors of the Federal Reserve System, *Implementing the Dodd-Frank Act: The Federal Reserve Board's Role: Initiatives Planned: April to June 2011* (online at www.federalreserve.gov/newsevents/reform_milestones201104.htm) (accessed Mar. 11, 2011).

¹¹⁹ Congressional Oversight Panel, Testimony of Timothy F. Geithner, secretary, U.S. Department of the Treasury, *Transcript: COP Hearing with Treasury Secretary Timothy Geithner* (Dec. 16, 2010) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-121610-geithner.cfm) (hereinafter "Geithner Testimony to the Panel") ("I am very confident that a regular part of risk management and supervision in the future for our system will be regular public disclosure of stress tests by major institutions.")

¹²⁰ 12 U.S.C. § 5371. The question of the level of capital leverage requirements remains a much debated issue among policymakers and academics. At the Panel's March 4, 2011 hearing, there was a consensus among economists across the political spectrum that the capital requirements should be more stringent than those required under Basel III and those that could be required under the Dodd-Frank Act. However, the economists still disagreed on the exact level that a bank should hold, with one economist suggesting that it should start at 10 percent and increase towards 20 percent based on the size of the bank and another economist indicating that a 40 or 50 percent capital requirement would not be unreasonable. Congressional Oversight Panel, Testimony of Allan H. Meltzer, Allan H. Meltzer University Professor of Political Economy, Carnegie Mellon University, *COP Hearing on the TARP's Impact on Financial Stability* (Mar. 4, 2011) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-030411-final.cfm) ("I would raise the requirement to say that for every—that after a minimum size to protect community banks, you start to phase in capital requirements which start at 10 percent and increase as the size of the bank increases so that it's 11, 12, 13, going up toward 20, so that the largest banks will be paying what they were paying in the 1920's."); Congressional Oversight Panel, Testimony of Simon Johnson, Ronald A. Kurtz (1954) Professor of Entrepreneurship, MIT Sloan School of Management, and senior fellow, Peterson Institute for International Economics, *COP Hearing on the TARP's Impact on Financial Stability* (Mar. 4, 2011) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-030411-final.cfm) (hereinafter "Simon Johnson Testimony to the Panel") ("Gene Fama suggests, and I actually agree with him, we should be looking at capital requirements closer to 40 or 50 percent. This is—this is just the percent of the assets financed with equity. . . .").

¹²¹ 2009 August Oversight Report, *supra* note 100, at 62.

¹²² During a discussion of Treasury's ability to exit CPP at the Panel's March 4, 2011 hearing, Acting Assistant Secretary for Financial Stability Timothy Massad indicated that Treasury was

Continued

than \$100 billion in assets have returned to profitability while smaller banks, which (among other things) have more significant CRE exposure, continue to struggle financially and are now struggling to meet their obligations to taxpayers.¹²³ To deal with CPP investments in smaller banks, the Panel's July 2010 report recommended that Treasury articulate and determine options for the illiquid portions of its portfolio, such as warrants that are too small to be listed on an exchange, including bundling or pooling investments if that makes them more attractive to investors.¹²⁴ The Panel went on to suggest that Treasury both articulate clear measures for risk-testing its own portfolio and aggressively exercise its shareholder rights, such as appointing directors in those banks that have missed the requisite number of dividends or payments, in order to protect the taxpayers' investment and maintain market discipline.¹²⁵ In addition, the Panel recommended that for the banks that Treasury's asset manager believed were in need of additional capital, Treasury should retain or create a workout team that will swiftly negotiate a deal.¹²⁶ Treasury has announced that it has exercised some of its shareholder rights and has observers attending board meetings at 31 banks; however, if Treasury has adopted any of these other recommendations, it has not announced them publicly.¹²⁷

c. Particular Stresses on Smaller Banks

In connection with its concerns about the risks that distressed CRE loans pose to smaller banks, the Panel has continued to monitor the sector.¹²⁸ In its most comprehensive discussion of the prob-

concerned with small banks and there was still work to be done to help their recovery. Congressional Oversight Panel, Testimony of Timothy G. Massad, acting assistant secretary for the Office of Financial Stability, U.S. Department of the Treasury, *Transcript: COP Hearing on the TARP's Impact on Financial Stability* (Mar. 4, 2011) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-030411-final.cfm) (hereinafter "Massad Testimony to the Panel") ("We've made a lot of progress, but we still have more work to do. And in particular with respect to our small banks, their path to recovery has been a little harder. And we need to continue to work with them on that."). In discussing stresses on smaller banks in the context of the CPP, however, the Panel noted that economic stability and a strengthened banking sector would help alleviate some of the difficulties facing various TARP recipients and Treasury. For example, if the banking sector strengthens and becomes a more attractive investment, all banks, but particularly smaller banks, may have an easier time repaying their CPP funds. If the economy recovers more generally, then commercial real estate (CRE) may weigh less on bank balance sheets and smaller banks may experience healthier balance sheets as a result. Similarly, if Treasury holds CPP-related warrants in a company, and the common stock value of that institution is greater than the strike price of its warrants, those warrants have a greater value since they can be exercised and immediately reap a profit. The strike price, or the fixed price that a holder must pay to exercise their option (warrant) to purchase a company's stock, for the warrants Treasury received as part of its TARP investment, were established by averaging the common stock price during the twenty days prior to TARP assistance being provided. U.S. Department of the Treasury, *Warrant Disposition Report*, at 3 (June 30, 2010) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/other/Documents/Other/TARP_WRRTDISP_80310.pdf) (hereinafter "June 2010 Warrant Disposition Report").

¹²³ 2010 July Oversight Report, *supra* note 105, at 5, 33. Of the smaller banks in the CPP, approximately 16 percent have repaid their CPP funds. Many have no clear path for repaying their CPP investment and exiting the program in the near future, if at all.

¹²⁴ 2010 July Oversight Report, *supra* note 105, at 61.

¹²⁵ 2010 July Oversight Report, *supra* note 105, at 61.

¹²⁶ 2010 July Oversight Report, *supra* note 105, at 61.

¹²⁷ See Section II.A.2.d for a more detailed description of the board observers.

¹²⁸ Specifically, the Panel has held three hearings and released one report specifically dedicated to CRE issues. See 2010 February Oversight Report, *supra* note 104; Congressional Oversight Panel, *COP Hearing on Commercial Real Estate's Impact on Bank Stability* (Feb. 4, 2011) (online at cop.senate.gov/hearings/library/hearing-020411-cre.cfm); Congressional Oversight Panel, *COP Atlanta Field Hearing on Commercial Real Estate* (Jan. 27, 2010) (online at cop.senate.gov/hearings/library/hearing-012710-atlanta.cfm); Congressional Oversight Panel,

lem, the February 2010 report, the Panel noted that there were no easy solutions to the risks CRE may pose to the financial system. Although it endorsed no specific proposals, the Panel identified a number of possible interventions to contain the problem until the CRE market could return to health. The Panel indicated that government cannot and should not keep every bank afloat, but neither should it turn a blind eye to the dangers of unnecessary bank failures and their impact on communities.¹²⁹

Since the release of the February 2010 report, CRE continues to threaten the economic viability of banks, particularly smaller banks. There is approximately \$3.2 trillion of outstanding debt associated with CRE loans, with a significant concentration of that debt centered in smaller banks.¹³⁰ Over the next two years over \$1 trillion of that debt will come to maturity.¹³¹ In February 2010, the Panel reported that losses on these loans for commercial banks alone could total \$200 billion to \$300 billion for 2011 and beyond.¹³² However, Chairman Bernanke recently indicated that many of the worst fears about the CRE market do not seem to be coming to fruition.¹³³ In pursuit of information as to the degree of risk that the CRE market poses to economic recovery, the Panel held a hearing on February 4, 2011. The hearing focused in particular on CRE's impact on bank stability. Though there were indicators of price stabilization in some key markets, issues related to commercial real estate continue to cause problems for the banking sector and are the main reason for recent bank failures.¹³⁴ Sandra

COP Field Hearing in New York City on Corporate and Commercial Real Estate Lending (May 28, 2009) (online at cop.senate.gov/hearings/library/hearing-052809-newyork.cfm).

¹²⁹ 2010 February Oversight Report, *supra* note 104, at 138.

¹³⁰ Congressional Oversight Panel, Written Testimony of Patrick M. Parkinson, director, Division of Banking Supervision and Regulation, Board of Governors of the Federal Reserve System, *COP Hearing on Commercial Real Estate's Impact on Bank Stability*, at 3–5 (Feb. 4, 2011) (online at cop.senate.gov/documents/testimony-020411-parkinson.pdf) (hereinafter “2011 COP Hearing on CRE Impact on Bank Stability”) (“Notably, CRE concentrations are not a significant issue at the largest banks. Among banks with total assets of \$10 billion or more, 10 percent had CRE concentrations. In contrast, one-third of all banks with assets between \$1 billion and \$10 billion had CRE concentrations. For banks with less than \$1 billion in assets, approximately 17 percent had CRE concentrations.”) *See also* Congressional Oversight Panel, Written Testimony of Matthew Anderson, managing director, Foresight Analytics, *COP Hearing on Commercial Real Estate's Impact on Bank Stability*, at 1, 3 (Feb. 4, 2011) (online at cop.senate.gov/documents/testimony-020411-anderson.pdf) (“Approximately two-thirds of CRE debt is held by banks with less than \$100 billion in total assets.”).

¹³¹ 2011 COP Hearing on CRE Impact on Bank Stability, *supra* note 130, at 5 (“Approximately one-third of all CRE loans (both bank and non-bank), totaling more than \$1 trillion, are scheduled to mature over the next two year”). *See also* Morgan Stanley, *CMBS Market Insights CRE Debt Markets: Challenges and Opportunities*, at 1 (Dec. 6, 2010) (online at cop.senate.gov/documents/testimony-020411-parkus.pdf) (“nearly \$1.4 trillion of commercial real estate loans maturing over the next three years”).

¹³² 2010 February Oversight Report, *supra* note 104, at 2, 38, 102.

¹³³ Senate Committee on Banking, Housing, and Urban Affairs, Testimony of Ben S. Bernanke, chairman, Board of Governors of the Federal Reserve System, *Transcript: The Semi-annual Monetary Policy Report to the Congress* (Mar. 1, 2011) (publication forthcoming) (online at banking.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=9ff8158e-fc56-495b-aa5b-e957b981da96) (“I would say overall that some of the worst fears about commercial real estate seem not to be coming true, that there is some stabilization of vacancy rates and prices and so on in this—in this market. That being said, there's still a lot of, as you say, a lot of properties that are going to have to be refinanced and probably some losses the banks are still going to have to take. So it's still certainly a risk to the financial system, but it does seem to be looking at least marginally better than we were fearing six months ago.”).

¹³⁴ Congressional Oversight Panel, Testimony of Patrick M. Parkinson, director, Division of Banking Supervision and Regulation, Board of Governors of the Federal Reserve, *Transcript: COP Hearing on Commercial Real Estate's Impact on Bank Stability* (Feb. 4, 2011) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-020411-cre.cfm) (“CRE-related issues also present ongoing problems for the banking industry, particularly for community and regional banking organizations. Losses associated with CRE, particularly residential construc-

Thompson, director of the Division of Supervision and Consumer Protection at the FDIC, indicated that it could take time to sort out the CRE market through restructuring and for loans that cannot be modified, “prompt loss recognition and restructuring, painful as it may be, is needed to lay the foundation for recovery in CRE market.”¹³⁵ The Panel stated that until Treasury and the bank supervisors address forthrightly and transparently the threats facing the CRE markets—and the potential impact that a breakdown in those markets could have on local communities, small businesses, and individuals—the financial crisis will not end.¹³⁶

As summarized in the July 2010 report, many smaller banks face balance sheet pressures in what remains a pervasively uncertain market. Faced with these pressures, however, smaller banks do not necessarily have the options for capital-raising available to larger banks. In particular, smaller banks have more difficulty accessing capital than larger banks for many reasons, among them that equity capital markets are more costly for smaller banks due to fixed costs associated with transactions; they are often too small to interest private equity funds; and their traditional investors, who tend to be locally based, might be unwilling to part with capital during difficult economic times.¹³⁷

d. Transparency and Accountability

Transparency is essential because it facilitates accountability and instills confidence in and increases credibility of the decisions of Treasury and the Federal Reserve—all of which are necessary and critical for proper management of the taxpayers’ involvement in the financial sector rescue. The Panel has emphasized the need for transparency in the operation and administration of the TARP since its first report. In that report, the Panel first asked whether Treasury knew what TARP recipients were doing with the money they had received from the government.¹³⁸ In the context of Treasury’s bank capital programs, the Panel stressed the need for transparency in the administration of both the stress tests and the CPP and has made calls more generally for release of additional data from recipients of TARP funds.

tion and land development lending, have been the dominant reason for the high number of bank failures since the beginning of 2008.”).

¹³⁵ Congressional Oversight Panel, Testimony of Sandra Thompson, director, Division of Supervision and Consumer Protection, Federal Deposit Insurance Corporation, *Transcript: COP Hearing on Commercial Real Estate’s Impact on Bank Stability* (Feb. 4, 2011) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-020411-cre.cfm) (“Distressed CRE loan exposures take time to work out, and in some cases require restructuring to establish a more realistic and sustainable repayment program. Some loans may not be able to be modified and must be written off. This process of prompt loss recognition and restructuring, painful as it may be, is needed to lay the foundation for recovery in CRE market. At the same time, it must be recognized that many institutions with CRE concentrations have weathered the financial crisis.”).

¹³⁶ 2010 February Oversight Report, *supra* note 104, at 139.

¹³⁷ 2010 July Oversight Report, *supra* note 105, at 24–25.

¹³⁸ Congressional Oversight Panel, *December Oversight Report: Questions About the \$700 Billion Emergency Economic Stabilization Funds*, at 11–12 (Dec. 10, 2008) (online at fwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_senate_committee_prints&docid=f:45840.pdf) (“If the funds committed under TARP have an intended purpose and are not merely no-strings-attached subsidies to financial institutions, then it seems essential for Treasury to monitor whether the funds are used for those intended purposes. Without that oversight, it is impossible to determine whether taxpayer money is used in accordance with Treasury’s overall economic stabilization strategy. Treasury cannot simply trust that the financial institutions will act in the desired ways; it must verify.”).

Stress Tests. In the June 2009 report, the Panel suggested that additional information on the results of the stress tests needed to be in the public domain, including the results under the “baseline” economic scenario, or at least an explanation if Treasury and the Federal Reserve decided not to release that data. Furthermore, the Panel advocated for the release of more extensive data on the stress test results, for instance, more granular details on estimated losses by sub-categories. The Panel noted that this additional information would improve the transparency of the process and increase confidence in the robustness of the tests.¹³⁹ The Panel also recommended that Treasury and the Federal Reserve publicly track the status of its stress tests’ macro-economic assumptions, including unemployment, GDP, and housing price assumptions.¹⁴⁰

Since the June 2009 report, there has not been significantly more information released regarding the results of the May 2009 stress tests. In November 2010, the Federal Reserve announced a second round of stress testing for SCAP banks.¹⁴¹ The Federal Reserve requested that by January 7, 2011 these banks file a comprehensive capital plan detailing their ability to absorb losses over the next two years and to comply with new banking industry capital rules.¹⁴² Although Secretary Geithner stated that disclosure of stress test results is an effective supervisory approach,¹⁴³ unlike the May 2009 stress tests the results of the Federal Reserve’s regulatory review will not be made public.¹⁴⁴ Similarly, in August 2009, the Panel suggested that Treasury and relevant government agencies work together to move financial institutions toward sufficient disclosure of the terms and volume of troubled assets on banks’ books so that markets can function more effectively.¹⁴⁵ To date, this has not occurred.

CPP. The Panel has continually advanced recommendations aimed at fostering transparency in the CPP. In the June 2009 report, the Panel urged Treasury to increase transparency in the

¹³⁹ 2009 June Oversight Report, *supra* note 95, at 49.

¹⁴⁰ 2009 June Oversight Report, *supra* note 95, at 48–49.

¹⁴¹ In November, the Federal Reserve announced that nine of the ten bank holding companies that needed to raise or improve the quality of their capital under the stress tests had done so and at the time they had sufficient capital to meet their capital requirements under the stress tests. Federal Reserve Announcement on the Supervisory Capital Assessment Program, *supra* note 79 (“The Federal Reserve Board on Monday said that 9 of the 10 Bank Holding Companies (BHCs) that were determined in the Supervisory Capital Assessment Program (SCAP) earlier this year to need to raise capital or improve the quality of their capital to withstand a worse-than-expected economic scenario now have increased their capital sufficiently to meet or exceed their required capital buffers. The one exception, GMAC, is expected to meet its remaining buffer need by accessing the TARP Automotive Industry Financing Program, and is in discussions with the U.S. Treasury on the structure of its investment.”); Fed Addendum to SR Letter 09–4, *supra* note 117.

¹⁴² Fed Addendum to SR Letter 09–4, *supra* note 117.

¹⁴³ Geithner Testimony to the Panel, *supra* note 119 (stating that disclosure is a “remarkably effective approach, because it allowed these firms to go out and raise a lot of capital much earlier”).

¹⁴⁴ In addition, under the Dodd-Frank Act, financial institution regulators will be required to perform stress tests for financial companies with over \$10 billion in assets for which they are the primary regulator. Those findings will then be reported to the Federal Reserve. The Dodd-Frank Act will not cover any financial institution with assets of below \$10 billion or which is a state chartered institution. Under rules to be accepted within 18 months of the enactment of the Dodd-Frank Act, any financial company with a primary federal regulator that has over \$10 billion in assets must conduct an annual stress test and report the results to the Federal Reserve. In addition, BHCs and non-bank financial Companies with assets in excess of \$50 billion must conduct semi-annual stress tests. At systemically important BHCs and non-bank financial companies, the Federal Reserve must conduct annual stress tests using at least three scenarios of increasing adversity. 12 U.S.C. § 5365(i).

¹⁴⁵ 2009 August Oversight Report, *supra* note 100, at 61–62.

CPP repayment process; including a recommendation that Treasury disclose information on the criteria for repayment eligibility, the approval process, and the process for valuation and repurchase of warrants. The Panel further suggested that the relationship of the stress test results to CPP repurchases should be completely transparent.¹⁴⁶ The Panel reiterated many of these recommendations in the July 2009 report about warrant dispositions, emphasizing that Treasury should negotiate the disposition of the warrants in a manner that is as transparent and fully accountable as possible.¹⁴⁷ The Panel noted that Treasury and the Federal Reserve must explain fully and clearly to the public the reasons for approval for repayment of financial assistance. The Panel also stated that Treasury must be transparent about the way warrants are valued, and clearly set forth the exit strategy for, or future use of, the TARP, including how it proposed to use repaid TARP funds.¹⁴⁸ Specifically, the Panel recommended that Treasury promptly provide written reports to the American taxpayer analyzing the fair market value determinations for any warrants either repurchased by a TARP recipient from Treasury or sold by Treasury through an auction, and that Treasury disclose the rationale for its choice of an auction or private sale.¹⁴⁹ Furthermore, in December 2009, the Panel suggested that Treasury disclose the precise number of warrants it holds for each financial institution within CPP.¹⁵⁰ Similarly, the Panel made several calls for additional transparency for the use of TARP funds, and noted in May 2010 that Treasury had failed to track TARP funds or require certain kinds of longitudinal lending data from TARP recipients, both of which hampered the Panel in its efforts to determine the effectiveness of CPP.¹⁵¹

Since the Panel made its recommendations for increased transparency, Treasury and the other banking regulators have released significantly more information; however, there is still room for improvement. For instance, even though federal regulators have established approval processes for CPP repayments, Treasury has not publicly issued uniform guidelines or documentation needed for meaningful oversight or to achieve transparency regarding these repayments. Additionally, while Treasury has issued some general statements on its overall repayment policy, it has not provided more detailed, case-by-case explanations for approval of financial assistance repayments. Furthermore, even though Treasury described its approach to CPP warrant dispositions in three Warrant Disposition Reports, Treasury's negotiations with the banks to repurchase the warrants are still not transparent.¹⁵² Treasury never

¹⁴⁶ 2009 June Oversight Report, *supra* note 95, at 48–49.

¹⁴⁷ 2009 July Oversight Report, *supra* note 92, at 44–45.

¹⁴⁸ 2009 July Oversight Report, *supra* note 92, at 44–45; 2009 June Oversight Report, *supra* note 95, at 49.

¹⁴⁹ 2009 July Oversight Report, *supra* note 92, at 44–45.

¹⁵⁰ 2009 December Oversight Report, *supra* note 27, at 108.

¹⁵¹ 2010 May Oversight Report, *supra* note 110, at 26.

¹⁵² 2010 February Oversight Report, *supra* note 104, at 149–152; U.S. Department of the Treasury, *Warrant Disposition Report* (Jan. 20, 2010) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/other/DocumentsOther/TARP%20Warrant%20Disposition%20Report%20v4.pdf); June 2010 Warrant Disposition Report, *supra* note 122; U.S. Department of the Treasury, *Warrant Disposition Report* (Dec. 31, 2010) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/other/DocumentsOther/TARP%20Warrant%20Disposition%20Report%2012.31.2010%20Update.pdf) (hereinafter “December 2010 Warrant Disposition Report”).

required the tracking of funds and has not collected the lending data that the Panel thought was essential for effective oversight.¹⁵³

The Panel's calls for transparency have also focused on Treasury's activities as a shareholder. In the July 2010 report, the Panel requested that Treasury explain its process for appointing board members to banks that are in arrears, including the way in which it will identify board members for those banks. The Panel added that Treasury should clearly articulate its restructuring policy and indicate to CPP participants that it will protect the priority of its investments.¹⁵⁴ Since the July 2010 report, Treasury has publicly released a "fact sheet" and "frequently asked questions" regarding the nomination of directors.¹⁵⁵ Although Treasury has not yet exercised its right to nominate board members for banks that have missed six dividend or interest payments, as of February 28, 2011, 31 banks have agreed to have Treasury observers attend board of directors meetings.¹⁵⁶ To date, 32 banks have missed at least six payments.¹⁵⁷ To the extent that Treasury has implemented the Panel's other recommendations, it has not announced these changes publicly.

Data Gathering and Disclosure. In pursuit of greater accountability, the Panel has called for data gathering to help review the

¹⁵³ 2010 May Oversight Report, *supra* note 110, at 26. When asked how institutions used the TARP funds they were given, Treasury raised the difficulty in tracking individual dollars through an institution in response—in essence, that because money is fungible, it is not useful to track particular funds. Nevertheless, as the Panel and the Special Inspector General for the Troubled Asset Relief Program (SIGTARP) have noted, Treasury could have conditioned receipt of TARP assistance upon requirements to report the usage of those funds and the overall lending activities of the institutions in question. See Congressional Oversight Panel, *January Oversight Report: Taking Stock: Accountability for the Troubled Asset Relief Program*, at 3–4 (Jan. 9, 2009) (online at cop.senate.gov/documents/cop-010909-report.pdf); 2009 December Oversight Report, *supra* note 27, at 108–111. See also Congressional Oversight Panel, *January Oversight Report: Exiting TARP and Unwinding Its Impact on the Financial Markets*, at 5 (Jan. 14, 2010) (online at cop.senate.gov/documents/cop-011410-report.pdf) (hereinafter "2010 January Oversight Report"); Office of the Special Inspector General for the Troubled Asset Relief Program, *SIGTARP Survey Demonstrates that Banks Can Provide Meaningful Information on Their Use of TARP Funds* (July 20, 2009) (online at sigtarp.gov/reports/audit/2009/SIGTARP_Survey_Demonstrates_That_Banks_Can_Provide_Meaningful_Information_On_Their_Use_Of_TARP_Funds.pdf). Further, banking industry witnesses at the Panel's Field hearing in Phoenix stated that they would support a tracking requirement for capital infusion programs. See Congressional Oversight Panel, Testimony of Candace Wiest, president and chief executive officer, West Valley National Bank, *Transcript: Phoenix Field Hearing on Small Business Lending* (Apr. 27, 2010) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-042710-phoenix.cfm) (hereinafter "Wiest Testimony to the Panel").

¹⁵⁴ 2010 July Oversight Report, *supra* note 105, at 61.

¹⁵⁵ In these documents released in August 2010, Treasury indicated that director nominations would be a two-step process based on the number of missed dividend or interest payments. After five missed payments, Treasury may request permission to send qualified members of its staff to observe board meetings of the institution. Then, once an institution misses six payments, Treasury will evaluate whether to nominate up to two board members. Such determinations will be based on Treasury's evaluation of the condition and health of the institution as well as the functioning of its board of directors. U.S. Department of the Treasury, *Frequently Asked Questions: Capital Purchase Program (CPP), Related to Missed Dividend (or Interest) Payments and Director Nomination* (Aug. 2010) (online at www.treasury.gov/initiatives/financial-stability/investment-programs/cpp/Documents/PPP%20Directors%20FAQs.pdf); U.S. Department of the Treasury, *Factsheet: Capital Purchase Program, Nomination of Board Observers & Directors* (Aug. 2010) (online at www.treasury.gov/initiatives/financial-stability/investment-programs/cpp/Documents/PPP%20Directors%20Observer%20Fact%20Sheet.pdf). See also U.S. Government Accountability Office, *Report to Congressional Addressees, Troubled Asset Relief Program: Status of Programs and Implementation of GAO Recommendations*, at 18–19 (Jan. 2011) (GAO–11–74) (online at www.gao.gov/new.items/d1174.pdf). Treasury has elected two members to AIG's board of directors under the AIG Investment Program. *Id.* at 18.

¹⁵⁶ U.S. Department of the Treasury, *Cumulative Dividends, Interest and Distributions Report as of February 28, 2011* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/dividends-interest/Documents/Dividends_Interest_February%202011%20Dividends%20Interest%20Report.pdf) (hereinafter "Treasury's Dividends & Interest Report").

¹⁵⁷ *Id.* Based on information as of February 28, 2011.

effectiveness of Treasury's programs. In the July 2010 report, the Panel recommended that Treasury analyze the characteristics of the smaller banks that took CPP funds and the data on the smaller banks that have repaid CPP funds in order to determine commonalities among them. The Panel further urged Treasury to use those commonalities to create a strategy for exit, to help anticipate risks in the portfolio, and to evaluate the effectiveness of capital infusions for stabilizing smaller banks, given the program design of the CPP.¹⁵⁸ The Panel also requested that Treasury review the CPP's impact on bank consolidations and concentration in the banking sector generally.¹⁵⁹ While the Panel acknowledges improvements in data disclosure, many of the specific recommendations of the Panel, such as a review of the CPP's impact on bank consolidation and concentrations, have not been implemented, or at least not announced publicly.

e. CPP Profits and Accountability

Accountability and program effectiveness are of particular import with respect to returns under the CPP. The CPP was the largest of three capital injection programs under the TARP, providing 707 banks with capital injections totaling nearly \$205 billion.¹⁶⁰ The program has to date generated returns for the government: the current CBO and Office of Management and Budget (OMB) subsidy costs for CPP are actually savings of \$15 billion and \$12 billion, respectively, which represents a positive rate of return. These returns come from redemptions, warrant repurchases, and dividend payments. As of March 8, 2011, 145 of the 707 banks that participated in the CPP have fully redeemed their preferred shares either through capital repayment or exchanges for investments under other government programs, including the Community Development Capital Initiative (CDCI).¹⁶¹ Currently, banks can apply to the Small Business Lending Fund (SBLF) as a means of refinancing their preferred shares issued through CPP and CDCI.¹⁶² In addition, Treasury receives dividend payments on the preferred shares it holds under the CPP, 5 percent per year for the first five years and 9 percent per year thereafter.¹⁶³ In total, Treasury has received approximately \$30 billion in net income from warrant repurchases, dividends, interest payments, profit from the sale of stock, and other proceeds deriving from TARP investments, after

¹⁵⁸ 2010 July Oversight Report, *supra* note 105, at 61.

¹⁵⁹ 2010 July Oversight Report, *supra* note 105, at 52–57. The Panel noted that although concerns about bank consolidation may not have informed the program at the outset, increasing concentration in the banking sector could have adverse effects on competition and services offered to customers, and, potentially, on systemic stability.

¹⁶⁰ Treasury Transactions Report, *supra* note 36.

¹⁶¹ Treasury Transactions Report, *supra* note 36.

¹⁶² In a pamphlet designed for community banks, Treasury explains the eligibility requirements for refinancing outstanding CPP or CDCI securities through the Small Business Lending Fund (SBLF). U.S. Department of the Treasury, *SBLF: Small Business Lending Fund—Getting Started Guide For Community Banks*, at 4–5 (online at www.treasury.gov/resource-center/sb-programs/Documents/SBLF_Getting_Started_Guide_Final.pdf).

¹⁶³ U.S. Department of the Treasury, *Capital Purchase Program* (online at www.treasury.gov/initiatives/financial-stability/investment-programs/cpp/Pages/capitalpurchaseprogram.aspx) (accessed Mar. 11, 2011). For preferred shares issued under the TIP, Treasury received a dividend of 8 percent per year. U.S. Department of the Treasury, *Targeted Investment Program* (online at www.treasury.gov/initiatives/financial-stability/investment-programs/tip/Pages/targetedinvestmentprogram.aspx) (accessed Mar. 11, 2011).

deducting losses.¹⁶⁴ As noted above, in conjunction with its preferred stock investments under the CPP and the TIP, Treasury generally received warrants to purchase common equity.¹⁶⁵ As of July 2009, the Panel reported that Treasury's method for selling stock options gained through the CPP appeared to be recovering only 66 percent of the warrants' estimated worth. Treasury has subsequently changed its approach and subsequent sales recovered 103 cents on the dollar compared to the Panel's best estimate. As of March 8, 2011, 51 institutions have repurchased their warrants from Treasury at an agreed-upon price and Treasury has also sold warrants for 18 other institutions at auction. To date, income from warrant dispositions totals \$8.6 billion. Treasury still holds warrants in 211 TARP recipients. The Panel's best estimate for the total value of all outstanding warrants is \$2.3 billion as of March 3, 2011.¹⁶⁶ Figure 38 in the Annex provides further detail on the income from warrant dispositions for financial institutions that have fully repaid CPP funds and Figure 39 in the Annex breaks down the value of Treasury's current holdings of warrants by financial institution.

That CPP has had an overall rate of return that is positive is not to say that all CPP investments have been profitable. As of February 28, 2011, 161 institutions have missed at least one dividend payment on outstanding preferred stock issued under the CPP. Among these institutions, 131 are not current on cumulative dividends, amounting to \$187.4 million in missed payments. Another 30 banks have not paid \$11.3 million in non-cumulative dividends.¹⁶⁷ Of the \$30.9 billion currently outstanding in CPP funding, Treasury's investments in banks with non-current dividend and interest payments total \$7.3 billion. A majority of the banks that are not current on dividend payments have under \$1 billion in total assets on their balance sheets.¹⁶⁸ Under the terms of the CPP, after a bank fails to pay dividends for six periods, Treasury has the right to elect two individuals to the company's board of directors. Figure 35 in the Annex provides further details on the distribution and the number of institutions that have missed dividend payments.

Other CPP investments have been losses. As of March 8, 2011, Treasury has realized a total of \$2.6 billion in losses from invest-

¹⁶⁴This number is calculated including only the CPP and CDCI. Treasury's Dividends & Interest Report, *supra* note 156; Treasury Transactions Report, *supra* note 36. Treasury also received an additional \$1.2 billion in participation fees from its Guarantee Program for MMFs. Treasury's Guarantee Program for Money Market Funds Expires, *supra* note 64.

¹⁶⁵For its CPP investments in privately held financial institutions, Treasury also received warrants to purchase additional shares of preferred stock, which it exercised immediately. Similarly, Treasury received warrants to purchase additional subordinated debt that were immediately exercised along with its CPP investments in subchapter S corporations.

¹⁶⁶As discussed in its July 2009 report, the Panel uses a Black-Scholes model to calculate low, high, and best valuation estimates of outstanding TARP warrants. For more details on the Panel's warrant valuation methods and inputs used in the Black-Scholes model, see 2009 July Oversight Report, *supra* note 92, at 20–28 and Annex A/B.

¹⁶⁷In addition, nine CPP participants have missed at least one interest payment, representing \$5.6 million in cumulative unpaid interest payments. Treasury's total investments in these non-public institutions represent less than \$100 million in CPP funding. Treasury's Dividends & Interest Report, *supra* note 156.

¹⁶⁸There are also 19 institutions that no longer have outstanding unpaid dividends, after previously deferring their quarterly payments. Fourteen banks have failed to make six dividend payments, eleven banks have missed seven quarterly payments, six banks have missed eight quarterly payments, and one bank has missed all nine quarterly payments. These institutions received a total of \$1.07 billion in CPP funding. Treasury's Dividends & Interest Report, *supra* note 156.

ments in seven CPP participants.¹⁶⁹ Figure 37 in the Annex details settled and unsettled investment losses from CPP participants that have declared bankruptcy, been placed into receivership, or renegotiated the terms of their CPP contracts. As of March 9, 2011, however, the average internal rate of return (IRR)¹⁷⁰ for all public financial institutions that participated in the CPP and TIP and fully repaid the U.S. government (including preferred shares, dividends, and warrants) was at 10 percent.

CPP Profits and the Risk of the Investments in 2008. As described above, the overall rate of return for CPP and TIP is 10 percent,¹⁷¹ and Treasury often points to this positive rate of return.¹⁷² As Harvard professor and economist Kenneth Rogoff noted to the Panel in connection with the September 2010 report, however, that should not be the end of the inquiry. In his words, a proper cost benefit analysis “needs to price the risk the taxpayer took on during financial crisis.” Ex post accounting (how much did the government actually earn or lose after the fact) can yield an extremely misguided measure of the true cost of the bailout, especially as a guide to future policy responses.¹⁷³ Therefore the simple question of whether the program ends with a negative or positive balance does not provide a complete answer to whether the program was necessary or properly designed and implemented.¹⁷⁴

The Panel first addressed the question of whether, given the risk involved, Treasury had paid a premium for the assets purchased

¹⁶⁹CIT Group Inc. and Pacific Coast National Bancorp both completed bankruptcy proceedings, and the preferred stock and warrants issued by the South Financial Group, TIB Financial Corp., the Bank of Currituck, Treaty Oak Bancorp, and Cadence Financial Corp. were sold to third-party institutions at a discount. Excluded from Treasury’s total losses are investments in institutions that have pending receivership or bankruptcy proceedings, as well as an institution that is currently the target of an acquisition. Treasury Transactions Report, *supra* note 36, at 14. Settlement of these transactions and proceedings would increase total losses in the CPP to \$2.8 billion.

¹⁷⁰The internal rate of return (IRR) is the annualized effective compounded return rate that can be earned on invested capital.

¹⁷¹That said, however, as the Panel noted in its September report, many of the banks that have yet to repay may be in weaker capital positions, and the ultimate overall returns may be less favorable. 2010 September Oversight Report, *supra* note 53, at 28 (“[B]anks that have not repaid their TARP funds may be under or could come under greater stress. Some banks that remain in the CPP may find it difficult or impossible to raise the capital necessary to meet their obligations to the taxpayers, and Treasury’s rate of return may therefore decline over the life of the program.”).

¹⁷²In an opinion piece for *The New York Times* titled “Welcome to the Recovery,” Secretary Geithner wrote that “[t]he government’s investment in banks has already earned more than \$20 billion in profits for taxpayers, and the TARP program will be out of business earlier than expected—and costing nearly a quarter of a trillion dollars less than projected last year.” Timothy F. Geithner, *Welcome to the Recovery*, *New York Times* (Aug. 2, 2010) (online at www.nytimes.com/2010/08/03/opinion/03geithner.html?_r=2&dbk). See also U.S. Department of the Treasury, *Treasury Department Announces TARP Milestone: Repayments to Taxpayers Surpass TARP Funds Outstanding* (June 11, 2010) (online at www.treasury.gov/press-center/press-releases/Pages/tg742.aspx) (quoting Assistant Secretary Herbert Allison as saying that “TARP repayments have continued to exceed expectations, substantially reducing the projected cost of this program to taxpayers . . . This milestone is further evidence that TARP is achieving its intended objectives: stabilizing our financial system and laying the groundwork for economic recovery.”).

¹⁷³Kenneth Rogoff, Thomas D. Cabot Professor of Public Policy, Harvard University, Written Answers to Questions Posed by the Congressional Oversight Panel (Aug. 2010); 2010 September Oversight Report, *supra* note 53, at 123. Professor Joseph E. Stiglitz echoed the same opinion stating that Treasury should have demanded appropriate compensation for the risk borne and that a proper evaluation should be done ex ante and take into account the risks at the time. Congressional Oversight Panel, Written Testimony of Joseph E. Stiglitz, Nobel Laureate and University Professor, Columbia Business School, Graduate School of Arts and Sciences Department of Economics and the School of International and Public Affairs, *COP Hearing on the TARP’s Impact on Financial Stability*, at 3 (Mar. 4, 2011) (online at cop.senate.gov/documents/testimony-030411-stiglitz.pdf) (“The fairness of the terms is to be judged ex ante, not ex post, taking into account the risks at the time.”).

¹⁷⁴2010 September Oversight Report, *supra* note 53, at 93.

under the CPP in February of 2009. At that time, there had been no CPP repayments: the first repayment took place in March 2009, and thus the analysis performed was made without the benefit of knowing the current CPP returns.¹⁷⁵ As noted above, while all of the investments under the CPP carry the same terms,¹⁷⁶ the first investments in the CPP were made before Treasury instituted an application process, on the publicly stated grounds that all recipients were healthy—an assertion that came into question very rapidly.¹⁷⁷

Shortly after the initial CPP investments, it became clear that the health of some of these initial recipients—particularly Bank of America and Citigroup—was less certain when soon after the initial CPP investments, these institutions received additional infusions through the TIP.¹⁷⁸ Testifying in front of the Panel, Assistant Secretary of the Treasury for Financial Stability Herb Allison stated that, “I think that Citi, and a number of other banks, many banks, would have been on the brink of failure had the system not been underpinned by actions of the government—including the Federal Reserve and the U.S. Treasury.”¹⁷⁹ Subsequent emails made public in connection with the Financial Crisis Inquiry Commission’s work made it clear that within weeks after the initial CPP investments, the regulators in various banking agencies, including the FDIC and FRBNY, were aware that Citigroup was in a “negative and deteriorating” situation and that its financial condition was “marginal.”¹⁸⁰ Similarly, in mid-January 2009, minutes of a board meeting indicate that the FDIC was significantly concerned about Bank of America’s health, describing that entity’s capital situation as “strained” and expressing concern about a systemic event that disclosure of Bank of America’s operating results might cause.¹⁸¹

¹⁷⁵ The February 2009 report also addressed the Systemically Significant Failing Institutions (SSFI) program, but this discussion focuses primarily on the CPP and the TIP.

¹⁷⁶ As noted above, the Panel addressed the effect this had on smaller banks in the CPP in July of 2010. See 2010 July Oversight Report, *supra* note 105, at 3.

¹⁷⁷ 2009 February Oversight Report, *supra* note 84, at 5 (“This program was intended for healthy banks: those that are sound and not in need of government subsidization. While a total of 317 financial institutions have received a total of \$194 billion under the CPP as of January 23, 2009, eight large early investments represent \$124 billion, or 64 percent of the total. The eight were: Bank of America Corporation, Citigroup, Inc., JPMorgan Chase & Co., Morgan Stanley, Goldman Sachs Group, Inc., PNC Financial Services Group, U.S. Bancorp, and Wells Fargo & Company.”).

¹⁷⁸ 2009 February Oversight Report, *supra* note 84, at 5.

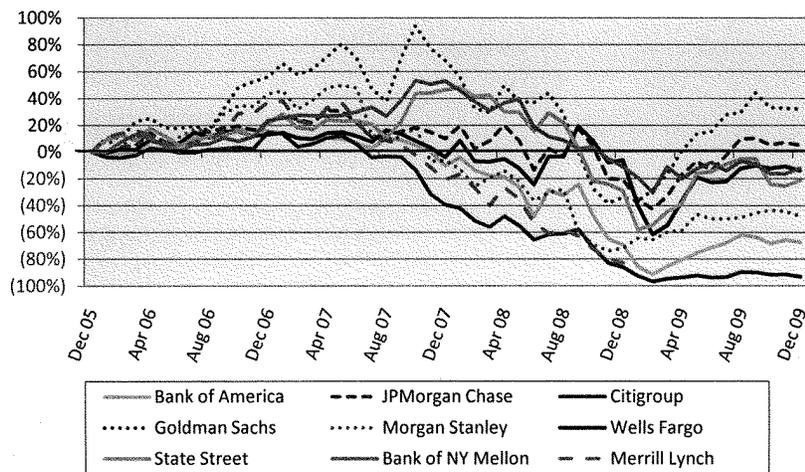
¹⁷⁹ Assistant Secretary Allison added that, “Citi [. . .] could have difficulty funding themselves at that time. Their debt spreads had widened considerably, and so, in the opinion of their management, they were facing a very serious situation.” Congressional Oversight Panel, Testimony of Herbert M. Allison, Jr., assistant secretary for financial stability, U.S. Department of the Treasury, *Transcript: COP Hearing on Assistance Provided to Citigroup Under TARP*, at 27 (Mar. 4, 2010) (online at cop.senate.gov/documents/transcript-030410-citi.pdf).

¹⁸⁰ See Email from Christopher J. Spoth to Sheila C. Bair (Nov. 21, 2008) (online at c0181567.cdn1.cloudfiles.rackspacecloud.com/2008-11-21%20FDIC%20Richardson%20Email%20re%2011-21-08%20Citi%20Liquidity%20Call%20Notes.pdf). See also Federal Deposit Insurance Corporation, *Transcript of the Minutes of the Meeting of the Board of Directors*, at 4 (Nov. 23, 2008) (online at c0181567.cdn1.cloudfiles.rackspacecloud.com/2008-11-23%20Transcript%20of%20FDIC%20Board%20of%20Directors%20meeting,%20closed%20session.pdf); Federal Reserve Bank of New York, *Memorandum to Citigroup Board of Directors* (Jan. 14, 2009) (online at c0181567.cdn1.cloudfiles.rackspacecloud.com/2009-01-14%20FRBNY%20Summary%20of%20Supervisory%20Activity%20and%20Findings%20on%20Citi.pdf).

¹⁸¹ Federal Deposit Insurance Corporation, *Transcript: Board of Directors Meeting* (Jan. 15, 2009) (online at c0181567.cdn1.cloudfiles.rackspacecloud.com/2009-01-15%20FDIC%20Board%20Meeting%20Transcript.pdf) (hereinafter “FDIC Transcript on Board of Directors Meeting”).

Nor was the market unaware of these differences among the big banks: an examination of the stock prices in the fall of 2008 of these nine banks shows that the market had a fairly accurate perception of their relative health—or lack thereof. Figure 11 details the percent change in stock prices of the nine banks from December 2005. Specifically, in February 2009 the monthly stock prices of Bank of America and Citigroup were below their December 2005 levels by 91 percent and 97 percent, respectively. While all of the first nine banks to enter the CPP clearly saw dipping stock prices, two banks, Citigroup and Bank of America, consistently tracked the bottom of the group after December 2008.

FIGURE 11: STOCK PRICE CHANGE OF THE FIRST NINE CPP BANKS (DECEMBER 2005–DECEMBER 2009) (RELATIVE TO DECEMBER 2005 LEVELS)



Accordingly, even assuming that the other large banks that received the initial CPP infusions were equally healthy, by virtue of being made on the same one-size-fits-all terms, at a minimum the Bank of America and Citigroup CPP investments appear not to have properly priced the risk of investing in those entities. As the Panel warned in its February 2009 report, when the initial CPP returns were unknown, using a one-size-fits-all investment policy, rather than using risk-based pricing more commonly used in market transactions, meant that Treasury made its investments at a substantial premium to the market value of the assets purchased under the CPP.¹⁸² As the Panel stated:

Treasury's emphasis on uniformity, marketability, and use of call options in structuring TARP investments helped produce a situation in which Treasury paid substantially more for its TARP investments than their then-current market value. The decision to model the far riskier investments under the TIP . . . closely on the CPP transactions also effectively guaranteed that a substantial subsidy

¹⁸² 2009 February Oversight Report, *supra* note 84, at 2.

would exist for these riskier institutions. Because Treasury decided to make all healthy bank purchases on precisely the same terms, stronger institutions received a smaller subsidy, while weaker institutions received more substantial subsidies.¹⁸³

Professors Luigi Zingales and Pietro Veronesi came to a similar conclusion in their evaluation of the redistributive effects of Treasury's initial investments into the first and largest banks.¹⁸⁴ Examining the TARP interventions on an ex-ante basis, they found that the initial CPP terms provided these banks' shareholders with a subsidy—or, as the authors put it, a gift—which they estimated to be between \$21 and \$44 billion. According to this study, the subsidy to the banks' bondholders was even larger: \$121 billion.¹⁸⁵ The general effect of the intervention on enterprise value also differed: stronger institutions received lower and sometimes negative increases in enterprise value from the announcement of the TARP interventions, while weaker institutions received more.¹⁸⁶

The subsequent positive returns on investment in the larger CPP banks—including Citigroup and Bank of America—should not obscure this point. Had Treasury more accurately priced the risk—and calibrated it to each investment, as a private investor would have done¹⁸⁷—Treasury's upside returns would have been greater. In illustrating this principle, Professors Zingales and Veronesi compared Treasury's returns using the terms of the CPP as implemented to Warren Buffet's investment in Goldman at around the same time. Professors Zingales and Veronesi concluded that if Treasury had demanded Mr. Buffet's terms, Treasury would in most cases have captured significant gains.¹⁸⁸ Thus, if this analysis is correct, and although Mr. Buffet remains currently invested in Goldman and his ultimate returns are unknown, it is likely that Mr. Buffet will realize more on his investment in Goldman than Treasury realized for its similar TARP investment in that institution.¹⁸⁹

Treasury was not, of course, acting as a normal private investor. Secretary Geithner recently stated that, “you can't say because we

¹⁸³ 2009 February Oversight Report, *supra* note 84, at 8.

¹⁸⁴ Luigi Zingales, Robert C. McCormack Professor of Entrepreneurship and Finance and the David G. Booth Faculty Fellow, Booth School of Business, University of Chicago. Pietro Veronesi, Roman Family Professor of Finance, Booth School of Business, University of Chicago.

¹⁸⁵ Zingales and Veronesi note, however, that if the goal of the plan was to get full participation and avoid signaling effects, more stringent terms might have interfered. Pietro Veronesi and Luigi Zingales, *Paulson's Gift*, *Journal of Financial Economics*, Vol. 97, No. 3, at 364 (Sept. 2010) (hereinafter “Zingales & Veronesi: Paulson's Gift”). At the time of the initial CPP infusion, Wells Fargo had already reached an agreement to purchase Wachovia. The Panel's reports have therefore consistently referred to the first nine banks; Professors Zingales and Veronesi refer in their paper both to the first nine and the first ten banks.

¹⁸⁶ *Id.* at 364.

¹⁸⁷ In the February report, the Panel noted that it appeared that private investors who made investments at around the same time received better terms and thus better valuations than Treasury. Two of the private transactions compared received assets worth more than their investment, and one received assets worth less than the investment, but still of greater worth than Treasury's assets (these ranged from securities worth \$123 on a \$100 investment to \$91 on a \$100 investment, as compared to Treasury's average \$66 on a \$100 investment). 2009 February Oversight Report, *supra* note 84, at 4, 8.

¹⁸⁸ Zingales & Veronesi: Paulson's Gift, *supra* note 185, at 364.

¹⁸⁹ These analyses are ex-ante, and not ex-post, and it is important to note that—to the best of the Panel's knowledge—there is no current academic effort to value the private investments under discussion in this section. Further, since the private investments are ongoing, it is impossible to determine what their ultimate value will be, and an unforeseen shock to Goldman could impair Mr. Buffet's returns in the future.

priced our investments below the cost of credit that was available in the market in a time of a financial panic that we underpriced those investments. That would not be a fair way to evaluate it or a sensible way to run a financial emergency.”¹⁹⁰ In the early days of the CPP, Treasury said that its primary goal for the program was to stabilize the financial system.¹⁹¹ Thus, Treasury was acting as a government body with the goal not only of returns to taxpayers, but also of market stability. In an atmosphere of profound uncertainty as to the health of banks in general, the regulators questioned whether the market was fully prepared for the details of what the regulators knew to be true—that not all of the largest banks were alike and healthy, and that some were indeed very fragile.¹⁹² Accordingly, the fact that Treasury’s returns likely differ from those of a private investor is not, and should not, be the end of the inquiry or dispositive of future policy responses to a crisis. Nonetheless, Professor Rogoff’s cautions—with which Secretary Geithner has said he agrees¹⁹³—are not satisfied by observations that Treasury has since made money without recognizing that Treasury did not necessarily price the risk of its investments in all of the CPP recipients.

3. Lessons Learned

As noted above, between February 2009 and July 2010, the Panel examined questions about the policy, strategy, and execution of the TARP’s approach to bank assistance, how Treasury and the Federal Reserve allowed banks to repay TARP assistance, the financial stability of banks in the context of troubled assets and CRE losses, and small banks’ ability to exit Treasury’s CPP. From the Panel’s recommendations common themes emerged: transparency and accountability, forward-looking risk assessment, and the fact that one size does not necessarily fit all banks. These themes are discussed below.

¹⁹⁰ Geithner Testimony to the Panel, *supra* note 119.

¹⁹¹ U.S. Department of the Treasury, *Interim Assistant Secretary for Financial Stability Neel Kashkari Remarks on Financial Markets and TARP Update* (Dec. 5, 2008) (online at www.treasury.gov/press-center/press-releases/Pages/hp1314.aspx).

¹⁹² For example, in FDIC board minutes from the time, the FDIC board acknowledged that while the market was sensitive to Bank of America’s losses and liabilities from Countrywide and Merrill Lynch, the extent of the losses to which it was exposed would still be a surprise. *See, e.g.*, FDIC Transcript on Board of Directors Meeting, *supra* note 181, at 22–23 (“DIRECTOR REICH: Yes, I think there’s been the perception that B of A has been sort of—well, certainly their acquisitions of Countrywide and Merrill Lynch has given them greater exposure to losses, but there nevertheless has been the perception that they are among the strongest of institutions, and I think this is going to be a surprise to the market. . . . DIRECTOR DUGAN: . . . My only comment would be, it would be a lot more surprise if it came out with a loss in November [unclear]...I mean, I think it will be a very big surprise, indeed, the size of the loss. That’s exactly the shock that I think we’re all fearful of and will generate the systemic risk that can have such harmful effects and the idea is that this will counteract that perception as much as possible.”); *Id.* at 5 (“MR. NEWBURY: The market reaction to Bank of America Corporation’s operating results may have systemic consequences given the size of the institution and the volume of counterparty transactions involved.”). *See also* Email from Jennifer Burns, Federal Reserve Bank of Richmond, to Richard Cox, FDIC, and Morgan Morris, Office of the Comptroller of the Currency, discussing Bank of America (online, at c0181567.cdn1.cloudfiles.rackspacecloud.com/2009-01-11%20FDIC%20Cox%20Email%20to%20Corston,%20Hoyer%20-%20FW%20Funding%20Vulnerabilities%20Memo.pdf).

¹⁹³ In testimony before the Panel, Secretary Geithner stated that Professor Rogoff’s approach was fundamentally right. Geithner Testimony to the Panel, *supra* note 119 (stating that “what [Professor Rogoff] says is fundamentally right. You have to measure, as any investor would do, you have to measure return against risk.”).

a. Transparency and Accountability

In the reports on banking, the Panel has been consistent in its call for greater transparency. Fuller disclosure to the public instills confidence that the steps that Treasury has implemented to buttress the financial system are being executed in a prudent and fair manner. Accountability and transparency go hand in hand: there can be no accountability without transparency in decision-making. The taxpayers are only able to assess Treasury's choices meaningfully if they get a complete picture of how those choices were made and why Treasury deemed those to be the most appropriate to recover the public's investment, stabilize financial markets, and maximize return. Such disclosure would prevent the appearance of ad hoc decision-making and give Treasury an opportunity to take credit for any positive outcomes. The Panel recognizes that occasionally there are statutory and supervisory reasons to limit transparency about certain data; however, except in those limited circumstances, Treasury should always err on the side of greater disclosure.

In some cases, and as mentioned above, this lack of transparency has made Treasury the target of criticism that it could have avoided had it been more open. Some economists believe that the TARP was the most visible of the government's actions in addressing the financial crisis, and that being the public face of the intervention has contributed to its negative reputation¹⁹⁴—a difficulty that additional transparency might have alleviated. The Panel has pointed out on numerous occasions that a major source of the TARP's unpopularity was insufficient transparency and inadequate communication. For instance, in the implementation of the CPP, Treasury initially indicated it was only infusing money into healthy banks. Later, when it became apparent that some participating banks were on the brink of failure, this not only tainted all participating banks (including healthy banks), but also diminished Treasury's credibility with the public.¹⁹⁵ Furthermore, with regard to TARP repayments by financial institutions small and large, Treasury has only issued some general statements on its overall repayment policy, instead of more detailed, case-by-case explanations for its approval of these repayments. Given the vast amounts of money involved, the public has a right to expect transparency and to hold Treasury accountable for its decisions. In addition, the lack of transparency may have contributed to the general misperceptions that exist about the TARP. Despite, for example, Treasury's recovery of much of the money taxpayers initially invested, there is the lingering belief that the TARP was an extremely costly program.¹⁹⁶ The transparency and accountability of Treasury's various choices in the TARP may thus have significant implications not only for

¹⁹⁴ 2010 September Oversight Report, *supra* note 53, at 95–96.

¹⁹⁵ 2010 September Oversight Report, *supra* note 53, at 107.

¹⁹⁶ The Pew Research Center, *Few Aware of TARP Repayment, Inflation Rate: Public Knows Basic Facts About Politics, Economics but Struggle with Specifics*, at 1–2 (Nov. 18, 2010) (online at people-press.org/reports/pdf/677.pdf) (“But the public continues to struggle with questions about the bank bailout program known as the TARP: Just 16 percent say, correctly, that more than half of loans made to banks under the TARP have been paid back; an identical percentage says that none has been paid back.”).

the policies chosen during this crisis, but also for policymakers facing difficult questions in the future.

b. Forward-Looking Risk Assessment

Stress testing of banks was designed to assess whether banks on a forward-looking basis could withstand a variety of worst-case scenarios of economic events and still continue to be financially viable. Banking regulators have used these tests to require capital buffers to be built in advance of any problem, based on projections about the economy and its impact on banks' operating results. While it would be unwise to think that stress testing could diagnose all of potential weaknesses of the banking system, it does determine the extent of problems in the market that are reasonably foreseeable.¹⁹⁷ For example, although it is not known to what degree the current stress tests will take into account the effect on bank balance sheets of mortgage documentation irregularities, the Panel has urged the regulators to do so.

c. One Size Does Not Necessarily Fit All

Treasury provided capital to banks participating in the CPP under a single set of repayment terms designed at the outset of the program. However, the result has been that large banks have been much better served by the program than smaller banks. For the stress-tested banks, the CPP proved to be a short-term investment. They entered early, and most have exited early—beneficiaries of capital market confidence resulting, in part, from their “too big to fail” status. For smaller banks, by contrast, the CPP is a long-term investment, subject to market uncertainty, stigma, and pressure. Additionally, the purchase agreements between Treasury and the banks did not address differences in credit quality among various capital-infusion recipients through variations in contractual terms governing the investments. Nor did the purchase agreements impose specific requirements on a particular recipient that might have helped insure stability and soundness.

The CPP had a different impact on large and small banks in part because these banks vary in a number of fundamental ways. Small banks are often privately held or thinly traded and have limited access to capital markets.¹⁹⁸ Also, small banks are disproportionately exposed to CRE, where there remains substantial uncertainty about future performance. In addition, and finally, as small banks do not benefit from any “too big to fail” guarantee, their regulators have been quite willing to close them down. Therefore, designing a standardized program may be the quicker answer, but speed may not address differences among participants in a program.

B. Guarantees and Contingent Payments

Capital infusions were not the only tool that Treasury employed under the TARP to stabilize the banking sector. In fact, during the financial crisis of late 2008 and early 2009, the federal government dramatically expanded its role as a guarantor.¹⁹⁹ All told, the fed-

¹⁹⁷ 2009 June Oversight Report, *supra* note 95, at 3–5.

¹⁹⁸ 2010 July Oversight Report, *supra* note 105, at 3.

¹⁹⁹ Created by the FDIC less than two weeks after the enactment of EESA, the TLGP was intended to promote liquidity in the interbank lending market and confidence in financial insti-

eral government's guarantees have exceeded the total value of the TARP, making guarantees the single largest element of the government's response to the financial crisis.

1. Background

As noted above, CPP infusions were not enough for some institutions. In a matter of weeks, two of the first nine institutions to receive CPP funds—Citigroup and Bank of America—needed additional support.²⁰⁰ Citigroup faced widening credit default swap spreads and losses due to write-downs on leveraged finance investments and securities, particularly in residential real estate. Citigroup's stock price, which had been volatile, fell below \$4 per share on November 21, 2008, from a high of over \$14 per share just three weeks earlier. This constituted a loss of more than two-thirds of Citigroup's market capitalization during those three weeks.²⁰¹ Citigroup ultimately incurred a loss of \$8.29 billion for the fourth quarter of 2008.²⁰² For its part, Bank of America incurred its first quarterly loss in more than 17 years in the fourth quarter of 2008. These losses were largely due to escalating credit costs (including additions to reserves), and significant write-downs and trading losses in the capital markets businesses.²⁰³ In addition, the market feared Bank of America's liability from its purchases of Merrill Lynch and Countrywide.²⁰⁴

Treasury, the Federal Reserve, and the FDIC stated that providing additional assistance to both institutions was necessary not only to keep them afloat, but also "to strengthen the financial system and protect U.S. taxpayers and the U.S. economy." Noting that at the end of 2008 no one knew what might happen to the economy next, Treasury stated that a driving force behind the decision to provide additional assistance was a fear that either institution's failure would cause the same deep, systemic damage as had Lehman Brothers' collapse.²⁰⁵

Part of the government's additional assistance to Citigroup and Bank of America was provided through the Asset Guarantee Program (AGP), which Treasury created pursuant to Section 102 of EESA to guarantee certain distressed or illiquid assets that were held by systemically significant financial institutions.²⁰⁶ In Treasury's view, asset guarantees would "calm market fears about really large losses," thereby encouraging investors to keep funds in

tutions. The U.S. government also developed two other initiatives with guarantee-like aspects. First, through the TALF, FRBNY served as a quasi-guarantor of the newly issued ABS by permitting participating ABS owners to default on their TALF loans without further recourse from the lender (the government). Second, the PPIP provides a quasi-guarantee to the markets by demonstrating the U.S. government's willingness to subsidize private investments and implement measures to encourage market liquidity.

²⁰⁰ 2009 November Oversight Report, *supra* note 60, at 13–14.

²⁰¹ 2009 November Oversight Report, *supra* note 60, at 43–44.

²⁰² 2009 November Oversight Report, *supra* note 60, at 43.

²⁰³ 2009 November Oversight Report, *supra* note 60, at 43.

²⁰⁴ See Section II.A.1.a, *supra*. As noted above, in FDIC board minutes from the time, the FDIC board acknowledged that the market was sensitive to Bank of America's losses and liabilities from Countrywide and Merrill Lynch, although the extent of the losses to which it was exposed would still be a surprise. See, e.g., FDIC Transcript on Board of Directors Meeting, *supra* note 181, at 22–23.

²⁰⁵ 2009 November Oversight Report, *supra* note 60, at 45.

²⁰⁶ 2009 November Oversight Report, *supra* note 60, at 14, 40. Section 102 of EESA required the Secretary of the Treasury, if he created the TARP, also to "establish a program to guarantee troubled assets originated or issued prior to March 14, 2008, including mortgage-backed securities."

Citigroup and Bank of America.²⁰⁷ Citigroup's guarantee under the AGP ended in December 2009, following the partial repayment of its TARP assistance.

In addition to the AGP, on September 19, 2008, two weeks before EESA was signed into law, Treasury announced the Temporary Guarantee Program for Money Market Funds (TGPMMF), which was designed to alleviate investors' concerns that MMFs would drop below a \$1.00 net asset value, an occurrence known as "breaking the buck."²⁰⁸ At the program's height, it guaranteed \$3.2174 trillion in MMFs.²⁰⁹ The TGPMMF ended in September 2009. Similarly, the FDIC's DGP, part of the TLGP, discussed in greater detail in Section I, placed the FDIC's guarantee behind the debt that banks issued in order to raise funds that they could use to lend to customers. The DGP closed to new issuances of debt on October 31, 2009. The FDIC will continue to guarantee debt issued prior to that date until the earlier of its maturity or June 30, 2012.

2. Summary of COP Report and Findings

The Panel's November 2009 oversight report found that the income of several government-backed guarantee programs would likely exceed their direct expenditures, and that guarantees had played a major role in calming financial markets. These same programs, however, exposed American taxpayers to trillions of dollars in guarantees and created significant moral hazard that distorted the marketplace. Despite the guarantees' significant impact, the contingent nature of guarantees, coupled with the limited transparency with which the guarantee programs were implemented, obscured the total amount of money that was being placed at risk. Some financial stabilization initiatives outside of the TARP, such as the FDIC's DGP and Treasury's TGPMMF, carried greater potential for exposure of taxpayer funds than the TARP itself.

3. Panel Recommendations and Updates

The extraordinary scale of these guarantees, the significant risk to taxpayers, and the corresponding moral hazard led the Panel to conclude that these programs should be subject to extraordinary transparency. The Panel strongly urged Treasury to provide regular, detailed disclosures about the status of the assets backing up the Citigroup AGP guarantee, the largest single guarantee offered. The Panel called upon Treasury to disclose greater detail about the rationale behind guarantee programs, the alternatives that might have been available and why they were not chosen, and whether these programs had achieved their objectives, including an analysis of why Citigroup and Bank of America were selected for the AGP and not others. The Panel also asked Treasury to provide a legal justification for its use of the Exchange Stabilization Fund to create the TGPMMF and to provide reports of the total number of MMFs participating in the program (or the total dollar value guaranteed), for each month that the program was in existence.

²⁰⁷ 2009 November Oversight Report, *supra* note 60, at 24–25, 46. As discussed above, while a provisional term sheet was drafted reflecting the outlines of Bank of America's asset guarantee agreement (which was intended to resemble the Citigroup guarantee), the parties never agreed upon a finalized term sheet.

²⁰⁸ 2009 November Oversight Report, *supra* note 60, at 54.

²⁰⁹ 2009 November Oversight Report, *supra* note 60, at 6.

To date, Treasury has not disclosed any of the information the Panel requested concerning the various guarantee programs it launched during the financial crisis, although a SIGTARP audit recently disclosed information germane to the Panel's requests.²¹⁰ As noted above, the temporary guarantee program for MMFs terminated in September 2009 and the Citigroup AGP terminated in December 2009.

4. Lessons Learned

As the Panel pointed out in its November 2009 oversight report, it is impossible to attribute specific results to a particular initiative given that so many stabilization initiatives have been in use. The guarantees provided by Treasury, the Federal Reserve, and the FDIC helped restore confidence in financial institutions, and did so without significant expenditure, initially at least, of taxpayer money. Moreover, as the market has stabilized and the scope of the programs has decreased, the likelihood diminishes that any such expenditure will be necessary. Additionally, the U.S. government—and thus the taxpayers—have benefited financially from the fees charged for guarantees.

This apparently positive outcome, however, was achieved at the price of a significant amount of risk. A significant element of moral hazard was injected into the financial system at that time and a very large amount of money was at risk. At its high point, the federal government guaranteed or insured \$4.4 trillion in face value of financial assets under the three major guarantee programs.²¹¹ In addition, while circumstances may have led the government into ad-hoc reactions to the financial crisis, rather than permitting it to develop clear and transparent principles, the result is that government intervention has caused confusion and muddled expectations.²¹²

²¹⁰A recent SIGTARP audit provides some key disclosures relating to the AGP and the government's decision to provide additional assistance to Citigroup. Not only does this audit detail Citigroup's initial proposal for additional government assistance, but it also discusses several alternatives that were floated besides guarantees to address the lack of market confidence in Citigroup. These included the possibility of creating a conservatorship for Citigroup or creating a SPV or public-private investment fund to purchase troubled assets from Citigroup with government funds. Office of the Special Inspector General for the Troubled Asset Relief Program, *Extraordinary Financial Assistance Provided to Citigroup, Inc.*, at 17–21 (Jan. 13, 2011) (online at www.sig tarp.gov/reports/audit/2011/Extraordinary%20Financial%20Assistance%20Provided%20to%20Citigroup,%20Inc.pdf).

²¹¹This figure includes the entirety of the governments exposure to the Citigroup and Bank of America guarantees, \$259 billion and \$97 billion respectively, as well as the maximum amount outstanding under the TLGP (\$346 billion in May 2009), and the size of the money market fund at the time Treasury enacted its guarantee (\$3.7 trillion). Federal Deposit Insurance Corporation, *Monthly Reports on the Temporary Liquidity Guarantee Program* (Instrument Used: Debt Issuance under Guarantee Program, Debt Outstanding) (May 31, 2009) (online at www.fdic.gov/regulations/resources/tlgp/total_issuance5-09.html). For details regarding the loss exposure for Treasury, the FDIC, and the Federal Reserve to Citigroup and Bank of America guarantees, see U.S. Department of the Treasury, *Master Agreement Among Citigroup Inc., Certain Affiliates of Citigroup Inc. Identified Herein, Department of the Treasury, Federal Deposit Insurance Corporation and Federal Reserve Bank of New York*, at 6–8, 13 (Jan. 15, 2009) (online at www.treasury.gov/initiatives/financial-stability/investment-programs/agp/Documents/Citigroup_01152009.pdf); Federal Deposit Insurance Corporation, *Summary of Terms* (Jan. 15, 2009) (online at www.fdic.gov/news/news/press/2009/pr09004a.pdf). IMMFA: Frequently Asked Questions, *supra* note 27.

²¹²2009 November Oversight Report, *supra* note 60, at 85.

C. Global Context and International Effects of the TARP

Many of the banks at the center of the TARP interventions had substantial global operations. Similarly, the U.S. banking sector contains multiple financial institutions headquartered elsewhere, but active in the U.S. economy. The crisis showed that these sorts of cross-border links within the financial system could magnify rather than reduce risks. In order to examine the effects of these links on financial stability, the Panel's August 2010 report addressed the international effects of the TARP.

1. Background

In an earlier era, a mortgage crisis that started in a few regions in the United States might have ended there as well. But by 2008, the global financial system had become deeply internationalized and interconnected. Mortgages signed in Florida, California, and Arizona were securitized, repackaged, and sold to banks and other investors in Europe, Asia, and around the world. At the same time, other countries experienced their own housing booms fueled by new financial products.

The conventional wisdom in the years immediately before the crisis held that banks that operated across global markets were more stable, given their ability to rely on a collection of geographically dispersed businesses. The conventional wisdom, however, was proved wrong. Using short-term liabilities (funding from the overnight and other short-term markets, often dollar-denominated) to purchase long-term assets such as RMBS, many firms simply recreated the classic problem faced by commercial banks prior to the securitization of mortgages, creating a mismatch in the length of liabilities and assets. When subprime borrowers began to default on their mortgages, banks around the world discovered that their balance sheets held the same deteriorating investments. The danger was amplified by the high leverage created by layers of financial products based on the same underlying assets. When short-term lenders began to question the ability of banks to repay their obligations, markets froze, and the international financial system verged on chaos.²¹³ The result was a truly global financial crisis, and the interconnections within the global financial marketplace and the significant cross-border operations of major U.S. and foreign-based firms widened the fallout of the crisis, requiring a multi-pronged response by a host of national regulators and central banks.²¹⁴

For the most part, governments across the globe responded to the crisis on an ad hoc basis as it unfolded. What this meant was that most of the responses were tailored to address immediate problems and they tended to target specific institutions or specific markets, rather than the entire financial system. Home country regulators generally took responsibility for banks headquartered in their jurisdictions, and the evidence suggests that assistance was doled out less to stabilize the international financial landscape than to re-

²¹³ Congressional Oversight Panel, *August Oversight Report: The Global Context and International Effects of the TARP*, at 3–4 (Aug. 12, 2010) (online at cop.senate.gov/documents/cop-081210-report.pdf) (hereinafter "2010 August Oversight Report").

²¹⁴ *Id.* at 29.

spond to potential fallout across a particular domestic market.²¹⁵ There was, however, substantial cross-border coordination between financial authorities and central banks of foreign governments to establish TARP-like programs.²¹⁶ For example, in response to market disruptions, the Federal Reserve and other central banks established reciprocal currency arrangements, or swap lines, starting in late 2007.²¹⁷ The Federal Reserve's swap line programs enhanced the ability of foreign central banks to provide U.S. dollar funding to financial institutions in their jurisdictions at a time when interbank lending was effectively frozen. Most countries ultimately intervened in similar ways and used the same basic set of policy tools: capital injections to financial institutions, guarantees of debt or troubled assets, asset purchases, and expanded deposit insurance.²¹⁸

2. Summary of COP Report and Findings

The Panel's August 2010 oversight report examined the TARP in an international context, describing how the financial crisis that began in 2007 exposed the interconnectedness of the global financial system. By 2008, the global financial system had become deeply internationalized and interconnected. Although the crisis began with subprime mortgage defaults in the United States, its damage spread rapidly overseas and it quickly evolved into a global financial crisis. Faced with the possible collapse of their most important financial institutions, many national governments intervened. While the United States attempted to stabilize the system by flooding money into as many banks as possible—including those that had significant overseas operations—most other nations targeted their efforts more narrowly toward institutions that in many cases had no major U.S. operations. While it was difficult to assess the precise international impact of the TARP or other U.S. rescue programs because Treasury gathered very little data on how TARP funds flowed overseas, it appeared likely that America's financial rescue had a much greater impact internationally than other nations' programs had on the United States.²¹⁹

²¹⁵ *Id.* at 35.

²¹⁶ *Id.* at 3–4. Treasury also stated that it coordinated extensively with its foreign counterparts throughout the financial crisis. *Id.* at 96.

²¹⁷ A swap line functions as follows: as the borrowing central bank draws down on its swap line, it sells a specified quantity of its currency to the lending central bank in exchange for the lending central bank's currency at the prevailing market exchange rate. The two central banks simultaneously enter into an agreement that obligates the borrowing central bank to buy back its currency at a future date at the same exchange rate that prevailed at the time of the initial draw, plus interest. The borrowing central bank then lends the dollars at variable or fixed rates to entities in its country. *Id.* at 107–108. The majority of the swap line programs established by the Federal Reserve terminated on February 1, 2010, but in response to the European sovereign debt crisis, the Federal Reserve reestablished its swap line facilities by entering into agreements with the European Central Bank and other major central banks (the Bank of England, the Swiss National Bank, the Bank of Canada, and the Bank of Japan) in May 2010 in order to counteract a shortage of dollar liquidity. These swaps were authorized through January 2011. In addition, on December 21, 2010, the Federal Reserve Board authorized an extension through August 1, 2011, of its temporary U.S. dollar liquidity swap arrangements with the Bank of Canada, the Bank of England, the European Central Bank, the Bank of Japan, and the Swiss National Bank. See Board of Governors of the Federal Reserve System, *Credit and Liquidity Programs and the Balance Sheet*, at 8–9 (Feb. 2011) (online at www.federalreserve.gov/monetarypolicy/files/monthlyclbsreport201102.pdf).

²¹⁸ 2010 August Oversight Report, *supra* note 213, at 117.

²¹⁹ 2010 August Oversight Report, *supra* note 213, at 3–5.

3. Panel Recommendations and Updates

Improved Data Collection and Reporting. In its August 2010 Oversight Report, the Panel called upon Treasury to collect and report more data about how the TARP and other rescue funds flowed internationally, to document the impact that the U.S. rescue had overseas, to create and maintain a database of this information, to urge foreign regulators to collect and report similar data, and to make international regulatory bodies and their interactions with U.S. regulators open and transparent. The Panel also urged U.S. regulators to make clear to policymakers the impact that such international regulatory bodies have on the U.S. banking industry and broader economy. It does not appear that Treasury has acted upon this recommendation.

“War gaming” Exercises. The Panel also recommended that the international community gather information about the international financial system, identify vulnerabilities, and plan for emergency responses to a wide range of potential future crises. The Panel called upon U.S. regulators to encourage regular crisis planning and financial “war gaming.”

Though no regulatory body has yet reported results from financial “war gaming,” a broad array of international standard-setting bodies, including the Basel Committee on Banking Supervision and national authorities, under the coordination of the Financial Stability Board, are in the midst of quantifying and finalizing key elements of regulatory reform. The Financial Stability Board, which includes the G20 (a group of 20 nations consisting of both industrialized and emerging economies), will assess financial system vulnerabilities, promote coordination and information exchange among authorities, advise and monitor best practices to meet regulatory standards, set guidelines for and support the establishment of supervisory colleges, and support cross-border crisis management and contingency planning. At the Seoul Summit in November 2010, the G20 leaders endorsed the Financial Stability Board policy framework, including its work processes and timelines, for reducing the moral hazard of systemically important financial institutions.²²⁰ Regulators are also working with international bodies to coordinate responses in the event of a large cross-border bank failure.²²¹ U.S. regulators do not have the authority to resolve foreign parents of U.S. subsidiary firms that fail in the United States and only have authority over the U.S. parent companies and U.S. subsidiaries of U.S. entities,²²² making international cooperation helpful for the successful resolution of large, transnational banks.

²²⁰ See Sullivan & Cromwell LLP, *Basel III and FSB Proposals* (Nov. 15, 2010) (www.sullcrom.com/files/Publication/27b4dd5f-05fd-4f6b-b49e-21caae447eee/Presentation/PublicationAttachment/6cdbbb2e-1103-4c89-b0d5-23f7341d2b4c/SC_Publication_Basel_III_and_FSB_Proposals.pdf).

²²¹ Federal Deposit Insurance Corporation, *Statement of John Corston, Acting Deputy Director, Complex Financial Institution Branch, Division of Supervision and Consumer Protection, Federal Deposit Insurance Corporation on Systemically Important Institutions and the Issue of “Too Big to Fail”* (Sept. 1, 2010) (online at www.fdic.gov/news/news/speeches/archives/2010/spsep0110.html).

²²² See Simon Johnson Testimony to the Panel, *supra* note 120. See also Jeffrey N. Gordon, *The Dangers of Dodd-Frank* (Oct. 15, 2010) (online at www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202473381266).

4. Lessons Learned

As the Panel highlighted in its August 2010 oversight report, the international response to the crisis that started in 2007 developed on an ad hoc, informal, jurisdiction-by-jurisdiction basis. Despite the limitations of international coordination, macro-economic responses taken by central banks, which had broader discretion to design liquidity facilities, were the most coordinated.²²³ Governments ultimately made their decisions, however, based on an evaluation of what was best for their own banking sector and their domestic economy: consideration of the specific impact of their actions on the financial institutions, banking sector, or economies of other jurisdictions was not a high priority. This was due to both the rapid and brutal pace of the crisis as well as the absence of effective cross-border crisis response structures. Ultimately, this meant that the assistance that was provided to specific troubled institutions depended very much on where they were headquartered.²²⁴

Although these ad hoc actions ultimately restored a measure of stability to the international system, there is no doubt that international cooperation could be improved. The internationalization of the financial system has, in short, outpaced the ability of national regulators to respond to global crises.²²⁵

III. Credit Markets: Small Business and Consumer Lending

As noted above, the majority of the Panel's reports have addressed topics relevant to the banking sector. Bank health and credit markets are opposite sides of the same coin, because a healthy bank with a solid balance sheet is in a better position to respond to demand for credit. Accordingly, this section discusses the impact of the financial crisis and subsequently the TARP on credit markets.

A. Background

1. Small Business Lending

Credit is critical to the ability of all businesses to purchase new equipment or new properties, expand their workforce, and fund their day-to-day operations. If credit is unavailable, businesses may be unable to meet current business demands or to take advantage of opportunities for growth.²²⁶ In contrast to large corporations, small businesses are generally less able to access the capital markets directly and thus are more vulnerable to a credit crunch. The result of reduced access to credit can be that too few small businesses start and too many stall—a combination that can hinder economic growth and prolong an economic downturn.²²⁷

²²³ 2010 August Oversight Report, *supra* note 213, at 116–117.

²²⁴ 2010 August Oversight Report, *supra* note 213, at 116.

²²⁵ 2010 August Oversight Report, *supra* note 213, at 117.

²²⁶ 2010 May Oversight Report, *supra* note 110, at 3; Congressional Oversight Panel, Written Testimony of Paul Smiley, president, Sonoran Technology and Professional Services, *Phoenix Field Hearing on Small Business Lending*, at 2 (Apr. 27, 2010) (online at cop.senate.gov/documents/testimony-042710-smiley.pdf).

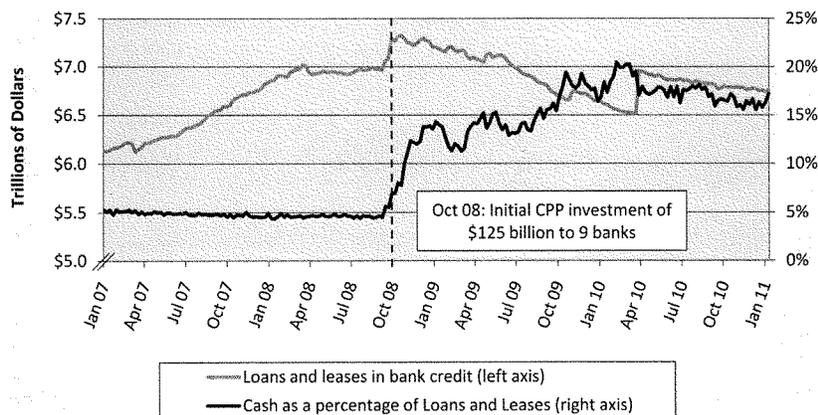
²²⁷ Congressional Oversight Panel, *May Oversight Report: Reviving Lending to Small Businesses and Families and the Impact of the TALE*, at 12 (May 7, 2009) (online at cop.senate.gov/documents/cop-050709-report.pdf) (hereinafter “2009 May Oversight Report”).

During the financial crisis, bank lending to individuals and businesses decreased across the board due to market uncertainty and continued credit quality deterioration.²²⁸ As Figure 12 shows, the amount of loans and leases outstanding at commercial banks dropped to \$6.5 trillion in the spring of 2010 from its level of \$7.3 trillion outstanding in October 2008.²²⁹ As loans and leases outstanding have declined, the amount of cash assets held as a portion of total loans and leases has increased. Following the government's initial \$125 billion investment in the first nine TARP participants in October 2008, the cash to loans ratio more than doubled, from 7 percent to its December 2010 level of 16 percent.²³⁰ While an increased cash to loan ratio is not necessarily a negative sign, as it conveys a desire to ensure adequate cash reserves, the continued decrease in loans outstanding shows that there continues to be a decrease in the amount of credit in the market.

²²⁸ Board of Governors of the Federal Reserve System, *U.S. Credit Cycles: Past and Present*, at 4 (online at www.treasury.gov/initiatives/financial-stability/results/cpp/cpp-report/Documents/Fed%20US%20Credit%20Cycles%20072409.pdf) (accessed Mar. 11, 2011) (“... credit growth typically declines prior to and during economic downturns”).

²²⁹ The National Bureau of Economic Research, the body responsible for determining when shifts in the business cycle occur, stated that the most recent recession began in December 2007 and ended in June 2009. NBER: US Business Cycle, *supra* note 21. The sharp jump in loans and leases to \$7.0 trillion in the spring of 2010 is predominantly due to the implementation of FAS 166/167, which required institutions to bring all loans held in variable interest entities onto their balance sheets. Since then, outstanding loans and leases have steadily decreased.

²³⁰ It is difficult to isolate new lending due to reporting standards of banks. As part of the TARP, banks that received assistance were required to report on their lending. Treasury used those data to publish a survey of the top 22 CPP recipients. However, Treasury did not require TARP recipients that repaid their funds to continue reporting, thereby leaving a deficiency of data on new lending by the nation's largest banks. Treasury continued publishing the Capital Purchase Program Monthly Lending Report, which measures only three metrics of the 26 measured by the survey of the top 22 CPP recipients. 2010 May Oversight Report, *supra* note 110, at 28.

FIGURE 12: LENDING AND CASH ASSETS AT COMMERCIAL BANKS²³¹

While it is difficult to gather data specifically about small business credit or to generalize across small business market participants, credit began to tighten for small businesses in early 2008 and worsened over the course of 2009.²³² For loans to small businesses, in the first quarter of 2008, 51.8 percent of the Federal Reserve’s Survey of Senior Loan Officers respondents reported that they had tightened credit standards. By the fourth quarter of that year, that percentage had risen to 69.2 percent. Credit remained tight during the first part of 2009: in the first quarter, 42.3 percent of the Survey of Senior Loan Officers respondents reported that they had tightened credit standards. The numbers of Senior Loan Officers reporting tightening credit eventually leveled off, reflecting the fact that most banks had already tightened their lending standards.²³³ Unable to find credit, many small businesses shut their doors, and some of the survivors are still struggling to find adequate financing.²³⁴ At an acute phase of the crisis, the Panel found compelling reports of slowed lending at its April 2009 field hearing in Milwaukee, Wisconsin. On the one hand, small business owners discussed their lack of access to credit at that hearing. Anecdotally,

²³¹ The considerable increase in loans and leases outstanding in this graphic in early 2010 is due to the adoption of the Financial Accounting Standards Board’s Financial Accounting Standards No. 166 and No. 167 as of the week ending March 31, 2010. These rules changed the accounting standards for financial assets and led to domestically chartered commercial banks consolidating approximately \$377.8 billion in assets and liabilities on their balance sheets at the end of the first quarter 2010. Financial Accounting Standards Board, *FASB Issues Statements 166 and 167 Pertaining to Securitizations and Special Purpose Entities* (June 16, 2009) (online at www.fasb.org/cs/ContentServer?c=FASBContent_C&pagename=FASB/FASBContent_C/NewsPage&cid=1176156240834); Board of Governors of the Federal Reserve System, *Assets and Liabilities of Commercial Banks in the United States—Notes on the Data* (Apr. 9, 2010) (online at www.federalreserve.gov/releases/h8/h8notes.htm#notes_20100409); Treasury Transactions Report, *supra* note 36.

²³² A source of information on trends is the Federal Reserve’s Senior Loan Officer Opinion Survey on Bank Lending Practices, which is based on quarterly data reported by the Survey of Senior Loan Officers respondents and addresses changes in the supply of and demand for loans to businesses and households. See Board of Governors of the Federal Reserve System, *January 2011 Senior Loan Officer Opinion Survey on Bank Lending Practices*, at 7 (Jan. 31, 2011) (online at www.federalreserve.gov/boarddocs/snloansurvey/201102/fullreport.pdf) (hereinafter “January 2011 Senior Loan Officer Survey”).

²³³ 2010 May Oversight Report, *supra* note 110, at 17.

²³⁴ 2010 May Oversight Report, *supra* note 110, at 3.

small business owners who testified suggested that their banks, which had received TARP injections, had been unable to fulfill their credit needs, which ranged from additional loans to restructuring or even sustaining existing lines of credit. On the other hand, the community bankers who testified at the field hearing highlighted their efforts to extend credit to their small business customers. Two witnesses representing community banks emphasized that they were continuing to lend throughout the crisis, while acknowledging that they had no choice but to pursue new opportunities cautiously.²³⁵

During the crisis, many larger banks pulled back from the small lending market.²³⁶ Some borrowers looked to community banks to pick up the slack, but smaller banks remained strained by both their exposure to CRE, which continued to pose a risk to the economic viability of banks, and other liabilities.²³⁷ In addition, many of the government programs aimed at banks were arguably designed more to provide relief for the kinds of assets held by larger banks, and have had little effect on the smaller banks now bearing a greater share of small business lending. Even now, with a cautious recovery under way in many sectors, standards for small business lending have remained tight, easing only very slightly by the fourth quarter of 2010.²³⁸

2. Consumer Lending

Leading into the financial crisis, families were deep in debt, including mortgages, auto loans, credit cards and student loans. Families were left with little savings, while declines in the value of housing and in the stock market further shrunk household net worth. As wages stagnated and unemployment rose, the ability of households to manage ever-larger debt loads became increasingly difficult.

During late 2008 and into 2009, consumer credit indicators showed the tightening of the credit markets and the effect on household borrowing. This reduction in credit availability can be seen through rising interest rates and higher lending standards, as well as through reductions in the rate and overall volume of lending. In the fourth quarter of 2008, consumer spending on goods and services fell 4.3 percent—a decline responsible for nearly half of the reported 6.2 percent annualized contraction in GDP. This was the largest spending decrease in 29 years.²³⁹ At the same time, the recession impacted demand for borrowing, as households paid down

²³⁵ 2009 May Oversight Report, *supra* note 227, at 13–14; Congressional Oversight Panel, *Hearing on the Credit Crisis and Small Business Lending* (Apr. 29, 2009) (online at cop.senate.gov/hearings/library/hearing-042909-milwaukee.cfm) (full audio recording).

²³⁶ 2010 May Oversight Report, *supra* note 110, at 62–63.

²³⁷ The withdrawal of consumer and small business loans because of a disproportionate exposure to commercial real estate capital creates a “negative feedback loop” that suppresses economic recovery. See Section II.

²³⁸ 2009 May Oversight Report, *supra* note 227, at 4, 12–13. According to the Federal Reserve Board’s January 2011 Senior Loan Officer Opinion Survey on Bank Lending Practices, a small fraction of banks reported they were continuing to ease standards for commercial and industrial (C&I) loans over the fourth quarter of 2010 to large and medium-size firms, but few reported changing standards on such loans to small businesses. January 2011 Senior Loan Officer Survey, *supra* note 232, at 4, 13. While the respondents reported a moderate increase in demand for C&I loans, there was little if any change in demand for other types of loans. Reports of strengthened demand for C&I loans were more widespread than in the previous survey. Approximately 5 percent of banks reported increased demand from small businesses. *Id.*

²³⁹ 2009 May Oversight Report, *supra* note 227, at 19–20.

debts built up during the boom years, which contributed to the economic contraction. Overall, the trend across the sector was one of debt reduction, credit limit decreases, rising delinquencies, and tightening lending standards.²⁴⁰ The aggregate decline in consumer lending was likely due to a combination of deleveraging by households and reduced access to credit.

3. Government Efforts to Stimulate Small Business and Consumer Lending

Since the onset of the financial crisis, the federal government has instituted a series of programs designed to support lending and liquidity in the consumer and small business credit markets. Since the TARP's inception, Treasury has announced almost \$60 billion in funding for TARP programs for small business-related initiatives, but it has reduced that commitment to approximately \$5.2 billion over the past year.²⁴¹ The government initiatives predominantly included additional support for Small Business Administration (SBA) programs, capital infusions for smaller banks, and various efforts to stimulate secondary markets for bank assets in hopes of easing the stresses on bank balance sheets and freeing banks to make more loans.

a. SBA Programs

In stable credit markets, the government's effort to facilitate small business lending relies chiefly on programs run by the SBA. The SBA acts as direct lender or, more often, guarantor in the small business lending sector. Guarantees, which comprise the bulk of the SBA's outstanding loan portfolio, derive from the agency's 7(a) and 504 loan programs and its Small Business Investment Company Program. Under its 7(a) program, the SBA is authorized to guarantee loans for working capital. Under its 504 program, the SBA is authorized to guarantee loans for the development of small assets such as land, buildings, and equipment that will benefit local communities. Direct loans originate from the SBA's microloan and disaster loan programs. While SBA programs have helped pro-

²⁴⁰ 2009 May Oversight Report, *supra* note 227, at 25–30.

²⁴¹ In April 2010, Treasury reduced its planned investment commitments for the Consumer and Business Lending Initiative from \$60 billion to \$52 billion. The \$52 billion of the Consumer and Business Lending Initiative was comprised of \$20 billion for the TALF, \$30 billion reserved for the SBLF (separate from the TARP through legislation), not more than \$1 billion for the CDCI Program, and not more than \$1 billion for the SBA 7(a) Securities Purchase Program. U.S. Department of the Treasury, *Troubled Asset Relief Program Monthly 105(a) Report—March 2010*, at 7 (Apr. 12, 2010) (online at [www.treasury.gov/initiatives/financial-stability/briefing-room/reports/105/Documents105/March%202010%20105\(a\)%20monthly%20report_final.pdf](http://www.treasury.gov/initiatives/financial-stability/briefing-room/reports/105/Documents105/March%202010%20105(a)%20monthly%20report_final.pdf)).

Before and after passage of the Dodd-Frank Act, Treasury announced changes in the planned commitments under the TARP, including changes to its small business-related initiatives. Treasury reserved \$5.48 billion for the Consumer and Business Lending Initiative in July 2010, of which (i) \$4.3 billion was allocated to TALF, (ii) \$337 million was disbursed from the \$400 million allocated for SBA 7(a) securities purchases, and (iii) \$570 million was disbursed from the \$780 million allocated for the CDCI. See U.S. Department of the Treasury, *Troubled Asset Relief Program Monthly 105(a) Report—July 2010*, at 4–6 (Aug. 10, 2010) (online at [www.treasury.gov/initiatives/financial-stability/briefing-room/reports/105/Documents105/July%202010%20105\(a\)%20Report_Final.pdf](http://www.treasury.gov/initiatives/financial-stability/briefing-room/reports/105/Documents105/July%202010%20105(a)%20Report_Final.pdf)). As of the expiration of Treasury's authority to make new financial commitments under the TARP on October 3, 2010, its Consumer and Business Lending Initiative commitment stood at approximately \$5.2 billion. See U.S. Department of the Treasury, *Troubled Asset Relief Program Monthly 105(a) Report—December 2010*, at 3 (Jan. 10, 2011) (online at [www.treasury.gov/initiatives/financial-stability/briefing-room/reports/105/Documents105/December105\(a\)%20report_FINAL_v4.pdf](http://www.treasury.gov/initiatives/financial-stability/briefing-room/reports/105/Documents105/December105(a)%20report_FINAL_v4.pdf)) (hereinafter "TARP Monthly 105(a) Report—December 2010").

mote lending to small businesses, SBA-guaranteed loans constitute only a small percentage of total small business lending.²⁴²

During the financial crisis, however, SBA lending declined considerably, even though those loans can be a fallback for business owners who fail to obtain conventional loans. The tightening of credit in the SBA lending markets mirrored the tightening of credit in conventional markets for small business loans, with loan volume decreasing over the course of 2008. In the fall of 2008, the secondary market for SBA 7(a) loans froze altogether. Unable to shed the associated risk from their books and free up capital to make new loans through securitization, commercial lenders significantly curtailed both their SBA lending and other lending activities. The decline in SBA lending became even more pronounced in the early months of 2009 while commercial lending remained very constricted, thus leading to few sources of credit for small businesses.²⁴³

In an effort to increase SBA lending, the American Recovery and Reinvestment Act (ARRA) included a provision that reduced the risk to private lenders by temporarily increasing the government guarantee on loans issued through the SBA's 7(a) loan program to as much as 90 percent.²⁴⁴ The SBA began implementing the increased guarantee program in March 2009.²⁴⁵

b. Capital Infusions

i. CDCI

On October 21, 2009, the White House announced a small business lending initiative under the TARP, the CDCI, to invest lower cost capital in community development financial institutions (CDFIs). As of the CDCI's close in September 2010, Treasury had provided to 84 community development financial institutions approximately \$570.1 million (approximately \$363.3 million of this amount was a result of exchanges from CPP by 28 institutions) of the \$780.2 million it originally allocated for this program.²⁴⁶ Treasury did not require community development financial institutions to use the capital to increase small business lending as a condition of participating in CDCI.

ii. SBLF

On September 27, 2010, President Barack Obama signed the Small Business Jobs and Credit Act of 2010 into law.²⁴⁷ This legislation created the SBLF, which was created outside the TARP and

²⁴² 2010 May Oversight Report, *supra* note 110, at 42.

²⁴³ 2009 May Oversight Report, *supra* note 227, at 14, 30–42.

²⁴⁴ 2010 May Oversight Report, *supra* note 110, at 45.

²⁴⁵ Moreover, ARRA temporarily eliminated up-front fees that the SBA charges on 7(a) loans that increase the cost of credit for small businesses, and temporarily eliminated certain processing fees typically charged on 504 loans. ARRA also included a Business Stabilization Program that allowed the SBA to guarantee fully loans to “viable” small businesses experiencing short-term financial difficulty (up to \$35,000).

Pursuant to H.R. 5297, the Small Business Jobs Act of 2010, the SBA loan guarantee enhancement provisions relating to guarantees and fees were extended through December 31, 2010.

²⁴⁶ U.S. Department of the Treasury, *Troubled Asset Relief Program: Two Year Retrospective*, at 33 (Oct. 5, 2010) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/agency_reports/Documents/TARP%20Two%20Year%20Retrospective__10%2005%2010__transmittal%20letter.pdf) (hereinafter “TARP: Two Year Retrospective”).

²⁴⁷ *Small Business Jobs and Credit Act of 2010*, Pub. L. No. 111–240 (2010).

aims to stimulate small business lending by providing capital to participating community banks at interest rates keyed to small business lending levels.²⁴⁸ The capital is in the form of a preferred stock investment with a variable dividend rate: it starts at 5 percent and can be reduced to as low as 1 percent or increased to as high as 7 percent, depending on small business lending levels. As small business lending increases, a bank will receive a reduced dividend rate on the funds borrowed. If small business lending fails to increase, the bank will pay increased dividend rates on the funds borrowed. After four and a half years, the dividend rate will increase to 9 percent regardless of the change in small business lending levels. The SBLF will be open to banks that received funds from the TARP's CPP as well as those that did not. The legislation limits participation in the SBLF to banks with under \$10 billion in assets, and it prohibits participation by institutions on the FDIC's Problem Bank List and by TARP recipients that have missed more than one dividend payment.²⁴⁹ Generally speaking, the SBLF will provide capital on terms that are more favorable than the CPP offered.

c. Supporting Secondary Markets

Starting in November 2008, Treasury and the FRB emphasized revival of the securitization markets, not simply basic bank lending, to restore the flow of credit to small businesses and families. The government developed numerous initiatives for supporting secondary lending markets. Secondary markets allow depository institutions either to sell or securitize loans, converting potentially illiquid assets into cash and shifting assets off their balance sheets. From the outset, however, this approach raised a variety of issues, including whether the program would meaningfully affect access to credit for small businesses because only a small fraction of small business loans are securitized, limiting the effectiveness of secondary market-driven programs for small business loans.²⁵⁰

i. TALF

Driven by the ABS market freeze in the fall of 2008, the Federal Reserve and Treasury announced the creation of the TALF in late November 2008. The TALF was designed to promote renewed issuance of consumer and business ABS at more normal interest rate spreads. As demonstrated in Figure 13 below, the majority of TALF ABS issuances were consumer lending-related, but only a small percentage of transactions occurred in the small business sec-

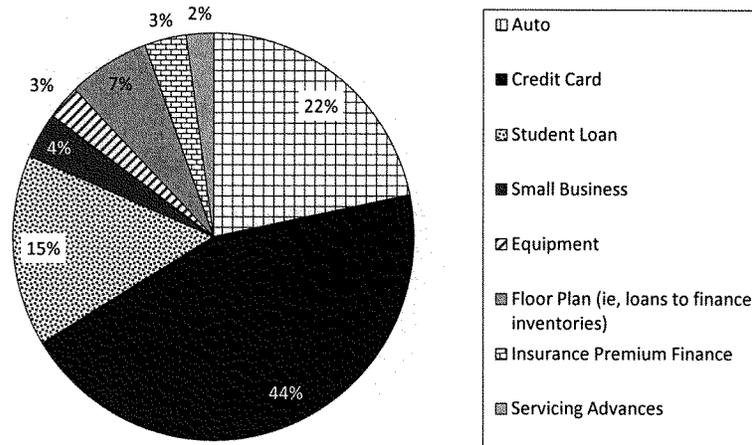
²⁴⁸ For further discussion concerning the SBLF, see Section III, *infra*. On December 20, 2010, Treasury issued guidance under which CDCI recipients can refinance into the SBLF. Banks that participate in the SBLF will not be able to continue to participate in the CDCI, must be in compliance with all the terms, conditions, and covenants of the CDCI in order to refinance, and must be current in their dividend payments owed to Treasury under the CDCI. U.S. Department of the Treasury, *Resource Center—Small Business Lending Fund* (Dec. 20, 2010) (online at www.treasury.gov/resource-center/sb-programs/Pages/Small-Business-Lending-Fund.aspx) (hereinafter "Treasury Resource Center—SBLF").

²⁴⁹ H.R. 5297 § 4103(d)(4), 111th Cong. (2010); H.R. 5297 § 4103(d)(7)(B), 111th Cong. (2010). Banks may be put on the Problem Bank List for a number of reasons, including failure to achieve certain capital ratios, the issuance of cease and desist orders, and other regulatory actions.

²⁵⁰ Generally, only SBA-guaranteed loans are securitized, and they constitute only a small fraction of small business lending. 2010 May Oversight Report, *supra* note 110, at 42; 2009 May Oversight Report, *supra* note 227, at 50–58.

tor. When the TALF program was closed on June 30, 2010, there were \$43 billion in loans outstanding. Accordingly, on July 20, 2010, Treasury reduced the credit protection provided for the TALF from \$20 billion to \$4.3 billion, constituting 10 percent of the total outstanding TALF loans.²⁵¹

FIGURE 13: TALF ABS ISSUANCES BY SECTOR ²⁵²



ii. SBA 7(a) and 504 Securities Purchase Programs

In addition to the TALF, Treasury created a program to make direct purchases of securities backed by the government-guaranteed portion of SBA 7(a) loans and the non-government-guaranteed first lien mortgage loans affiliated with the SBA's 504 loan program in hopes of unlocking the small business loan market. Treasury announced its SBA 7(a) initiative in March 2009 to help restart small business credit markets and provide an additional source of liquidity designed to foster new lending. Despite stating that 7(a) and 504 purchases would begin by May 2009, Treasury did not implement the program until March 19, 2010.²⁵³ Treasury initially allocated \$15 billion in TARP funds for the purchases, but this was revised to just \$1 billion, and was again reduced to \$400 million.²⁵⁴ As of the program's close in September 2010, Treasury had made 31 purchases of SBA 7(a) securities totaling about \$357 million.²⁵⁵

²⁵¹ Federal Reserve Bank of New York, *Term Asset-Backed Securities Loan Facility: Terms and Conditions* (July 21, 2010) (online at www.newyorkfed.org/markets/talf/terms.html); Board of Governors of the Federal Reserve System, *Press Release* (July 20, 2010) (online at www.federalreserve.gov/newsevents/press/monetary/20100720a.htm).

²⁵² The TALF provided investors with non-recourse loans secured by certain types of ABS, including credit card receivables, auto loans, equipment loans, student loans, floor plan loans, insurance-premium finance loans, loans guaranteed by the SBA, residential mortgage servicing advances, and commercial mortgage-backed securities (CMBS). The chart reflects all TALF ABS issuances, but does not reflect CMBS issuances.

²⁵³ 2010 May Oversight Report, *supra* note 110, at 41.

²⁵⁴ 2010 September Oversight Report, *supra* note 53, at 53–54.

²⁵⁵ TARP: Two Year Retrospective, *supra* note 246, at 43.

Securities purchased by Treasury comprised approximately 700 loans ranging across approximately 17 industries including retail, food services, manufacturing, scientific and technical services, health care, and educational services. The program supported loans from 39 of the 50 states.

Treasury never purchased any 504 securities through this initiative.

d. Other Government Programs

Some programs, like the PPIP, discussed above in Section II.A.1.b, were initially expected to help stimulate small business and consumer lending but ultimately did not. The PPIP was designed to allow banks and other financial institutions to shore up their capital by removing troubled assets from their balance sheets. Since the PPIP did not ultimately purchase the whole loans that many smaller banks hold on their books, it had little effect on the banks responsible for a disproportionate amount of small business lending. Many state and local entities also have programs to support small business lending within their geographic boundaries. These programs generally mirror, on a smaller scale, tools employed by SBA, including both direct lending and loan guarantees.²⁵⁶

B. Summary of COP Reports and Findings

In May 2009, the Panel addressed small business lending and evaluated the impact of FRBNY's and Treasury's TALF. The report examined the design of the TALF, which was intended to restart securitization markets, and questioned whether any securitization program could help meet the credit needs of small businesses. The report also examined other sources of small business credit, including credit cards and informal credit sources, such as angel investors, family, and friends. The report noted Treasury's assertion that restoring access to credit has multiplier effects throughout the economy and examined the difficulties that small businesses were having in obtaining credit of any kind.

The Panel's examination of small business credit at the beginning of 2009 showed credit terms tightening and loan volume dropping, based on the limited data available. Small businesses found themselves in a contradictory position: they needed credit to operate, but the drop in demand for their products or services as a result of the country's economic difficulties likely made lenders unwilling to give them that credit except on terms that small businesses could not accept. While noting that the TALF, if successful, could improve access to lending for families and small businesses, the Panel found that there was reason for caution in predicting the ultimate impact of the TALF, though the program could succeed in improving investor demand for ABS.

In May 2010, the Panel re-examined the contraction in small business lending and noted that although Treasury had launched several programs aimed, in whole or in part, at improving small business credit availability, it was not clear that they had had any significant impact on small business lending, which remained severely constricted. Numerous factors—bank strength or weakness, number of creditworthy borrowers, soft demand for goods and services, and deleveraging, among other things—can all cause low lending levels, and the relative importance of these factors in the overall mix can shift over time. As demand and supply shift and inter-

²⁵⁶2010 May Oversight Report, *supra* note 110, at 46–47, Annex II.

act, low lending levels can be difficult to analyze.²⁵⁷ For example, at the Panel's April 2010 field hearing in Phoenix, Arizona, Candace Wiest, President and CEO of the West Valley National Bank, noted that "we want to loan"²⁵⁸ but "it is difficult to find anyone who has not been impacted [by the recession] and remains creditworthy."²⁵⁹ FDIC San Francisco Regional Director Stan Ivie noted, however, that "many banks have financial difficulties right now with their credit quality and they need to reserve their capital for losses and future losses which results in less capital and liquidity to lend . . . to borrowers."²⁶⁰ In focusing on measures to increase the supply of small business loans, the Panel's report noted that Treasury's actions may ultimately be ineffective if the demand for small business loans fails to keep pace. While government intervention in the form of capital infusions, for example, might foster additional lending if the recipient institutions are facing depleted capital, a bank might not necessarily use an unrestricted capital infusion to increase leverage if low lending volume is in fact the result of constrictions in demand.

The Panel also evaluated the proposed SBLF,²⁶¹ which the Administration sent to Congress shortly before publication of the Panel's May report. The Panel found that even if enacted by Congress the prospects of the SBLF in its draft form were far from certain. Not only would the program require legislative approval (and even if Congress had acted immediately, the program would not be fully operational for some time), but the Panel also noted the possibility that banks could shun the program for fear of being stigmatized by its association with the TARP, or avoid taking on SBLF liabilities in such troubled economic times.

C. Panel Recommendations and Updates

1. Current State of Commercial and Industrial Lending

After declining or stagnating consistently through 2008 and 2009, commercial and industrial (C&I) lending at domestic commercial banks began to increase slightly towards the end of 2010.²⁶² As of February 23, 2011, there were approximately \$620 billion in outstanding C&I loans at large banks, while small banks had \$374 billion in outstanding C&I loans.²⁶³ Figure 14 below illustrates the level of outstanding C&I loans from 2000 to 2011.

²⁵⁷ 2010 May Oversight Report, *supra* note 110, at 47–57.

²⁵⁸ Wiest Testimony to the Panel, *supra* note 153.

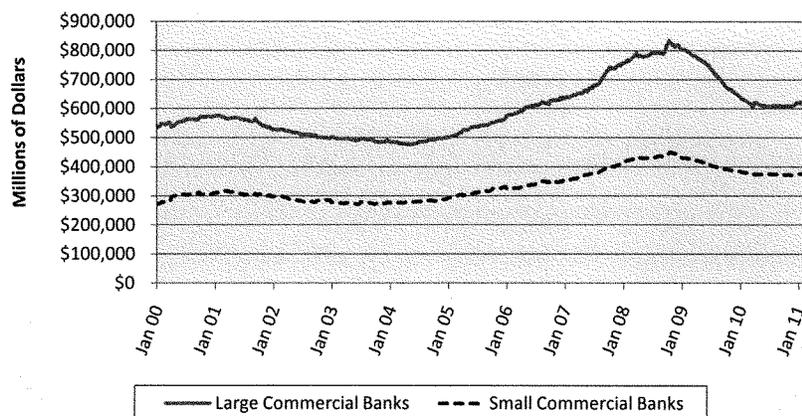
²⁵⁹ Congressional Oversight Panel, Written Testimony of Candace Wiest, president and chief executive officer, West Valley National Bank, *Phoenix Field Hearing on Small Business Lending*, at 61–62 (Apr. 27, 2010) (online at cop.senate.gov/documents/transcript-042710-phoenix.pdf).

²⁶⁰ Congressional Oversight Panel, Testimony of Stan Ivie, San Francisco regional director, Federal Deposit Insurance Corporation, *Transcript: Phoenix Field Hearing on Small Business Lending* (Apr. 27, 2010) (online at cop.senate.gov/documents/transcript-042710-phoenix.pdf).

²⁶¹ On May 7, 2010, the Administration provided Congress with revised proposed legislation for the SBLF program, and the discussion of the SBLF in the Panel's May 2010 oversight report was based upon that proposal. This revised proposed legislation modified the Administration's original proposal in some respects, and is different from the version that ultimately was passed by both houses of Congress and signed into law by President Obama in September 2010. For further discussion of the final SBLF legislation, see Section III.A.3.b.ii, *supra*.

²⁶² Board of Governors of the Federal Reserve System, *Monetary Policy Report to Congress*, at 12 (Mar. 1, 2011) (online at www.federalreserve.gov/monetarypolicy/files/20110301_mprfullreport.pdf).

²⁶³ Board of Governors of the Federal Reserve System, *H.8 Assets and Liabilities of Commercial Banks in the United States: Data Download Program* (Instruments: Large Domestically Chartered Banks, Small Domestically Chartered Banks; Frequency: Weekly; Seasonally-Ad-

FIGURE 14: COMMERCIAL AND INDUSTRIAL LOANS OUTSTANDING AT DOMESTIC COMMERCIAL BANKS (2000–2011)²⁶⁴

Despite the slight increase in loans, data from the January 2011 Senior Loan Officer Opinion Survey offered mixed responses from banks regarding the state of C&I lending over the fourth quarter in 2010. More large banks were reporting easing standards for both large/middle-market and small firms, while responses from small banks show that loan standards remained largely unchanged for all firms. Respondents cited increased competition from other banks and nonbank lenders, as well as “a more favorable or less uncertain” economic horizon, as reasons for easing lending standards. With regard to loan demand, the net percentage of large banks reporting stronger demand for C&I loans from large/middle-market firms was 53 percent. However, a lesser percentage indicated stronger demand from small firms. Small banks, on the other hand, reported weaker overall demand for C&I loans.²⁶⁵

2. Consideration of Alternatives

In its May 2009 Oversight Report, the Panel recommended that if Treasury’s efforts to revive securitization failed to expand small business access to credit, then the administration should consider: (1) reviving SBA direct loans without going through bank intermediaries; and/or (2) devoting more funds directly to business lending rather than securitization, given that secondary markets may

justed) (online at www.federalreserve.gov/datadownload/Choose.aspx?rel=H.8) (accessed Mar. 10, 2011) (hereinafter “Federal Reserve H.8”). Large banks are defined as the top 25 domestically chartered commercial banks. As of December 2009, these banks had more than \$65 billion in total assets. Board of Governors of the Federal Reserve System, *Assets and Liabilities of Commercial Banks in the United States—H.8: About the Release* (Apr. 9, 2010) (online at www.federalreserve.gov/releases/h8/about.htm) (hereinafter “Federal Reserve H.8: About the Release”).

²⁶⁴ Federal Reserve H.8, *supra* note 263. Large banks are defined as the top 25 domestically chartered commercial banks. As of December 2009, these banks had more than \$65 billion in total assets. Federal Reserve H.8: About the Release, *supra* note 263.

²⁶⁵ The Senior Loan Officer Opinion Survey on Bank Lending Practices reviews changes in lending terms and standards, as well as demand for loans to businesses and households at approximately 60 domestic banks and 22 U.S. branches and agencies of foreign banks. The survey defines large and middle-market firms as firms with more than \$50 million in annual sales. Also, large banks are defined as banks with at least \$20 billion in total assets as of October 31, 2010. January 2011 Senior Loan Officer Survey, *supra* note 232, at 3–5. For measures of C&I loan standards and demand, *see id.* at 12–13, 24.

have limited impact on the financing of small and medium-sized firms.²⁶⁶ Treasury's new programs, the CDCI and the SBLF, however, while not dependent on the SBA or securitization, still focused on bank intermediaries and capital infusions. The Panel also recommended that Treasury and relevant federal regulators establish a rigorous data collection system or survey that examines small business finance that would include demand- and supply-side data along with data from banks of different sizes (both TARP recipients and non-TARP recipients). The Panel also recommended that Treasury require reporting obligations as part of any future capital infusion program, some of which were addressed through the SBLF.

3. Small Business Lending Fund

In its May 2010 report, the Panel evaluated a proposed draft of the SBLF and made multiple recommendations about aspects of the program, many of which appear to have informed the final legislation. The Panel recommended that Treasury consider mandating minimum standards for underwriting SBLF loans in order to ensure that the incentives embedded in any program do not spur imprudent lending; and evaluate whether the SBLF could be implemented quickly enough to make any difference at all in small business lending. The SBLF as enacted,²⁶⁷ several months after the Panel's May 2010 report, contains some key provisions relating to several of the Panel's recommendations. It mandates minimum standards for underwriting SBLF loans to ensure that the incentives embedded in any program do not spur imprudent lending.²⁶⁸ The SBLF as enacted also improved tracking and reporting over the draft reviewed by the Panel. It requires the Secretary of the Treasury to report to the appropriate congressional committees on key SBLF metrics, including the duty to provide a written report detailing how SBLF participants have used the funds they received within seven days after the end of each calendar quarter in which transactions are made under the SBLF.²⁶⁹ Similarly, as part of their application form, prospective SBLF participants must submit a "small business lending plan" of approximately two pages to their primary federal regulator and to their state regulator, if applicable.²⁷⁰

The terms for the SBLF have been made available, and the application deadline is March 31, 2011. As of March 8, 2011, Treasury had received 336 applications.²⁷¹

²⁶⁶ 2009 May Oversight Report, *supra* note 227, at 58.

²⁶⁷ See the *Small Business Jobs and Credit Act of 2010*, Pub. L. No. 111-240 (2010). President Obama signed the law on September 27, 2010. Although the SBLF evolved from a 2009 administration proposal to use \$30 billion in TARP funds to spur small business lending, the latest incarnation of the SBLF is separate from the TARP.

²⁶⁸ H.R. 5297 § 4103(d)(10), 111th Cong. (2010).

²⁶⁹ H.R. 5297 § 4103(3), 111th Cong. (2010).

²⁷⁰ The "small business lending plan" must detail how the institution would use the SBLF funds to increase small business lending in their community, their expected increase in small business lending after receipt of SBLF funds, and proposed outreach efforts to inform community members about how to apply for small business loans. Treasury Resource Center—SBLF, *supra* note 248.

²⁷¹ Data provided by Treasury (Mar. 9, 2011).

D. Lessons Learned

Several important lessons can be identified through the Panel's examinations of Treasury's efforts to support small business and consumer lending.

First, FRB and Treasury's emphasis on the securitization markets as an avenue to restore small business and consumer credit and creation of the TALF to regenerate investor interest in those markets illustrate the complexities and difficulties of making predominant use of any single approach to reviving credit for small businesses and families.²⁷² While the revival of the securitization markets, which are an important part of the nation's financial sector, can be a part of any effective strategy for restarting the credit markets, this cannot be the primary means to stimulate credit for small business lending because of the relatively small number of small business loans that are securitized. Therefore, it is also critical to consider bank lending without regard to securitization. Ultimately, keeping the credit markets open in a fair—and economically healthy—manner to small businesses requires a mix of policies that reflect the realities that borrowers face.²⁷³

Second, while it is easier and arguably more efficient for Treasury and other government actors to use regulated entities like banks as conduits to small businesses since small businesses are so heterogeneous, this does not come without cost. Not only are the intermediary's incentives and challenges not identical to the government's in this approach, but also the form of the government's involvement depends entirely upon the assets the intermediary holds. For example, the government can use an intermediary to help provide guarantees and secondary market support only if that intermediary holds assets that can be securitized or guaranteed.²⁷⁴

Third, when adopting any particular small business and consumer lending program, the government should consider whether approaches that are less dependent on healthy bank balance sheets (i.e., state-level consortia and programs in which banks take first losses and first profits with a public backstop), might more likely effectuate Treasury's stated objectives.²⁷⁵

Finally, the lack of aggregated, timely, and consistent data collection regarding small business lending undermines the development of sound policy and fails to reflect the importance of small business to the economy. One problem in trying to analyze small business lending, or in identifying and designing programs for spurring small business lending, arises from the heterogeneity of small businesses (which makes it difficult to determine what, precisely, constitutes a small business). "Small business" has been variously defined by Congress and several agencies, including the SBA, the Federal Reserve, and others.²⁷⁶ The myriad definitions not only complicate any discussion of small business but also make it difficult to compare data and results across studies and surveys in a field in which, as an added complication, data are notoriously hard

²⁷² 2009 May Oversight Report, *supra* note 227, at 62–63.

²⁷³ 2009 May Oversight Report, *supra* note 227, at 62–63.

²⁷⁴ 2010 May Oversight Report, *supra* note 110, at 81–82.

²⁷⁵ 2010 May Oversight Report, *supra* note 110, at 82–83.

²⁷⁶ These definitions depend on sector, assets, number of employees, and revenue. 2010 May Oversight Report, *supra* note 110, at 8–9.

to obtain. The wide variety among small businesses also makes it difficult to collect data, target individual trends, and effectively stimulate small business lending. Furthermore, in the absence of a rigorous data collection system or survey that examines small business finance and includes timely and consistent data, the federal government's efforts to develop sound policies to address small business lending will remain significantly hampered.

IV. Foreclosure Mitigation

Given the importance of foreclosure mitigation to families and communities and the impact of foreclosures on bank balance sheets and financial stability, the Panel has devoted more attention to this topic than any other single area under the TARP. The Panel issued its first foreclosure mitigation report in March 2009, coinciding with the announcement of Treasury's Making Home Affordable initiative, and released three update reports, approximately every six months after the initial program announcement and report. The Panel produced a fifth foreclosure mitigation report in November 2010, focusing specifically on the foreclosure irregularities that had come to light. The body of foreclosure mitigation work was shaped by information obtained at field hearings held in Clark County, Nevada, Prince George's County, Maryland, and Philadelphia, as well as a hearing in Washington, DC.

A. Background

As the housing boom peaked and began its long downward slide in 2006, millions of families began entering foreclosure, with serious implications for the housing markets and broader financial stability. Policymakers appeared to take for granted that the housing market would not require government intervention. Theoretically, loan modifications should be in the self-interest of lenders, since they are typically less costly than foreclosure, and should therefore need no inducement. But lenders did not engage in the anticipated number of modifications due to a number of factors that the Panel has examined in its reports. In particular, incentives built into the mortgage servicing system often make foreclosure more attractive than modification.²⁷⁷

As millions of borrowers continued moving into foreclosure, the federal government made several attempts to address the foreclosure problem, generally with minimal impact. In the wake of the financial crisis of late 2008, and incorporating lessons from these unsuccessful foreclosure mitigation efforts, Treasury developed the Home Affordable Modification Program (HAMP) to fulfill the foreclosure prevention mandate in TARP's authorizing legislation,

²⁷⁷ The Panel has looked at the disincentives for servicers to employ HAMP modifications in several reports. See, e.g., Congressional Oversight Panel, *April Oversight Report: Evaluating Progress on TARP Foreclosure Mitigation Programs*, at 70-76 (Apr. 14, 2010) (online at cop.senate.gov/documents/cop-041410-report.pdf) (hereinafter "2010 April Oversight Report"). Some of the more notable of these include: misalignment of servicer and investor interests, including lack of servicer funds at risk and servicing fees that are not tied to investment performance; impediments to loan modification in pooling and servicing agreements that, even if they can be overcome, create additional cost and complication for servicers; lack of investor supervision of servicers to encourage financially beneficial modifications; and the possible negative assessment of modifications by credit rating agencies.

EESA.²⁷⁸ At the time, policymakers were concerned about both the social and economic effects of mass foreclosures and the systemic risk to the banking system caused by non-performing mortgages.

Prior to the introduction of HAMP in March 2009, there were several federal foreclosure mitigation initiatives, but they met with little success. One of the earliest of these initiatives was endorsement of the HOPE NOW Alliance, a voluntary coalition of mortgage companies and industry organizations designed to centralize and coordinate private foreclosure mitigation efforts. Although both Treasury and the Department of Housing and Urban Development were consulted and strongly promoted the effort, the federal government is not an official sponsor.²⁷⁹ HOPE NOW reports that it has modified over 3 million loans to date,²⁸⁰ but little information is available about the monthly savings those modifications provide to homeowners.

The outcome of several federal programs influenced the design of HAMP. The first official federal government foreclosure mitigation program was FHA Secure, announced in August 2007, which refinanced adjustable-rate mortgages into fixed-rate mortgages insured by the Federal Housing Administration (FHA). FHA Secure ended in late 2008. Although the program refinanced nearly half a million loans, only about 4,000 of these were delinquent at the time of refinancing. The Panel has previously attributed FHA Secure's failure to its restrictive borrower criteria.²⁸¹

HOPE for Homeowners was established by Congress in July 2008 to permit the FHA to insure refinanced distressed mortgages. HOPE for Homeowners was initially expected to help 400,000 homeowners, but it managed to refinance only a handful of loans. This was likely due to the program's poor initial design, lack of flexibility, and its reliance on voluntary principal write-downs, which lenders were very reluctant to make, a pattern also seen in HAMP.²⁸²

Also in July 2008, the FDIC took over IndyMac, one of the nation's largest subprime lenders. Soon afterward, the FDIC announced a loan modification program to assist the 65,000 delinquent borrowers with loans in IndyMac's non-securitized portfolio. The FDIC instituted a number of similar efforts for loans owned by other, smaller failed banks, which have been moderately successful in mitigating foreclosures at those particular lenders.²⁸³

Figure 15 below shows a timeline of foreclosure mitigation efforts and the number of new foreclosure actions each month from January 2007 to the present. It is important to note that although fore-

²⁷⁸ See *Emergency Economic Stabilization Act of 2008 (EESA)*, Pub. L. No. 110-343, at § 109 (2008) (online at thomas.loc.gov/cgi-bin/query/z?c110:H.R.1424.enr).

²⁷⁹ See U.S. Department of the Treasury, *Statement by Secretary Henry M. Paulson, Jr. on Announcement of New Private Sector Alliance—HOPE NOW* (Oct. 10, 2007) (online at www.treasury.gov/press-center/press-releases/Pages/hp599.aspx).

²⁸⁰ HOPE NOW Alliance, *HOPE NOW: Mortgage Servicers Completed 1.76 million Loan Modifications for Homeowners in 2010* (Feb. 2, 2011) (online at www.hopenow.com/press_release/files/HN%202010%20Full%20Data_FINAL.pdf).

²⁸¹ Congressional Oversight Panel, *March Oversight Report: Foreclosure Crisis: Working Toward a Solution*, at 35 (Mar. 6, 2009) (online at cop.senate.gov/documents/cop-030609-report.pdf) (hereinafter "2009 March Oversight Report").

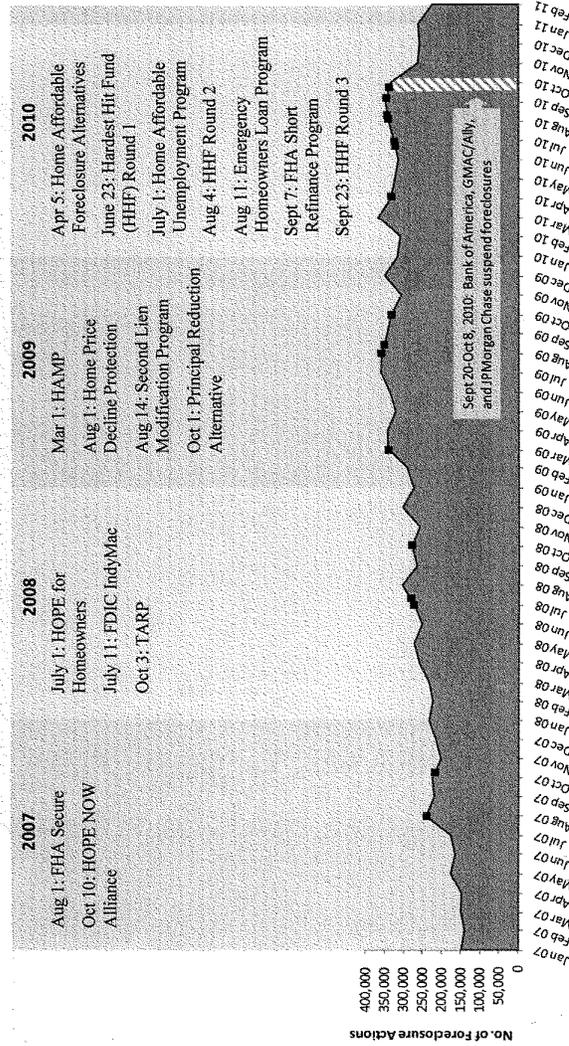
²⁸² See *id.* at 36.

²⁸³ For more discussion of the FDIC's IndyMac program, see Congressional Oversight Panel, *December Oversight Report: A Review of Treasury's Foreclosure Prevention Programs*, at 92 (Dec. 14, 2010) (online at cop.senate.gov/documents/cop-121410-report.pdf) (hereinafter "2010 December Oversight Report").

closure actions have declined in recent months, this likely is due to voluntary foreclosure suspensions put in place in the fall of 2010 in response to the documentation irregularities situation. At that time many of the government initiatives were still relatively new and would not reasonably be expected to cause a significant decline in the foreclosure rate.²⁸⁴

²⁸⁴ For statistics on how many borrowers Treasury's programs have helped to date, see Figure 19 and footnote 336.

FIGURE 15: TIMELINE OF FORECLOSURE MITIGATION PROGRAMS AND FORECLOSURE ACTIONS ²⁸⁵



²⁸⁵ Foreclosure action data compiled by RealtyTrac, and accessed through Bloomberg Financial Data Service (accessed Mar. 10, 2011). Foreclosure actions are defined as default notices, scheduled auctions, and bank repossessions. RealtyTrac, *Foreclosures Frozen in February* (Mar. 9, 2011) (online at www.realtytrac.com/content/press-releases/foreclosure-activity-declines-14-percent-in-february-6420) (hereinafter "RealtyTrac: Foreclosures in February"). The dates for programs shown in this figure are the dates the programs became effective or funding became available rather than the date the programs were announced.

B. Summary of COP Reports and Findings

The Panel's first report on foreclosures was published in March 2009, roughly concurrent with the announcement of HAMP.²⁸⁶ The report, *Foreclosure Crisis: Working Toward a Solution*, described major impediments to mortgage modifications, including the presence of second liens and incentive problems for mortgage servicers caused by the securitization process. The report called for the collection and public dissemination of more nationwide mortgage performance data. And it established eight questions on which to evaluate a foreclosure mitigation program:²⁸⁷

- Will the plan result in modifications that create affordable monthly payments?
- Does the plan deal with negative equity?
- Does the plan address junior mortgages?
- Does the plan overcome obstacles in existing pooling and servicing agreements that may prevent modifications?
- Does the plan counteract mortgage servicer incentives not to engage in modifications?
- Does the plan provide adequate outreach to homeowners?
- Can the plan be scaled up quickly to deal with millions of mortgages?
- And finally, will the plan have widespread participation by lenders and servicers?

The report did not specifically evaluate the administration's initial foreclosure-prevention plan, since Treasury announced it shortly before the Panel's report went to press, and it had not yet become operational.

The Panel's October 2009 report, *An Assessment of Foreclosure Mitigation Efforts After Six Months*, provided a preliminary evaluation of HAMP, which at the time was still in its early stages. The report expressed concern that HAMP was not designed to deal with the evolving nature of the foreclosure crisis; in particular, the report raised questions about the ability of HAMP to prevent foreclosures caused by unemployment or negative equity. The report questioned whether HAMP would be able to attain the scale necessary to deal with the millions of foreclosures that were expected. Finally, the report questioned whether or not HAMP would merely forestall foreclosure for many homeowners, since only a small percentage of HAMP trial modifications had converted into five-year, so-called permanent modifications, and also because even those

²⁸⁶ HAMP is designed to provide a path to modifying mortgages and provides subsidies to lenders, servicers, and homeowners to encourage such modifications. Once approved for assistance through HAMP, a borrower must successfully complete a trial period, typically three months, during which the borrower makes payments on the modified mortgage. A borrower who remains current through the trial period becomes eligible for a permanent modification, under which the terms of the trial modification remain in effect for a period of five years. After the five-year term is up, the interest rate on the loan can increase by a maximum of 1 percent per year until it reaches the prevailing Freddie Mac average interest rate at the time the HAMP modification was made.

²⁸⁷ These criteria were considerably influenced by the testimony of foreclosure prevention experts and borrowers facing foreclosure in the Panel's field hearings on foreclosures in Clark County, Nevada, and Prince George's County, Maryland. See Congressional Oversight Panel, *COP Field Hearing: Clark County, NV: Ground Zero of the Housing and Financial Crisis* (Dec. 16, 2008) (online at cop.senate.gov/hearings/library/hearing-121608-firsthearing.cfm); Congressional Oversight Panel, *Coping with the Foreclosure Crisis: State and Local Efforts to Combat Foreclosures in Prince George's County, MD* (Feb. 27, 2009) (online at cop.senate.gov/hearings/library/hearing-022709-housing.cfm).

that became permanent modifications carried the risk that the homeowner would redefault.

The Panel again assessed HAMP in April 2010. The report applauded Treasury for beginning to address the problems that the Panel highlighted during the previous year and in particular for taking steps to address the ways in which unemployment, second liens, and negative equity may lead to foreclosure. Foreclosures continued at a rapid pace, however, and the report found that Treasury's response continued to lag well behind the pace of the crisis. The April 2010 report highlighted in particular the role of unemployment as a driver of delinquencies and foreclosures. However, the program as structured at that time did not meet the needs of the unemployed. First, many unemployed individuals were unable to qualify for HAMP because they could not pass the net present value test for program admittance. Second, borrowers who have lost their jobs and have no income are rarely able to pay their mortgages for long, even if they receive favorable concessions from their lender; therefore, a program premised on moderate, long term payment relief did not provide the deep, short term relief necessary to keep unemployed borrowers temporarily without income in their homes. Finally, the unemployed are also often forced to move to take advantage of better job opportunities. This can undermine many loan modifications designed to prevent foreclosure, since these modifications are generally based on an assumption that the borrower will stay in place for several years. The Panel stated the best foreclosure mitigation initiative would be a sound economy with low unemployment.²⁸⁸

The Panel articulated three major concerns with HAMP in the April 2010 report: (1) its failure to deal with the foreclosure crisis in a timely way; (2) the unsustainable nature of many HAMP modifications, given the large debt burdens and negative equity that many participating homeowners continued to carry; and (3) the need for greater accountability in HAMP, particularly with regard to the activities of participating servicers.

Following the release of the Panel's April 2010 report, Treasury implemented certain previously announced changes to HAMP, but the Panel remained concerned that the choices made by Treasury in terms of program structure, transparency, and data collection did not leave borrowers well served. In a December 2010 report, the Panel estimated that HAMP would prevent only 700,000 to 800,000 foreclosures if it continues on its current trajectory—far fewer than the three to four million foreclosures that Treasury initially aimed to prevent, and vastly fewer than the eight to 13 million foreclosures expected by 2012. The Panel attributed many of the problems plaguing HAMP to the program's design, including its failure to address adequately the incentive structures for loan servicers and the obstacles to modifications created by second liens. Because Treasury's authority to restructure HAMP ended on October 3, 2010, the Panel noted that HAMP's prospects were unlikely to improve substantially in the future.

In the December 2010 report, the Panel again raised concerns that Treasury refused to specify meaningful goals by which to

²⁸⁸See 2010 April Oversight Report, *supra* note 277, at 18–20, 134–139.

measure HAMP's progress. The program's sole initial goal—to prevent 3 to 4 million foreclosures—had been repeatedly redefined and watered down.²⁸⁹ When the stated objectives of a program are limited or not meaningful, the scope of oversight and analysis is narrowed. However, as of the publication of this report, with fewer than 1.5 million total trial modifications started and only about 540,000 permanent modifications in place, it is clear that Treasury is going to fall well short of its initial goal, no matter how that goal is defined.²⁹⁰

The Panel further noted in December 2010 that the problem of evaluating HAMP was exacerbated by Treasury's failure to collect and analyze data that would explain its shortcomings. Absent a dramatic and unexpected increase in HAMP enrollment, it appears that many billions of dollars set aside for foreclosure mitigation will be left unused. Yet Treasury continues to state that \$30 billion in TARP funding will be expended under HAMP. Because Treasury's authority to restructure HAMP ended, the Panel noted in December 2010 that it was too late for Treasury to revamp its foreclosure prevention strategy, but that meaningful steps could be taken to wring every possible benefit from the program.

The Panel also focused on possible conflicts of interest and their impact on servicer compliance in the December 2010 report. Treasury has essentially outsourced the responsibility for overseeing servicers to Fannie Mae and Freddie Mac, but both companies have critical business relationships with the very same servicers, calling into question their willingness to conduct stringent oversight. Freddie Mac in particular has hesitated to enforce some of its contractual rights related to the foreclosure process, arguing that doing so “may negatively impact our relationships with these seller/servicers, some of which are among our largest sources of mortgage loans.”²⁹¹

A complex group of issues that came to light in the summer and fall of 2010 related to documentation “irregularities” in recent foreclosure actions added further to the factors impeding HAMP success and recovery of the housing market. These widely reported problems include improper mass “robo-signing” of mortgage documents by servicers, lost promissory notes and other documents that call into question the proper legal ownership of mortgage loans, and related securitization issues. The Panel's November 2010 report examined these issues and considered their implications for HAMP, the housing market, and the stability of the economy and the banking system. As of the date of publication, a group comprised of Treasury, bank regulators, and attorneys general of all 50 states and the District of Columbia are engaged in negotiations over resolution of the documentation irregularity situation with a group representing servicers and lenders.

²⁸⁹ See 2010 December Oversight Report, *supra* note 283, at 42–48. For an example of Treasury's articulation of HAMP goals and expectations in the early months of the program, see Congressional Oversight Panel, *Transcript: Hearing with Herbert M. Allison, Jr., Assistant Secretary of the Treasury for Financial Stability*, at 30–33 (Oct. 22, 2009) (online at cop.senate.gov/documents/transcript-102209-allison.pdf).

²⁹⁰ U.S. Department of the Treasury, *Making Home Affordable Program: Servicer Performance Through January 2011*, at 2 (Jan. 31, 2011) (online at www.treasury.gov/initiatives/financial-stability/results/MHA-Reports/Documents/Jan_2011_MHA_Report_FINAL.PDF) (hereinafter “MHA Program: Servicer Performance January 2011”).

²⁹¹ 2010 December Oversight Report, *supra* note 283, at 5.

Although the ultimate implications of these irregularities remain unclear, it is possible that the irregularities may conceal deeper problems in the mortgage market that could potentially threaten financial stability and undermine foreclosure prevention efforts.²⁹²

The Panel observed that in the coming years, in the best-case scenario, mortgage documentation irregularities may prove to be relatively rare paperwork errors that can be easily corrected, and have little impact on the housing and financial markets. However, the Panel also found that if future revelations show that documentation problems are pervasive, investors and others will have reason to doubt the legal ownership of pooled mortgages, which could have severe consequences. In this scenario, borrowers may be unable to determine whether they are sending their monthly payments to the right people. Judges may block any effort to foreclose, even in cases where borrowers have failed to make regular payments. Multiple banks may attempt to foreclose on the same property. Borrowers who suffered foreclosure may seek to regain title to their homes and force any new owners to move out. Would-be buyers and sellers could find themselves in limbo, uncertain about whether they can safely buy or sell a home.²⁹³

Should foreclosure irregularities cause such wide-scale disruptions in the housing market, financial institutions may suffer significant harm, and the stability of the financial system may be at risk. For example, if a bank were to discover that, due to shoddily executed paperwork, it still owns many defaulted mortgages that it thought it sold off years ago, it could face substantial unexpected losses. This could disrupt foreclosure prevention efforts such as HAMP. This situation has the potential to reduce public trust substantially in the entire real estate industry, especially in the legitimacy of important legal documents and the good faith of other market participants, particularly if foreclosure irregularities prove to be very common or to involve deliberate fraud.²⁹⁴

C. Panel Recommendations and Program Updates

After examining various issues related to the foreclosure crisis and Treasury's response throughout the last two years, the Panel provided a series of specific recommendations designed to improve the modification process, the structure of Treasury's foreclosure programs, their transparency, and their accountability.²⁹⁵ Treasury's response to these recommendations has been mixed. Treasury followed some suggestions, ignored some, and partially or unsuccessfully followed others. Overall, Treasury's response thus far has been disappointing.

²⁹² Congressional Oversight Panel, *November Oversight Report: Examining the Consequences of Mortgage Irregularities for Financial Stability and Foreclosure Mitigation*, at 83 (Nov. 16, 2010) (online at cop.senate.gov/documents/cop-111610-report.pdf) (hereinafter "2010 November Oversight Report").

²⁹³ *Id.* at 84.

²⁹⁴ *Id.* at 84.

²⁹⁵ SIGTARP released a report in January 2011 that echoed many of the Panel's recommendations for HAMP, particularly in the fields of transparency, servicer accountability, and goals. See Office of the Special Inspector General for the Troubled Asset Relief Program, *Quarterly Report to Congress*, at 10–13 (Jan. 26, 2011) (online at www.sig tarp.gov/reports/congress/2011/January2011_Quarterly_Report_to_Congress.pdf).

1. Transparency

In order to provide a source of comprehensive information about loan performance and foreclosure mitigation initiatives, the Panel concluded in its March 2009 report that Congress should create a national mortgage loan performance reporting requirement applicable to banking institutions and other mortgage servicers. In subsequent reports, the Panel repeatedly recommended that Treasury collect more loan-level data on borrowers facing foreclosure.²⁹⁶ In particular, the Panel stated that Treasury does not collect sufficient information to determine why loans are moving to foreclosure rather than workouts, nor does it monitor closely enough any loan modifications performed outside of HAMP.²⁹⁷ Since the Panel published those recommendations, federal banking regulators have not implemented a national mortgage loan performance reporting requirement. After being surveyed by the Panel, the OCC and OTS did create a quarterly report that contains a limited amount of aggregate information about mortgage performance across the country, but this information falls far short of the loan-level data that is needed.

In April 2010, the Panel recommended that Treasury commit to providing regular and publicly available data reports on all HAMP modifications through the end of their five-year modification period. In addition, the Panel called on Treasury to release more data collected by its program administrator, Fannie Mae, and its compliance agent, Freddie Mac, so that Congress, the TARP oversight bodies, and the public can better evaluate the effectiveness of HAMP.²⁹⁸ In late January 2011, Treasury for the first time released loan-level data on HAMP participants, fulfilling the Panel's recommendation. This information provides a great deal of raw data that could reveal insights that could then be used to improve HAMP. The data include information on the gross income of applicants, the loan balances of HAMP participants after they receive permanent modifications, the credit scores of HAMP participants, and the race and ethnicity of HAMP participants, as well as other information. However, the timing of the data release provides limited time for oversight bodies or academics to draw any conclusions from the data before HAMP expires at the end of 2012.

The Panel expressed concern about the impact of redefaults of HAMP permanent modifications on the program's ultimate success, and the related need for the collection of better data specifically on redefaults. At the Panel's October 2010 hearing, Guy Cecala, publisher of *Inside Mortgage Finance*, emphasized the danger that redefaults pose to the housing market as a whole. "Even a re-default rate at the lower end of estimates would put more than 600,000 additional distressed properties into the housing market at time when it is struggling to unload an already high inventory," Cecala stat-

²⁹⁶ Treasury officials have predicted that upcoming "dramatic" changes in the servicing industry will lead to a comprehensive database of mortgages in foreclosure, but have provided no indication of when these changes will occur, or whether Treasury will take any specific actions on this front. Congressional Oversight Panel, *Transcript: COP Hearing on TARP's Impact on Financial Stability* (Mar. 4, 2011) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-030411-final.cfm) (hereinafter "COP Transcript: Hearing on TARP's Impact on Financial Stability").

²⁹⁷ 2010 December Oversight Report, *supra* note 283, at 107.

²⁹⁸ 2010 April Oversight Report, *supra* note 277, at 88.

ed.²⁹⁹ In order to understand which HAMP participants are most at risk of redefault and thereby improve the program's success rate, the Panel believes that Treasury should focus its data analysis on identifying borrower characteristics that positively correlate to a higher risk of redefault. To maximize the effectiveness of their data collection efforts, Treasury's metrics should be comprehensive, and the results should be disaggregated by lenders and servicers and made publicly available.³⁰⁰ Treasury has begun to release a limited amount of aggregate data on HAMP redefaults, but despite the Panel's urging, it has not made public any analysis that identifies borrower characteristics that positively correlate to a higher risk of redefault. Nor has Treasury made public data on redefaults that is disaggregated by servicer, or that shows redefault rates for more than 12 months after the permanent modification begins. Such information is crucial for evaluating the extent to which redefaults are undermining HAMP's performance.

The Panel made a number of specific recommendations related to publicly available information. In October 2009, the Panel called on Treasury to provide borrowers and housing counselors with access to its net present value model.³⁰¹ Contrary to the Panel's recommendations, Treasury has never made the net present value model fully or even substantially public. Treasury has provided borrowers and housing counselors with greater access to its net present value model, but the model remains less than fully transparent.

In December 2010, the Panel urged Treasury to determine which sorts of modifications have proven to be most successful in practice. Treasury could then encourage servicers to make more of these types of modifications and fewer of the types of modifications that tend to end in redefault.³⁰² Treasury has thus far shown no indication that it has studied or understands which types of loan modifications tend to be most effective and sustainable. Without this knowledge, it is impossible for Treasury to press servicers to favor more effective types of modifications over others.

The Panel also called on Treasury to provide detailed public information related to its selection and use of Fannie Mae as a financial agent and HAMP administrator and Freddie Mac as compliance agent.³⁰³ Treasury has not provided this information. In January 2010, the Panel recommended that Treasury release a legal

²⁹⁹ Congressional Oversight Panel, Written Testimony of Guy Cecala, chief executive officer and publisher, Inside Mortgage Finance Publications, Inc., *COP Hearing on TARP Foreclosure Mitigation Programs* (Oct. 27, 2010) (online at cop.senate.gov/documents/testimony-102710-cecala.pdf).

³⁰⁰ Congressional Oversight Panel, *October Oversight Report: An Assessment of Foreclosure Mitigation Efforts After Six Months*, at 112 (Oct. 9, 2009) (online at cop.senate.gov/documents/cop-100909-report.pdf) (hereinafter "2009 October Oversight Report"); 2010 April Oversight Report, *supra* note 277, at 90.

³⁰¹ 2009 October Oversight Report, *supra* note 300, at 47. HAMP relies on a net present value calculation performed by the loan servicer to determine whether or not a modification is warranted. This consists of a comparison of the net present value of an unmodified delinquent loan to the net present value of a modification of that same delinquent loan. If the net present value of the modified loan is greater than the net present value of the unmodified loan, then a modification is value maximizing for the investors in the loan. The Panel's October 2009 report examined Treasury's model and models used by similar programs. *Id.* at 45–47, 83, 106, 113–116, 129–131.

³⁰² 2010 December Oversight Report, *supra* note 283, at 109–110.

³⁰³ 2010 April Oversight Report, *supra* note 277, at 78.

opinion on its HAMP authority.³⁰⁴ Although Treasury did provide a legal opinion on its HAMP authority to the Panel and allowed the Panel to quote from the document, it objected to the Panel making the entire document public.

2. Compliance

Treasury has struggled to ensure that HAMP servicers comply with the program's rules. In describing the ineffectiveness of the current system, which provides few real "sticks" to punish non-compliance, Professor Katherine Porter, University of Iowa College of Law, testified before the Panel that, "servicers . . . have gorged themselves at a buffet of carrots, and they're still not doing what we want them to do."³⁰⁵ In October 2009, the Panel stressed that Treasury needed an appropriate monitoring mechanism to ensure that servicers were accurately reporting the reasons for denial or cancellation and that those who did not receive meaningful sanctions for noncompliance.³⁰⁶ The Panel stated that these sanctions should include the use of Treasury's authority to withhold or claw back incentive payments.³⁰⁷ Following the Panel's recommendations, Treasury has not permanently withheld or clawed back any incentive payments as a result of noncompliance.

In addition to meaningful monetary penalties for noncompliance, the Panel stated that foreclosures should be stayed until an independent analysis of the application or trial could be performed, with the servicer paying the cost of the evaluation.³⁰⁸ The Panel also stressed that information on eligibility and denials should be clearly and promptly communicated to borrowers, and that denial information should be reported to the public. The Panel reiterated these recommendations in April 2010 and again in December 2010, stressing that denials should be subject to a meaningful, independent appeals process managed by either the Office of Homeowner Advocate or an ombudsman. While Treasury made progress in ensuring that HAMP applicants receive clear and prompt notice on why they are being denied a modification, it has not stayed any foreclosures until an independent analysis of the application has been performed. Furthermore, Treasury has not implemented the Panel's recommendation that HAMP denial be made subject to a meaningful, independent appeals process. And while Treasury collects data on why modifications are being denied or cancelled, it still lacks a monitoring mechanism to ensure that those reasons are being reported accurately, and that servicers that make inaccurate reports face meaningful sanctions.

3. Goals

The Panel repeatedly requested that Treasury announce firmer goals for HAMP. Specifically, the Panel recommended that Treasury produce a clear metric of how many foreclosures it expects

³⁰⁴ 2010 January Oversight Report, *supra* note 153, at 12.

³⁰⁵ Congressional Oversight Panel, Testimony of Katherine Porter, professor of law, University of Iowa College of Law, *Transcript: COP Hearing on TARP Foreclosure Mitigation Programs* (Oct. 27, 2010) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-102710-foreclosure.cfm).

³⁰⁶ 2009 October Oversight Report, *supra* note 300, at 9, 96.

³⁰⁷ 2010 December Oversight Report, *supra* note 283, at 109.

³⁰⁸ 2010 April Oversight Report, *supra* note 277, at 53.

HAMP to prevent, since foreclosures prevented is the only real measure of the program's success.³⁰⁹ To date, Treasury has not released any goals or estimates for how many foreclosures will be ultimately prevented by HAMP since its original goal of 3 to 4 million.³¹⁰ Although Treasury has made some additional data on the program available to the public, and also asserts that HAMP has yielded indirect benefits by establishing industry-wide standards for mortgage modifications,³¹¹ the lack of clearly articulated goals still hampers evaluation of the program.

In addition, the Panel recommended that Treasury be clearer about exactly how much TARP money it intends to spend on HAMP.³¹² Treasury has not provided a realistic estimate of how much it expects to spend. Treasury continues to insist that it will use the entire \$30 billion allocated to HAMP, a highly unlikely outcome considering the program's meager performance to date and the looming expiration of HAMP in December 2012, after which no new trial modifications can begin.³¹³ More realistically, CBO estimated that Treasury will spend a total of \$12 billion among Treasury's three foreclosure-prevention programs—HAMP, the Hardest Hit Fund, and the FHA Short Refinance Program. The Panel further estimated that as little as \$4 billion may be spent on HAMP.

4. Streamlining

The Panel repeatedly urged Treasury to improve and streamline communications with borrowers, and to make it easier for them to apply for HAMP assistance. For instance, the Panel recommended that Treasury establish an ombudsman and dedicated case staff to help borrowers cut through red tape and resolve servicer problems.³¹⁴ Treasury did not implement this recommendation. The Panel also requested that Treasury standardize the paperwork that HAMP applicants must submit in order to document their income.³¹⁵ The shift in June 2010 to requiring that servicers verify borrower income upfront for all trial modifications was an important step in this direction, but it would not be accurate to call the current system "standardized."

The Panel focused on the slow rollout of the HAMP borrower web portal, which allows borrowers to apply for modifications and to

³⁰⁹ 2010 December Oversight Report, *supra* note 283, at 106.

³¹⁰ 2010 December Oversight Report, *supra* note 283, at 106. *See also* Congressional Oversight Panel, Testimony of Timothy F. Geithner, secretary, U.S. Department of the Treasury, *Transcript: COP Hearing with Treasury Secretary Timothy Geithner*, at 55 (June 22, 2010) (online at cop.senate.gov/documents/transcript-062210-geithner.pdf) ("Well, again, what HAMP does and what HAMP is designed to do—it was not designed to prevent all foreclosures. It could not be designed to do that. . . . What HAMP is designed to try to do is to make sure that a set of people facing the risk of foreclosure have the chance of being able to afford the challenges of staying in their home.")

³¹¹ Congressional Oversight Panel, Written Testimony of Timothy G. Massad, acting assistant secretary for the Office of Financial Stability, U.S. Department of the Treasury, *COP Hearing on the TARP's Impact on Financial Stability*, at 8 (Mar. 4, 2011) (online at cop.senate.gov/documents/testimony-030411-massad.pdf) (hereinafter "COP Hearing on the TARP's Impact on Financial Stability") ("Moreover, many more homeowners have been helped indirectly as a result of the standards that HAMP has catalyzed across mortgage modifications industry-wide."). The Panel has encouraged Treasury to collect and release information on non-HAMP proprietary loan modifications. Treasury has stated that it has suggested to several servicers that they submit such information, but it has made no commitments to the Panel. COP Transcript: Hearing on TARP's Impact on Financial Stability, *supra* note 296.

³¹² 2010 April Oversight Report, *supra* note 277, at 5.

³¹³ As of February 25, 2011 Treasury has expended \$1.038 billion under HAMP.

³¹⁴ 2009 October Oversight Report, *supra* note 300, at 112.

³¹⁵ 2009 October Oversight Report, *supra* note 300, at 111.

track their application status online. The Panel repeatedly encouraged Treasury to get the portal operational, ensure that it is user-friendly, and press servicers to use it as the primary point of entry for applications.³¹⁶ The Panel also called on Treasury to enforce borrower outreach and communication standards and timelines.³¹⁷ Although the servicer portion of the HOPE LoanPort web portal finally rolled out in November 2010, a development the Panel applauded, the “borrower portal” portion, which would allow borrowers to interact directly with the LoanPort system by uploading documents and information without working through housing counselors, has not been implemented due to cost reasons. The Panel sees this as a significant problem.

Overall, Treasury made some progress in making the program more accessible and understandable to borrowers, improving communications with HAMP participants, and streamlining the HAMP process. For example, Treasury instituted a campaign of televised public service announcements. Treasury implemented firmer timelines and standards for the servicers, although as discussed above, servicer compliance remains a major challenge. But there are several indications that Treasury has more work to do in this area: the low number of new trial modifications in recent months; the long average time that it takes for a trial modification to convert into a permanent modification; the still considerable, though much reduced number of trial modifications that remain in the conversion pipeline for many months; and anecdotal evidence that many borrowers remain confused and frustrated.

5. Program Structure

Since the inception of HAMP, the Panel made numerous recommendations regarding the structure of the program, in order to address problems that became apparent during the program’s implementation. Although Treasury made some modest progress in increasing participation and reducing the redefault rate, it adopted relatively few of the Panel’s recommendations thus far.

The Panel repeatedly called on Treasury to modify the program to address three areas of major concern: second lien mortgages, unemployed borrowers, and borrowers with negative equity. In response to criticisms by the Panel and other observers, Treasury developed several new HAMP-related programs intended to deal with these issues directly, which the Panel applauded. Unfortunately, as of the publication of this report, these efforts have not demonstrated a track record of success.

The Panel addressed the problems caused by second-lien mortgages in each of its reports on HAMP. The Panel encouraged Treasury to investigate and find a solution to the obstacles that second liens often present to first-lien mortgage modifications.³¹⁸ The Panel recommended that Treasury explore the implications of adding borrower-specific junior lien information directly into HAMP’s

³¹⁶The web portal, officially the HOPE LoanPort, is operated by the HOPE Alliance, a consortium of private lenders and other mortgage industry firms. 2009 October Oversight Report, *supra* note 300, at 111; 2010 April Oversight Report, *supra* note 277, at 96; 2010 December Oversight Report, *supra* note 283, at 78, 198.

³¹⁷2010 April Oversight Report, *supra* note 277, at 96.

³¹⁸2009 March Oversight Report, *supra* note 281, at 38–39. See also 2010 April Oversight Report, *supra* note 277, at 16, 126; 2010 December Oversight Report, *supra* note 283, at 109.

net present value model, which is a key tool that servicers use to determine whether applicants are eligible for the program. The Panel also recommended that Treasury consider the effect these additional debts have on the number of borrowers served by HAMP and the impact they have on the sustainability of HAMP modifications.³¹⁹

On April 28, 2009, Treasury announced the Second Lien Modification Program to address the problem of second liens. The program went into effect on August 14, 2009. Borrowers are eligible after their corresponding first liens have been modified under HAMP. Although servicer participation is voluntary, once they sign a participation agreement, servicers must modify or extinguish the second liens of all eligible borrowers. Servicers, borrowers, and second-lien investors all receive incentive payments for their participation. Although the second lien modification program is a welcome development, the program has so far seen relatively little use.

The Panel repeatedly urged Treasury to find a way to provide assistance to unemployed borrowers, and Treasury attempted to do so by instituting several new programs. The Panel commends Treasury for creating the Home Affordable Unemployment Program. This program, announced on March 26, 2010, and effective July 1, 2010, assists unemployed homeowners by granting temporary forbearance of a portion of their monthly mortgage payments. During the forbearance period, which lasts a minimum of three months, unless the homeowner finds a job, payments fall to no more than 31 percent of the borrower's gross monthly income, including unemployment benefits. Once borrowers are in the program, the forbearance ends when they find work.

Another Treasury program designed in part to deal with the problem of unemployed homeowners is the Hardest Hit Fund. This program, announced on February 19, 2010, provides TARP money to state-run foreclosure mitigation programs in specific states hit hardest by home value decreases and unemployment. Eighteen states and the District of Columbia are eligible for funding. Before receiving the funds, eligible states must submit and receive approval for their plans to use the money. Many of the proposed Hardest Hit Fund programs aim to help low- to moderate-income families. Some states, such as Arizona, developed programs intended to help any struggling homeowner with a demonstrated hardship who meets certain qualifications. To date, Treasury allocated \$7.6 billion to the states in four rounds of funding. All states receiving these funds are using at least a portion of the money to aid unemployed homeowners.

The Panel also suggested that Pennsylvania's successful Homeowners' Emergency Mortgage Assistance Program, which provides short-term loans to unemployed homeowners, could serve as a model for a nationwide program.³²⁰ Although it is not part of HAMP, Congress authorized and the Department of Housing and Urban Development is implementing the Emergency Homeowners' Loan Program, which will assist unemployed borrowers. Despite

³¹⁹ 2010 April Oversight Report, *supra* note 277, at 16; 2010 December Oversight Report, *supra* note 283, at 109.

³²⁰ 2009 October Oversight Report, *supra* note 300, at 89–90; 2010 April Oversight Report, *supra* note 277, at 20.

these new programs, however, unemployed borrowers continue to account for many foreclosures.³²¹

Negative equity constituted another longstanding area of concern for the Panel, since there is a correlation between negative equity, or owing more on your mortgage than your home is worth, and delinquency.³²² In December 2009, the Panel encouraged Treasury to consider incentivizing servicers to use principal reduction to deal with these “underwater” borrowers.³²³ Since then, Treasury has attempted to deal with negative equity in several ways.

Treasury created the HAMP Principal Reduction Alternative, which attempts to incentivize servicers to write down underwater loans voluntarily. The program was announced on June 3, 2010, and went into effect on October 1, 2010. The Principal Reduction Alternative operates much like HAMP, except that instead of postponing payments on a portion of the mortgage, the program forgives that portion altogether. Servicers are required to consider loans that are HAMP-eligible and have loan-to-value ratios greater than 115 percent. This evaluation involves comparing the amount of money that a modification involving principal reduction would generate to the amount generated by a modification that does not involve principal reduction. The final decision on whether to grant a principal reduction is ultimately up to the servicer. Participating investors receive standard incentive payments as well as a percentage of each dollar forgiven.

The Principal Reduction Alternative also includes an equity sharing option, in which the investor may be able to share the benefits of a subsequent appreciation in the home’s value. Based on this option, the Panel suggested that Treasury monitor the Principal Reduction Alternative to determine whether equity sharing increased program participation. If so, the Panel suggested that Treasury should consider authorizing equity sharing arrangements in other programs.³²⁴ Although the Principal Reduction Alternative program allows equity sharing, it is not required, and it is unclear at this time if this feature will be extensively used or will significantly boost overall program performance. Treasury has not implemented any additional equity sharing arrangements. Although the Principal Reduction Alternative is a welcome additional tool to prevent foreclosures, it does not yet have a demonstrated track record of

³²¹ In September 2009, the Panel visited Philadelphia’s Mortgage Foreclosure Diversion Pilot Program, a court sponsored mediation program for borrowers in foreclosure created by Judge Annette Rizzo of the Philadelphia Court of Common Pleas. This program, instituted in April 2008, requires “conciliation conferences” in all foreclosure cases involving residential properties with up to four units that were used as the owner’s primary residence, based on the idea that bringing borrowers into the same room with lenders’ representatives will foster a compromise that is in both parties’ best interests. The program was also discussed in the Panel’s September Field Hearing. See Congressional Oversight Panel, Written Testimony of Judge Annette M. Rizzo, Court of Common Pleas, First Judicial District, Philadelphia County, Philadelphia Mortgage Foreclosure Diversion Program, *Philadelphia Field Hearing on Mortgage Foreclosures* (Sept. 24, 2009) (online at cop.senate.gov/documents/testimony-092409-rizzo.pdf); Congressional Oversight Panel, Testimony of Judge Annette M. Rizzo, Court of Common Pleas, First Judicial District, Philadelphia County, Philadelphia Mortgage Foreclosure Diversion Program, *Transcript: Philadelphia Field Hearing on Mortgage Foreclosures*, at 46–47, 103–105 (Sep. 24, 2009) (online at cop.senate.gov/documents/transcript-092409-philadelphia.pdf).

³²² See First American CoreLogic, *Underwater Mortgages On the Rise According to First American CoreLogic Q4 2009 Negative Equity Data* (Feb. 23, 2010) (online at www.corelogic.com/uploadedFiles/Pages/About_Us/ResearchTrends/Q4_2009_Negative_Equity_FINAL.pdf).

³²³ 2010 December Oversight Report, *supra* note 283, at 67.

³²⁴ 2010 December Oversight Report, *supra* note 283, at 109.

success, and Treasury has not made much data available on its performance.

Treasury's Home Affordable Foreclosure Alternative and the FHA Short Refinance Program are also intended to address problems caused by negative equity. The Home Affordable Foreclosure Alternative program, announced on November 30, 2009, but not effective until April 5, 2010, seeks to encourage the use of short sales and deeds-in-lieu of foreclosure for HAMP-eligible borrowers who are underwater and unable to qualify for modifications. Servicers agree to forfeit the ability to seek a deficiency judgment in exchange for allowing borrowers to make short sales or issue a deed-in-lieu. Essentially, a servicer agrees to accept the property itself in satisfaction of a borrower's mortgage obligation. All parties receive TARP financial incentives.

The FHA Short Refinance Program, which was announced on March 26, 2010 and went into effect on September 7, 2010, offers a similar option. This TARP-funded program allows for the refinancing of non-FHA-insured underwater mortgages into positive equity, FHA-insured mortgages. Program participation is voluntary for servicers on a case-by-case basis. As with the Principal Reduction Alternative, both the Home Affordable Foreclosure Alternative program and the FHA Short Refinance program are relatively new and have not been used extensively so far.

The Panel also recommended that Treasury consider allowing borrowers whose monthly mortgage payments are currently less than 31 percent of their monthly incomes to enter HAMP, thereby capturing additional at-risk borrowers, especially those who owe large amounts in overdue payments.³²⁵ In the Panel's October 2010 hearing on foreclosures, Faith Schwartz, senior adviser for the HOPE NOW Alliance, testified that HAMP's 31 percent minimum eligibility standard was considered "aggressive" when HAMP was first rolled out, but that even this level of mortgage payment to income is too high for many homeowners who wind up in foreclosure.³²⁶ Treasury has not taken action on this suggestion.

6. Document Irregularities

The Panel's November 2010 report on foreclosure irregularities included several recommendations for Treasury. Treasury stated at the Panel's October 2010 hearing that based on the information it had at the time, foreclosure irregularities posed no systemic threat to the financial system. The Panel challenged this view and asked Treasury to explain why it saw no danger. The Panel also encouraged Treasury to monitor closely the impact of foreclosure irregularities and publicly report its findings. Further, the Panel's November 2010 report stated that Treasury should develop contingency plans to prepare for the potential worst-case scenario.³²⁷ Treasury indicated that as of the publication of this report, it has not found evidence of a systemic threat. However, the 11 member

³²⁵ 2009 October Oversight Report, *supra* note 300, at 112.

³²⁶ Congressional Oversight Panel, Written Testimony of Faith Schwartz, senior advisor, HOPE NOW Alliance, *COP Hearing on TARP Foreclosure Mitigation Programs*, at 7 (Oct. 27, 2010) (online at cop.senate.gov/documents/testimony-102710-schwartz.pdf).

³²⁷ 2010 November Oversight Report, *supra* note 292, at 6, 83–84; Congressional Oversight Panel, *COP Hearing on TARP Foreclosure Mitigation Programs* (Oct. 27, 2010) (online at cop.senate.gov/hearings/library/hearing-102710-foreclosure.cfm).

federal agency working group, of which Treasury is a member, continues to investigate. Rather than conducting an independent monitoring effort, Treasury has chosen to monitor the situation through its participation with the interagency working group and updates from various regulators. Finally, Treasury has not yet prepared any contingency plans for a worst case scenario, but is awaiting the findings of the interagency investigations to decide what action, if any, it should take.³²⁸

So far, the most comprehensive federal response to the Panel's concerns came from the OCC, which, along with other federal banking regulators, conducted examinations of foreclosure processing at the 14 largest federal regulated servicers during the fourth quarter of 2010. These examinations found "critical deficiencies and shortcomings in foreclosure governance process, foreclosure document preparation process, and oversight and monitoring of third party law firms and vendors" that "have resulted in violations of state and local foreclosure laws, regulations, or rules that have had an adverse effect on the functioning of the mortgage markets and the U.S. economy as a whole." The examinations also found "[a] small number of foreclosure sales" that "should not have proceeded" for various reasons, but also that "servicers maintained documentation of ownership and had a perfected interest in the mortgage to support their legal standing to foreclose."³²⁹

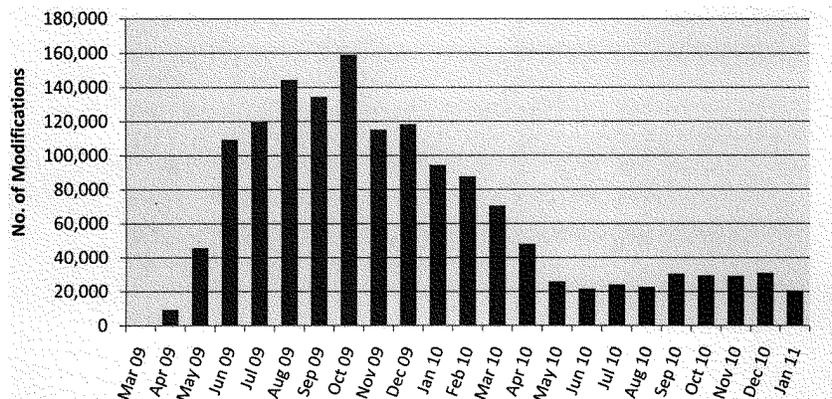
D. Data Updates

1. Treasury's Foreclosure Mitigation Programs

Treasury announced its broad foreclosure mitigation initiative, headlined by HAMP, more than two years ago. Since that time, what results has the effort produced? HAMP began in 2009 with a major push to get at-risk homeowners into trial modifications. As early enrollees either converted into permanent modifications or dropped out of the program, the number of new trial modifications began to fall. As a result, the pipeline of new trial modifications has slowed considerably since 2009. Unless this trend reverses, which appears unlikely, the program will fall far short of Treasury's initial goal of 3 million to 4 million foreclosures prevented. Figure 16 shows the number of trial modifications started each month since the program's inception.

³²⁸ Information provided by Treasury (Mar. 9, 2011).

³²⁹ Senate Committee on Banking, Housing, and Urban Affairs, Written Testimony of John Walsh, acting comptroller of the currency, Office of the Comptroller of the Currency, *Oversight of Dodd-Frank Implementation: A Progress Report by the Regulators at the Half-Year Mark*, at 13–15 (Feb. 17, 2011) (online at banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=99d7b6a8-d834-46e6-a088-f463fb740cf0).

FIGURE 16: NUMBER OF NEW TRIAL MODIFICATIONS SINCE HAMP'S INCEPTION BY MONTH³³⁰

According to Treasury, most of the decline in new trial modifications has been due to Treasury's decision, instituted in June 2010, to require that servicers verify upfront the income of HAMP applicants. Prior to June 2010, homeowners were able to qualify for trial modifications by verbally providing their incomes to servicers over the phone. As the Panel observed in the December 2010 report, however, this change cannot completely explain the decrease, since the number of new trial modifications began dropping off long before the upfront verified documentation standard was implemented. The Panel also considered the possibility that HAMP has already reached the majority of eligible borrowers who can be helped.³³¹ In the early months of the program, there was a large pool of borrowers awaiting help. Once many of these homeowners entered HAMP or other programs, there were simply fewer potential applicants who met HAMP criteria.³³²

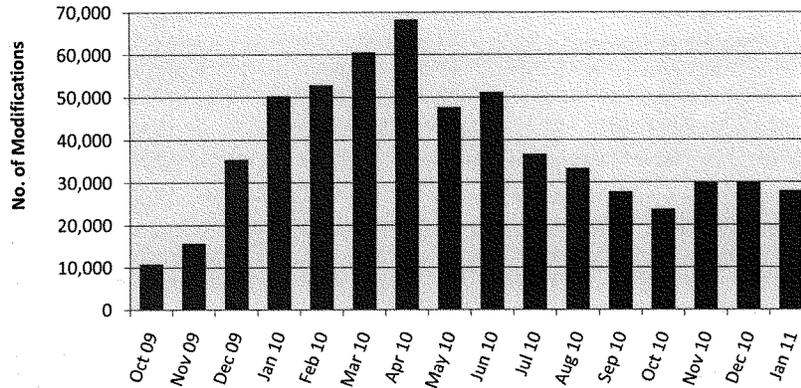
While new trials are an important metric for determining the maximum number of borrowers the program may be able to assist, a trial modification that fails to convert to a permanent modification can hardly be called a success. The pipeline of new permanent modifications expanded in late 2009 and early 2010 as Treasury made a major push to convert trial modifications into permanent ones. Between January and June 2010, Treasury recorded an average of about 55,000 new permanent modifications each month. But since then, the numbers have fallen, as Figure 17 shows, to an average of around 30,000 new permanent modifications per month.

³³⁰ Trial modifications are categorized by the month in which homeowners made their first reduced trial payment. Data provided by Treasury (Feb. 28, 2011).

³³¹ 2010 December Oversight Report, *supra* note 283, at 20.

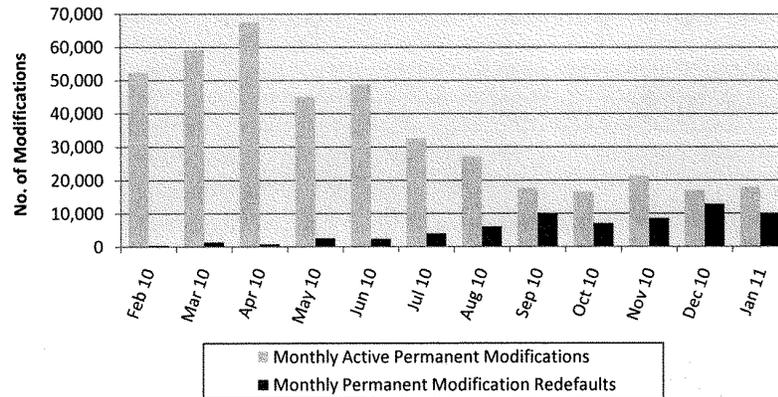
³³² Office of the Comptroller of the Currency and Office of Thrift Supervision, *Mortgage Metrics Report, Second Quarter 2010*, at 22 (Sept. 2010) (online at www.ots.treas.gov/files/490019.pdf). See also Fitch Ratings, *U.S. RMBS: Still Under a Shadow*, at 5 (Nov. 1, 2010) (noting that "the number of remaining borrowers eligible for a loan modification appears to be declining, as new loan modification activity has declined from its peak in 2009").

FIGURE 17: NUMBER OF NEW PERMANENT MODIFICATIONS SINCE HAMP'S INCEPTION BY MONTH ³³³



The number of permanent modifications is not a complete indicator of program success either, since HAMP participants who redefault after conversion to permanent modifications not only face foreclosure once again, but also represent an unsuccessful expenditure of taxpayer dollars. The Panel in its December 2010 report expressed concern about HAMP redefaults, since they have the potential to undermine the program's success. As Figure 18 illustrates, the gap between the number of redefaults and the new monthly permanent modifications narrowed in recent months.

³³³ From May 2009 to September 2009, new permanent modifications totaled 4,742. Monthly new permanent modifications are derived from "All Permanent Modifications Started" levels from October 2009 to January 2011, which are recorded in the Making Home Affordable Program's monthly Servicer Performance Reports. For these monthly reports, see U.S. Department of the Treasury, *Program Results, Making Home Affordable Reports* (online at www.treasury.gov/initiatives/financial-stability/results/MHA-Reports/Pages/default.aspx) (accessed Mar. 3, 2011) (hereinafter "MHA: Program Results").

FIGURE 18: MONTHLY HAMP PERMANENT MODIFICATIONS AND REDEFAULTS ³³⁴

As noted earlier, Treasury set a goal in March 2009 of assisting 3–4 million homeowners avoid foreclosure through HAMP, although Treasury’s definition of “assist” has been somewhat unclear. Figure 19 shows the number of households currently being assisted by HAMP, as measured by active trial and permanent modifications, along with the number of households currently being assisted by the other TARP foreclosure prevention programs. It is important to note that some HAMP trial modifications will not convert to permanent modifications and some permanent modifications will end in redefaults; therefore, not all of these households will avoid foreclosures.

³³⁴ “Monthly Active Permanent Modifications” and “Monthly Permanent Modification Defaults” are derived from cumulative “Active Permanent Modifications” and “Permanent Modifications Canceled” (excluding loans paid off) from February 2010 to January 2011, as recorded in the Making Home Affordable Program’s monthly Servicer Performance Reports. For these monthly reports, see MHA: Program Results, *supra* note 333.

FIGURE 19: NUMBER OF HOUSEHOLDS CURRENTLY BEING ASSISTED BY TARP FORECLOSURE PREVENTION PROGRAMS ³³⁵

Program	Households Receiving Assistance
HAMP ³³⁶	684,753
FHA Short Refinance Program ³³⁷	64
Hardest Hit Fund ³³⁸	757
Total	685,574

³³⁵In light of the number of households assisted to date by Treasury's foreclosure prevention programs, some members of Congress have introduced legislation proposing the repeal of various TARP foreclosure prevention programs. See H.R. 430, *The HAMP Repeal and Deficit Reduction Act of 2011*, 112th Cong. (online at www.gpo.gov/fdsys/pkg/BILLS-112hr430ih/pdf/BILLS-112hr430ih.pdf) (accessed March 11, 2011); H.R. 839, *The HAMP Termination Act of 2011*, 112th Cong. (online at www.gpo.gov/fdsys/pkg/BILLS-108hr839ih/pdf/BILLS-108hr839ih.pdf) (accessed March 11, 2011).

Treasury has stated that it is "very concerned" about HAMP repeal legislation, and believes that if the program was terminated, "many, many Americans who otherwise could be helped into an affordable mortgage will not have that opportunity to do so." Massad Testimony to the Panel, *supra* note 122.

The Panel has taken no position on this issue.

³³⁶This figure is the sum of 539,493 active permanent modifications and 145,260 active trial modifications. Both numbers are as of Jan. 31, 2011. MHA Program: Servicer Performance January 2011, *supra* note 290, at 2. Treasury also reports that 21,043 households have received assistance through HAMP's Principal Reduction Alternative, HAMP's Unemployment Program, HAMP's Second Lien Program, the Home Affordable Foreclosure Alternatives Program, and the Home Price Decline Protection Program. It is likely, however, that at least some of these households are among those in active HAMP trial and permanent modifications, and that some of the households are not currently receiving assistance. Treasury data provided to the Panel (Feb. 28, 2011).

³³⁷Data provided by Treasury (Mar. 10, 2011).

³³⁸The Hardest Hit Fund data show the number of applications approved through December 31, 2010. The data is sourced from seven of the 19 states participating in the program. Treasury data provided to the Panel (Feb. 28, 2011).

To achieve these results, Treasury has spent \$1.2 billion out of the \$45.6 billion in TARP funds allocated for foreclosure mitigation programs, or 2.6 percent of the funds available.³³⁹ Spending on these programs will continue until 2018, but given the current pace of outlays, Treasury seems unlikely to spend anywhere near \$45.6 billion.³⁴⁰ CBO estimates that Treasury will ultimately spend only about \$12 billion on these programs.³⁴¹ Figure 20 shows Treasury's expenditures to date for its TARP foreclosure mitigation programs.

FIGURE 20: EXPENDITURES FOR TARP FORECLOSURE MITIGATION PROGRAMS ³⁴²

Program	Expenditures
HAMP	\$1.0 billion
FHA Short Refinance Program	53.9 million
Hardest Hit Fund	125.1 million
Total	\$1.2 billion

³⁴²The HAMP expenditures are as of February 25, 2011, while the expenditures for the other two programs are as of February 28, 2011. Treasury data provided to the Panel (Feb. 28, 2011).

2. Housing Market

Treasury introduced the foreclosure mitigation programs in an effort to prevent foreclosures and stabilize the housing markets. Yet, foreclosures have remained at very high levels over the last two years. In December 2010, there were 232,000 foreclosure starts, while there were 56,000 foreclosure sales. This compares to 282,000 foreclosure starts and 51,000 foreclosure sales in March 2009, when HAMP was introduced. (Foreclosure sales dipped in

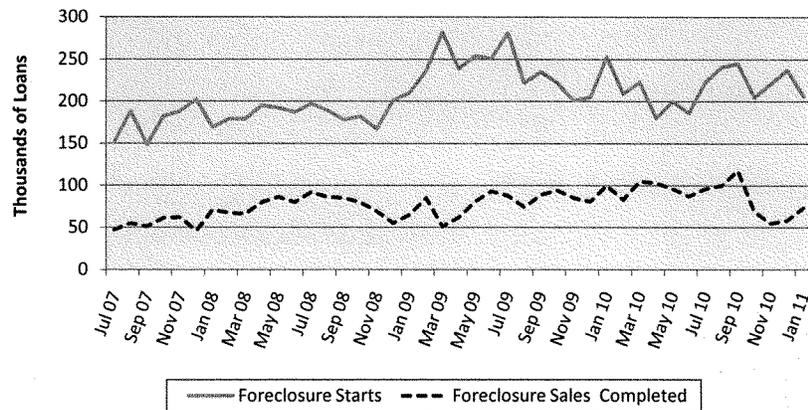
³³⁹Treasury estimates that over time each HAMP permanent modification will cost the federal government \$20,000. Massad Testimony to the Panel, *supra* note 122.

³⁴⁰Although HAMP expires on December 31, 2012, and new trial modifications after that date are prohibited, existing trial modifications can continue to convert. Considering the five-year term of HAMP assistance, the program should continue to expend funds into 2018.

³⁴¹Congressional Budget Office, *Report on the Troubled Asset Relief Program—November 2010*, at 4 (Nov. 29, 2010) (online at www.cbo.gov/ftpdocs/119xx/doc11980/11-29-TARP.pdf) ("CBO Report on TARP—November 2010").

late 2010 as a result of a number of large mortgage servicers suspending foreclosures in order to review their internal foreclosure procedures, but these numbers will likely increase in the coming months as these servicers resume their foreclosures.) Figure 21 shows foreclosure starts and completions by month since March 2009. The 685,574 households currently receiving TARP housing assistance—shown in Figure 19—represent roughly the same number of households that move into foreclosure proceedings every three months, based on the current rate.

FIGURE 21: FORECLOSURE STARTS AND COMPLETIONS ³⁴³



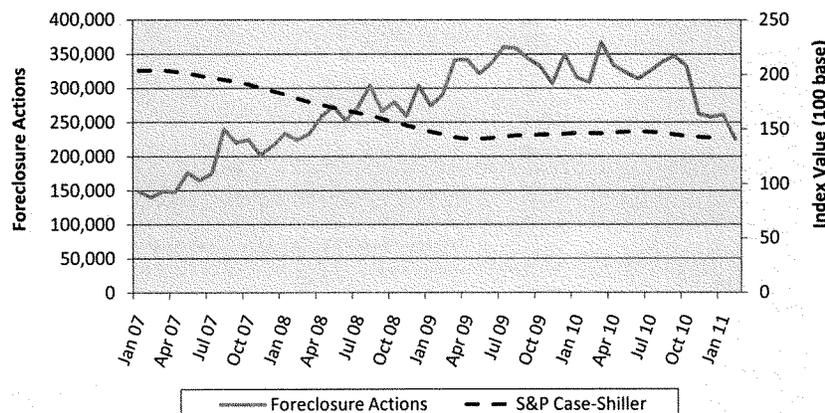
As foreclosure starts and completions have remained at a persistently high level, home prices have continued to fall. The S&P/Case Shiller index, which measures residential real estate prices nationwide, began declining in 2007, and the index's fall continued through the financial crisis of 2008 and beyond. After stabilizing in early 2010, home prices continued their decline in the second half of last year. Since the TARP was enacted in October 2008, nationwide home prices have declined by 9.1 percent. Since their peak in February 2007, nationwide home prices have fallen by 30.2 percent.³⁴⁴ Figure 22 shows that this decline in home prices has happened simultaneous with the rise in foreclosures.³⁴⁵

³⁴³ HOPE NOW Alliance, *Appendix—Mortgage Loss Mitigation Statistics: Industry Extrapolations (Quarterly from Q1-2007 to Q1-2009)*, at 4 (online at www.hopenow.com/industry-data/HOPE%20NOW%20National%20Data%20July07%20to%20April09.pdf) (accessed Mar. 11, 2011); HOPE NOW Alliance, *Appendix—Mortgage Loss Mitigation Statistics: Industry Extrapolations (Monthly for Dec 2008 to Nov 2009)*, at 2 (online at [www.hopenow.com/industry-data/HOPE%20NOW%20National%20Data%20July07%20to%20Nov09%20v2%20\(2\).pdf](http://www.hopenow.com/industry-data/HOPE%20NOW%20National%20Data%20July07%20to%20Nov09%20v2%20(2).pdf)) (accessed Mar. 11, 2011); HOPE NOW Alliance, *Industry Extrapolations and Metrics (May 2010)*, at 8 (June 28, 2010) (online at [www.hopenow.com/industry-data/HOPE%20NOW%20Data%20Report%20\(May\)%2006-21-2010.pdf](http://www.hopenow.com/industry-data/HOPE%20NOW%20Data%20Report%20(May)%2006-21-2010.pdf)); HOPE NOW Alliance, *Industry Extrapolations and Metrics (September 2010)*, at 8 (Oct. 31, 2010) (online at [hopenow.com/industry-data/HOPE%20NOW%20Data%20Report%20\(September\)%2010-31-2010%20v2.pdf](http://hopenow.com/industry-data/HOPE%20NOW%20Data%20Report%20(September)%2010-31-2010%20v2.pdf)); HOPE NOW Alliance, *Industry Extrapolations and Metrics (December 2010)*, at 8 (Feb. 2, 2011) (online at [www.hopenow.com/industry-data/HOPE%20NOW%20Data%20Report%20\(December\)%2002-01-2011%20v2.pdf](http://www.hopenow.com/industry-data/HOPE%20NOW%20Data%20Report%20(December)%2002-01-2011%20v2.pdf)).

³⁴⁴ S&P/Case Shiller Index data, which runs through December 2010, accessed through Bloomberg Financial Data Service (accessed Mar. 4, 2011).

³⁴⁵ At the Panel's March 4, 2011, hearing, Assistant Secretary Massad noted that foreclosures put downward pressure on the prices of neighboring homes. "A foreclosure for any family that

Continued

FIGURE 22: FORECLOSURE ACTIONS AND HOME PRICES³⁴⁶

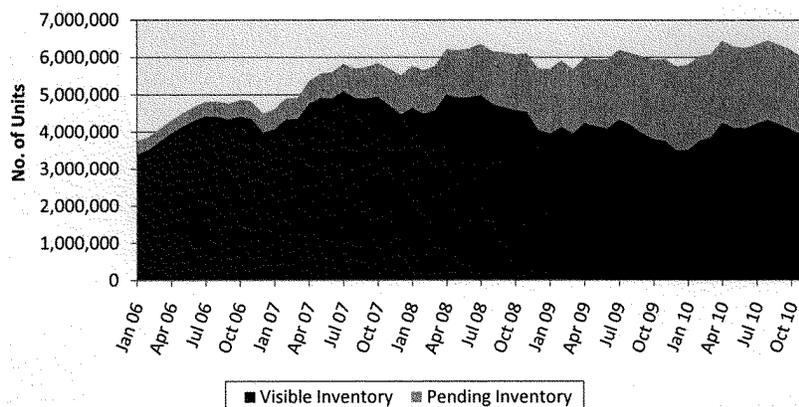
Putting additional pressure on housing prices is a glut of unsold homes. According to one estimate, there are currently more than six million unsold housing units in the United States, as compared to a pre-crisis level of 3.8 million.³⁴⁷ Figure 23 shows the overhang of housing inventory in the market. The chart distinguishes between visible inventory and pending inventory, which is a measure of potential additions to the sales inventory from homes that are in the foreclosure process or have mortgages that are seriously delinquent. There are currently 16 months of visible housing supply, as compared to an average of 7.3 months of visible inventory in 2006.³⁴⁸

goes through it is obviously a terrible economic loss," he stated. "It's also a great social and—or great psychological and emotional loss. It's a loss to the community. The community suffers from it because neighboring house prices fall. Particularly where you have a vacant home that can then be subject to vandalism. . . . So you know this situation is a drag on our economy as a whole." Massad Testimony to the Panel, *supra* note 122. Patrick Lawler, the FHFA's chief economist, made a related point, noting that foreclosures can result in additional losses for government sponsored enterprises Fannie Mae and Freddie Mac. Speaking about HAMP and other foreclosure-prevention programs, he stated: "These programs have benefited the enterprises by mitigating risks and reducing both direct losses on loans where foreclosure is avoided and indirect losses on properties where housing markets are stabilized, which reduces defaults on other loans." Congressional Oversight Panel, Testimony of Patrick Lawler, chief economist and head of the Office of Policy Analysis and Research, Federal Housing Finance Agency, *Transcript: COP Hearing on the TARP's Impact on Financial Stability* (Mar. 4, 2011) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-030411-final.cfm).

³⁴⁶The metric "foreclosure actions," as used by RealtyTrac, encompasses default notices, scheduled auctions and bank repossessions. RealtyTrac: Foreclosures in February, *supra* note 285. S&P/Case Shiller Index data accessed through Bloomberg Financial Data Service (accessed Mar. 4, 2011).

³⁴⁷Data provided by CoreLogic (Feb. 16, 2011).

³⁴⁸Even though the pending nationwide inventory increased only from 3.4 million in January 2006 to 3.9 million in November 2010, the rate at which the inventory was clearing slowed down, which explains why the rate at which the pending inventory is expected to clear has more than doubled during the same nearly five-year period. Data provided by CoreLogic (Feb. 15, 2011).

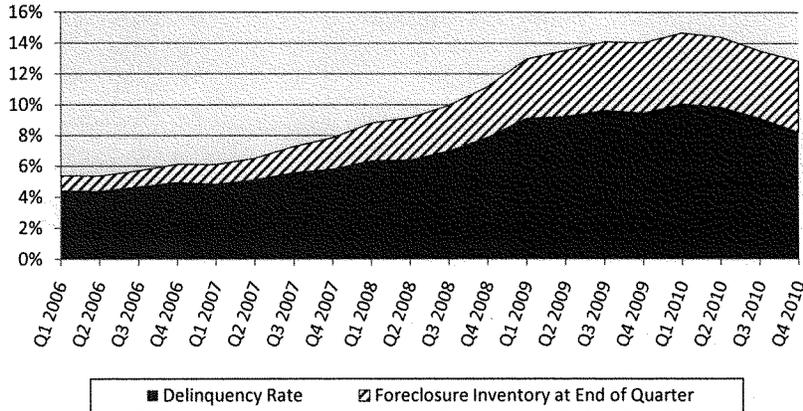
FIGURE 23: VISIBLE AND PENDING HOUSING INVENTORY³⁴⁹

Because borrowers entering foreclosure have been delinquent on their mortgage payments for several months, delinquencies are an indicator of likely future trends in foreclosures. HAMP's declining trial modification production is therefore troubling in relation to the current high level of delinquencies. While mortgage delinquencies have declined over the past three quarters, they remain near historically high levels. At the end of 2010, loans that were 30, 60, or 90 or more days delinquent represented approximately 8.2 percent of all outstanding loans—down from 10.1 percent during the first quarter of 2010, which was the peak during the current crisis, but still above 7.8 percent rate in the fourth quarter of 2008. Mortgages in the foreclosure inventory, meaning those currently in the foreclosure process, represent 4.6 percent of outstanding loans—which equals the highest level since 2006 and is well above the 3.3 percent rate in the fourth quarter of 2008. The delinquency rate remains 18 percent above its level at the time the TARP was enacted, and the foreclosure inventory rate is 56 percent above its level from that period.³⁵⁰ Figure 24 shows delinquency and foreclosure inventory rates since before the foreclosure crisis began.

³⁴⁹Data provided by CoreLogic (Feb.16, 2011).

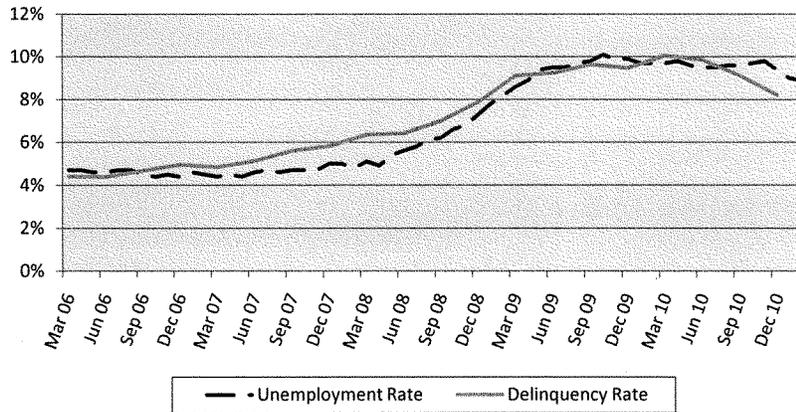
³⁵⁰National Delinquency Survey—2010 4th Quarter, *supra* note 4.

FIGURE 24: DELINQUENCY AND FORECLOSURE INVENTORY RATES ³⁵¹



Unemployment rates remain problematic as well, given the link between joblessness and mortgage delinquency. Figure 25 shows that the nationwide delinquency rate and the U.S. unemployment rate have followed similar trends since early 2006.

FIGURE 25: UNEMPLOYMENT AND DELINQUENCY RATES ³⁵²

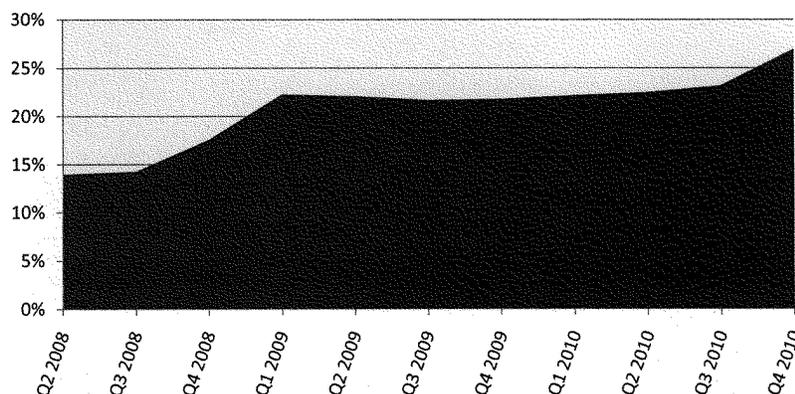


³⁵¹ National Delinquency Survey—2010 4th Quarter, *supra* note 4.

³⁵² Data accessed through Bloomberg Financial Data Service (accessed Mar. 4, 2011).

Negative equity, a situation in which homeowners owe more than their homes are worth, is another factor that may contribute to foreclosures. Figure 26 shows that the percentage of homeowners who are underwater has risen by more than 10 percentage points since the second quarter of 2008.

FIGURE 26: PERCENTAGE OF HOMEOWNERS WHO ARE UNDERWATER ³⁵³



While we cannot know what the state of the housing market would be in the absence of HAMP, we do know that despite the implementation of HAMP and other foreclosure mitigation efforts, foreclosures remain high, and the housing market shows continuing signs of stress.

E. Lessons Learned

The first step in crafting a successful mortgage modification program is to have an accurate empirical picture of the mortgage market. As the Panel has noted with other TARP programs, insufficient data collection undermines the development of good policies. The lack of comprehensive, reliable data also makes it difficult for policymakers to identify successful loan modifications or make apples-to-apples comparisons among programs. This information is crucial for understanding the changing nature of the mortgage market and crafting informed, targeted policy responses.

It is important to ensure that modified mortgages be affordable to borrowers. Because the HAMP requirement that homeowners spend 31 percent of their monthly income on their first-lien mortgage payments does not take into account local conditions, overdue payments, second liens, and other borrower debt, the Panel has questions about the sustainability of many HAMP modifications. Future mortgage modification programs should consider the best way to measure overall affordability.

The problems that Treasury has encountered with HAMP underscore the importance of a timely, decisive response to any future foreclosure crisis. When HAMP was introduced in early 2009, the foreclosure crisis was already well under way, and HAMP was not

³⁵³Data provided by Zillow.com (Feb. 18, 2011).

well designed to address the coming waves of foreclosures, which were increasingly driven by unemployment and negative equity. Over the next two years, Treasury provided increasingly generous incentives to participating borrowers, lenders, and servicers, which gave them reason to hold out for a better offer. While the constant flux of new programs, new standards, and new requirements reflected Treasury's efforts to respond to recommendations made by oversight bodies, the shifting ground also led to confusion among servicers and borrowers. Any future foreclosure mitigation programs should be forward-looking and attempt to address new and emerging problems before they reach crisis proportions.

Future policymakers should be mindful that the incentives of mortgage servicers are different from those of the government, and design any foreclosure mitigation program with that reality in mind. Borrower eligibility must depend on criteria set forth in the foreclosure mitigation program, rather than on the willingness of servicers or lenders to participate. If incentive payments are used to drive servicer participation, those payments must be sufficient to offset the financial incentives for servicers to push for foreclosure. Modification programs should also include an appropriate monitoring mechanism to ensure that servicers are accurately reporting the reasons for denials and cancellations, and there should be meaningful sanctions for noncompliance.

The need for better communication with homeowners is another important lesson to be drawn from HAMP. Because servicers generally first contact borrowers in a debt-collection role, any future foreclosure mitigation program that relies on servicers would benefit from a government-run outreach campaign designed to inform borrowers of their options for preventing foreclosure. A uniform and streamlined modification process would allow housing counselors to be more effective and allow borrowers and servicers to navigate the system more easily. Foreclosure mitigation efforts that rely on servicers should also make increasing servicer capacity an early priority.

It is also important that policymakers focus on ensuring good outcomes for homeowners, rather than becoming bogged down in process-related concerns. HAMP has a dizzying number of rules. In its oversight of Fannie Mae, HAMP's administrator, and Freddie Mac, HAMP's compliance agent, Treasury has seemed to focus more on ensuring that its rules are followed than on addressing the individual concerns of the people that the program is supposed to help.

Finally, the current crisis shows how closely foreclosure prevention is intertwined with efforts to ensure bank solvency. Delinquent mortgages continue to weigh on the U.S. banking system, and government efforts to remedy either the debt facing homeowners or the weakness of the banking system can have significant effects on the other problem. Principal write-downs on a large scale, for example, would help homeowners but hurt the banks. Over the last two years, Treasury has designed housing programs that aim to avoid fully facing this trade-off, by providing assistance to home-

owners without restructuring bank balance sheets.³⁵⁴ The limitations of that approach are apparent in the problems that Treasury has encountered.

V. Automotive Industry Assistance

A. Background

The automotive industry has traditionally accounted for a significant portion of U.S. domestic output and employment. As recently as 2004, the industry produced nearly 4 percent of U.S. GDP.³⁵⁵

Even prior to the financial crisis, the industry had begun to experience severe strain. Foreign competitors were steadily increasing market share at the expense of domestic manufacturers. Legacy costs and poor strategic decisions added to the problems of General Motors Corporation (GM) and Chrysler. Between 2000 and 2008, employment in the industry fell by roughly 34 percent, from a high of 1,254,900 in February 2001 to 822,900 in October 2008.³⁵⁶

In the fall of 2008, a combination of rising gasoline prices, tightening credit markets, eroding consumer confidence, high unemployment, and a decline in consumer discretionary spending led to a significant downturn in automobile sales in the United States and abroad. U.S. automobile sales fell to a 26-year low.³⁵⁷ By early December 2008, GM and Chrysler were struggling to secure the credit they needed to conduct their day-to-day operations.

Additionally, the freeze in credit markets in late 2008 resulted in lenders experiencing increased difficulty in raising capital to finance auto loans. At that time, GMAC/Ally Financial had already suffered third quarter losses and was facing even greater fourth quarter losses, due largely to their hemorrhaging residential mortgage unit, ResCap. The contraction of the credit markets and the shaky financial condition of the companies had an especially severe impact on their automotive lending businesses. Since substantially all wholesale purchases by automobile dealers and about three quarters of retail consumer purchases are financed with borrowed funds,³⁵⁸ GM and Chrysler faced additional losses in sales due to potential customers' inability to find credit.

³⁵⁴ See, e.g., Congressional Oversight Panel, Written Testimony of Timothy F. Geithner, secretary, U.S. Department of the Treasury, *COP Hearing with Treasury Secretary Timothy Geithner*, at 6 (Apr. 21, 2009) (online at cop.senate.gov/documents/testimony-042109-geithner.pdf) ("Falling home prices are a major financial challenge for many families. At the same time, financial losses related to the housing sector adjustment continue to be a significant headwind for banks and other financial institutions. Foreclosures are particularly problematic because they not only impose significant financial and emotional burdens on families, they are also costly for communities and banks. For all these reasons, addressing the housing crisis and reducing foreclosures is an important objective.")

³⁵⁵ Bureau of Economic Analysis, *National Income and Product Accounts Table: Table 1.5.5—Gross Domestic Product, Expanded Detail* (online at www.bea.gov/national/nipaweb/TableView.asp?SelectedTable=35&ViewSeries=NO&Java=no&Request3Place=N&3Place=N&FromView=YES&Freq=Year&FirstYear=1990&LastYear=2008&3Place=N&Update=Update&JavaBox=no) (accessed Mar. 11, 2011).

³⁵⁶ Bureau of Labor Statistics, *Automotive Industry: Employment, Earnings, and Hours* (online at data.bls.gov/pdq/SurveyOutputServlet?series_id=CEU3133600101&data_tool=XGtable) (accessed Mar. 11, 2011).

³⁵⁷ IHS Global Insights, *U.S. Executive Summary* (Aug. 2009).

³⁵⁸ Senate Committee on Banking, Housing, and Urban Affairs, Written Testimony of Ron Bloom, senior advisor, U.S. Department of the Treasury, *The State of the Domestic Automobile Industry: Impact of Federal Assistance* (June 10, 2009) (online at banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=40341601-355c-4e6f-b67f-b9707ac88e32). As of December 2009, 26 percent of all retail automobile purchases were cash transactions. This figure

Continued

The CEOs of Chrysler and GM appeared before Congress in December of 2008 to plead for government assistance to keep them from going under.³⁵⁹ The House of Representatives responded on December 10 by passing legislation that would have provided a total of \$14 billion in loans to Chrysler and GM, but the bill was blocked in the Senate on December 11.³⁶⁰ The Bush administration then reversed its previous stance that had precluded TARP funding for the auto industry, and on December 19 announced that Chrysler and GM would both be provided TARP assistance. This was justified in part on the basis that allowing them to fail would result in a more than 1 percent reduction in real GDP growth and about 1.1 million workers losing their jobs.³⁶¹

Meanwhile, on November 20, 2008, GMAC/Ally Financial requested the approval of FRB to become a BHC, contingent on the conversion of GMAC Bank to a commercial bank.³⁶² Becoming a BHC would make GMAC/Ally Financial eligible for access to both the FDIC's TLGP and the TARP's CPP. GMAC/Ally Financial's management also maintained that conversion to a BHC addressed a weakness in the company's business model by providing it with access to deposits for liquidity. FRB expedited GMAC/Ally Financial's BHC application, citing "emergency conditions," although the 4-1 split in the vote of FRB was unusual for these kinds of actions.³⁶³

1. Initial Treasury Action

The Automobile Industry Financing Program (AIFP) was announced on December 19, 2008. Its first acts were to provide Chrysler and GM with bridge loans of \$4 billion and \$13.4 billion, respectively, under separate loan and security agreements. Treasury, asserting that GM and Chrysler could not survive without access to GMAC/Ally Financial's and Chrysler Financial's financial underpinning, further provided GMAC/Ally Financial with \$5 billion in emergency funding under the AIFP on December 29, 2008. Another \$887 million lent to GM was used to buy GMAC/Ally Financial shares in a \$2 billion equity rights offering to current shareholders. Additionally, Chrysler Financial was provided with a \$1.5 billion loan on January 16, 2009.

has been relatively constant over the past five years, fluctuating between 22 and 32 percent. Data provided to the Panel by J.D. Power and Associates.

³⁵⁹The President and Chief Executive Officer of Ford Motor Company also testified at this hearing. Senate Committee on Banking, Housing, and Urban Affairs, Written Testimony of Richard Nardelli, chairman and chief executive officer, Chrysler LLC, *State of the Domestic Automobile Industry: Part II* (Dec. 4, 2008) (online at banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=c41857b2-7253-4253-95e3-5cfd7ea81393).

³⁶⁰The money would have been re-allocated from a pre-existing Department of Energy program for advanced vehicle technology. H.R. 7321, *Auto Industry Financing and Restructuring Act*, 110th Cong. (2008). The Senate failed to invoke cloture on the proposed legislation by a vote of 52 to 35. U.S. Senate, Roll Call Vote on the Motion to Invoke Cloture on the Motion to Proceed to Consider H.R. 7005 (Dec. 11, 2008) (online at www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=2&vote=00215) (52 yeas, 35 nays).

³⁶¹The George W. Bush White House Office of the Press Secretary, *Fact Sheet: Financing Assistance to Facilitate the Restructuring of Auto Manufacturers to Attain Financial Viability* (Dec. 19, 2008) (online at georgewbush-whitehouse.archives.gov/news/releases/2008/12/20081219-6.html) (hereinafter "White House Fact Sheet: Assistance to Auto Manufacturers").

³⁶²GMAC, LLC, *GMAC Files Application With Federal Reserve to Become Bank Holding Company* (Nov. 20, 2008) (online at media.gmacfs.com/index.php?s=43&item=288).

³⁶³Board of Governors of the Federal Reserve System, *Order Approving Formation of Bank Holding Companies and Notice to Engage in Certain Nonbanking Activities*, at 2, 15 (Dec. 24, 2008) (online at www.federalreserve.gov/newsevents/press/orders/orders20081224a1.pdf).

A key component of the receipt of this federal aid required each company to demonstrate that the assistance would allow it to achieve “financial viability.”³⁶⁴ Both companies were required to submit viability plans incorporating “meaningful concessions from all involved in the automotive industry.”³⁶⁵ These plans were submitted to the Obama administration in February 2009, and on February 15, 2009, President Obama announced the creation of the interagency Presidential Task Force on the Auto Industry, to assume responsibility for reviewing the Chrysler and GM viability plans. In addition, the President named two advisors, Ron Bloom and Steven Rattner, to lead the Treasury auto team in reviewing the viability plans and negotiating the terms of any further assistance.³⁶⁶

The results of the auto team’s review were announced by President Obama on March 30, 2009. The team found GM’s plan “not viable as it is currently structured” due largely to overly optimistic assumptions about prospects for the macroeconomy and GM’s ability to generate sales. GM was provided 60 days of working capital in order to submit a substantially more aggressive plan.³⁶⁷ The team found that Chrysler had an even poorer outlook than GM and concluded that Chrysler was not viable outside of a partnership with another automotive company. Chrysler was offered working capital for 30 more days in order to seek an agreement with Fiat.³⁶⁸

Unable to reach agreement in 30 days, Chrysler filed for bankruptcy on April 30. Forty-two days later, the sale of the majority of its assets to a newly formed entity, Chrysler Group LLC (new Chrysler), closed. Treasury provided a total of \$8.5 billion in working capital and exit financing to support Chrysler through the bankruptcy and restructuring process.³⁶⁹

GM followed Chrysler into bankruptcy on June 1, 2009. On July 5, 2009, the sale of the “good” assets of GM to the new government-owned General Motors Company (new GM) closed. Treasury provided \$30.1 billion of financing to facilitate an expedited Chapter 11 proceeding and restructuring.³⁷⁰

GMAC/Ally Financial, in the interim, one of the 19 large entities subject to stress tests, had failed the stress test and was unable to raise capital in the private markets. Accordingly, Treasury extended a further \$7.5 billion in TARP financing in May of 2009, and another \$3.8 billion in December 2009.

³⁶⁴ “Financial viability” was defined as “positive net value, taking into account all current and future costs, and [the ability to] fully repay the government loan.” White House Fact Sheet: Assistance to Auto Manufacturers, *supra* note 361.

³⁶⁵ The George W. Bush White House Office of the Press Secretary, *President Bush Discusses Administration’s Plan to Assist Automakers* (Dec. 19, 2008) (online at georgewbush-whitehouse.archives.gov/news/releases/2008/12/20081219.html).

³⁶⁶ The missions and personnel of the Presidential Task Force on the Auto Industry and Treasury auto team—a joint Treasury-National Economic Council team that staffs the Task Force—overlap considerably; therefore, these entities are often cited interchangeably.

³⁶⁷ U.S. Department of the Treasury, *GM February 17 Plan: Viability Determination* (Mar. 30, 2009) (online at www.whitehouse.gov/assets/documents/GM_Viability_Assessment.pdf).

³⁶⁸ The White House, *Obama Administration New Path to Viability for GM & Chrysler* (Mar. 30, 2009) (online at www.whitehouse.gov/assets/documents/Fact_Sheet_GM_Chrysler_FIN.pdf).

³⁶⁹ Treasury Transactions Report, *supra* note 36, at 18.

³⁷⁰ The White House, *Remarks by the President on General Motors Restructuring* (June 1, 2009) (online at www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-General-Motors-Restructuring/); Treasury Transactions Report, *supra* note 36, at 18.

Meanwhile, in July 2009, Chrysler Financial repaid its \$1.5 billion loan in full with all interest and an additional \$15 million note. GMAC/Ally Financial had taken over its floor plan business in May 2009. The remaining platform of Chrysler Financial was owned by Chrysler Holding LLC, which was in turn owned by Cerberus Management. Through Treasury's investment in Chrysler Holding LLC, Treasury remained entitled to proceeds Chrysler Holding LLC received from Chrysler Financial: the greater of either \$1.375 billion, or 40 percent of the equity value of Chrysler Financial.³⁷¹

2. Additional Initiatives and Actions

In addition to the assistance provided to the automotive industry described above, several other initiatives were undertaken to support the industry, both within and outside of the TARP.

On March 19, 2009, Treasury announced the Auto Supplier Support Program (ASSP), a TARP initiative. At the time it was announced, Treasury stated that up to \$5 billion in financing would be available to auto suppliers, to be funded through participating automotive companies. Under this program, auto suppliers could obtain government-backed protection on receivables to provide a safety net for those who may not receive payment for their shipments. Auto suppliers were also able to sell their receivables into the program at a discount to provide immediate liquidity for suppliers in need of cash to continue operations. This facility was reduced to \$3.5 billion, and ultimately only \$413 million was used.³⁷² On the same day, as part of ARRA, the Obama administration announced a grant of up to \$2 billion for competitively awarded cost-shared agreements for manufacturing of advanced batteries and related drive components, plus another \$400 million for transportation electrification demonstration and deployment projects.³⁷³

To help spur automotive sales, Congress created the Car Allowance Rebate System (nicknamed "cash for clunkers") to be administered through the Department of Transportation. The program, announced on July 27, 2009, offered rebates for new car buyers who were trading in older cars for newer, more efficient models. The program attracted interest and resulted in a brief surge in sales in the summer of 2009, with federal disbursements of \$2.9 billion.

The Energy Independence and Security Act of 2007 established a \$25 billion loan program to encourage the development of advanced technology vehicles—primarily those that meet certain energy efficiency criteria—and associated components in the United States. The program, administered by the Department of Energy, had completed a little over \$2 billion in loans as of the end of 2010. Before declaring bankruptcy, GM applied for a loan under this program and was rejected. The new GM later resubmitted the old GM's applications but ultimately withdrew these, saying it had enough liquidity of its own to modernize its facilities and build

³⁷¹ For more discussion of how Treasury potentially left money on the table in the Chrysler Financial deal, see Congressional Oversight Panel, *January Oversight Report: An Update on TARP Support for the Domestic Automotive Industry*, at 15–16 (Jan. 13, 2011) (online at cop.senate.gov/documents/cop-011311-report.pdf) (hereinafter "2011 January Oversight Report").

³⁷² Treasury Transactions Report, *supra* note 36.

³⁷³ U.S. Department of Energy, *President Obama Announces \$2.4 Billion for Electric Vehicles* (Mar. 19, 2009) (online at apps1.eere.energy.gov/news/daily.cfm/hp_news_id=159).

fuel-efficient vehicles.³⁷⁴ Chrysler is still awaiting a determination on its application for a total of \$3 billion in loans to be disbursed over three years.

B. Summary of COP Reports and Findings

In September 2009, the Panel issued its first report on the use of TARP funds in supporting the domestic automotive industry.³⁷⁵ In that report, the Panel examined several key considerations relating to the commitment of \$85 billion in TARP funds, including: Treasury's justification for extending TARP funds to the automotive sector, how exactly this money had been used, and whether Treasury had properly and publicly articulated its objectives and taken action in furtherance of those objectives. The report also examined Treasury's role in the bankruptcy of Chrysler Holding LLC (Chrysler) and GM, how Treasury planned to protect taxpayers' interests while the government controlled these companies, and how Treasury intended to maximize taxpayers' returns when the government divested itself of ownership.

The Panel compared Treasury's dealings with the automotive companies with its dealings with banks under the CPP and similar programs, and found that Treasury's financial assistance to the automotive industry differed significantly from its assistance to the banking industry. In particular, assistance provided to the banks carried less stringent conditions, and money was made readily available without a review of business plans and without any demands that shareholders forfeit their stake in the company, or that top management lose their jobs. By contrast, the Panel found that Treasury was a tough negotiator as it invested taxpayer funds in the automotive industry, requiring the companies to file for bankruptcy, wiping out their old shareholders, cutting their labor costs, reducing their debt obligations and replacing some top management. While this stance may have provided better protection for Treasury's investment, the Panel noted that it may have raised other issues related to the government's role as shareholder in private companies. The report recommended that Treasury consider placing the government's shares in a trust that could be managed in a more hands-off manner, effectively removing the concern that direct management by Treasury itself could have undesirable consequences.

The Panel also examined the bankruptcy processes each of the companies underwent and concluded, with the assistance of outside bankruptcy experts, that the government's intervention in the bankruptcies raised questions about the long-term effects of such intervention on credit markets, but that it was too early to determine what those effects might be. Although the Panel also discussed the legal justification for using the TARP to support the automotive industry, the Panel took no position on whether this use was authorized by EESA.

³⁷⁴ General Motors Company, *GM Withdraws Federal Loan Application* (Jan. 27, 2011) (online at www.gm.com/news-article.jsp?id=/content/Pages/news/us/en/2011/Jan/0127_federal_loan.html).

³⁷⁵ Congressional Oversight Panel, *September Oversight Report: The Use of TARP Funds in the Support and Reorganization of the Domestic Automotive Industry* (Sept. 9, 2009) (online at cop.senate.gov/documents/cop-090909-report.pdf).

At the time of the Panel's 2009 report, the prospects for a return of the \$85 billion invested in the automotive industry were not favorable. Projected losses on TARP investments in the auto industry at that time varied from Treasury's estimate that approximately \$23 billion of the initial loans made would be subject to "much lower recoveries" to an estimate of \$40 billion in losses from CBO.³⁷⁶ Although Treasury at times stated its definition of success was whether taxpayers saw a return of their money, at other times it defined success in terms of preserving jobs or preventing the disorganized bankruptcy of systemically significant institutions that could potentially destabilize all or a sector of the fragile economy. Treasury's inability to articulate a clear objective, the Panel noted, made it difficult to determine whether the program had been a success even by Treasury's own standards.

In March 2010, the Panel examined Treasury's use of TARP funds to rescue GMAC/Ally Financial.³⁷⁷ Although the Panel took no position on whether Treasury should have rescued GMAC/Ally Financial, it found that Treasury missed opportunities to increase accountability and better protect taxpayers' money. Treasury did not, for example, condition access to TARP money on the same kinds of sweeping changes that it required from GM and Chrysler: it did not wipe out GMAC/Ally Financial's equity holders; it did not require GMAC/Ally Financial to create a viable plan for returning to profitability; nor did it require a detailed, public explanation of how the company would use taxpayer funds to increase consumer lending. Treasury's explanations for the need to rescue GMAC/Ally Financial were also at times inconsistent, casting the decision sometimes as a part of the wider automotive industry rescue and at other times as a part of the stress tests, and therefore a part of the effort to backstop the nation's financial sector. If the rescue of GMAC/Ally Financial was necessitated by its inclusion in the stress tests, it was not clear why Treasury turned to the AIFP, a program intended to support the automotive sector, for financing instead of using the Capital Assistance Program (CAP), which was devised specifically to provide additional capital to those BHCs that did not pass the stress tests.

Whatever the reason for rescuing GMAC/Ally Financial, the report questioned Treasury's assertion that bankruptcy was not a viable option in 2008.³⁷⁸ The report concluded that, in connection with the Chrysler and GM bankruptcies, Treasury might have been able to orchestrate a strategic bankruptcy for GMAC/Ally Financial.³⁷⁹ This bankruptcy could have preserved GMAC/Ally Financial's automotive lending functions while winding down its other, less significant operations, dealing with the ongoing liabilities of the mortgage lending operations, and putting the company on more

³⁷⁶ *Id.* at 5.

³⁷⁷ Congressional Oversight Panel, *March Oversight Report: The Unique Treatment of GMAC Under the TARP* (Mar. 11, 2010) (online at cop.senate.gov/documents/cop-031110-report.pdf) (hereinafter "2010 March Oversight Report").

³⁷⁸ Ron Bloom, senior advisor to the Secretary of the Treasury, testified that the administration considered bankruptcy in April and May 2009. He did not state whether bankruptcy was considered before Treasury made the December 2008 investment. Congressional Oversight Panel, Testimony of Ron Bloom, senior advisor, U.S. Department of the Treasury, *Transcript: COP Hearing on GMAC Financial Services*, at 23–24 (Feb. 25, 2010) (online at cop.senate.gov/documents/transcript-022510-gmac.pdf).

³⁷⁹ 2010 March Oversight Report, *supra* note 377, at 5.

sound economic footing. The Panel also expressed concern that Treasury had not given due consideration to the possibility of merging GMAC/Ally Financial back into GM, a step which would have restored GM's financing operations to the model generally shared by other automotive manufacturers, thus strengthening GM and eliminating other money-losing operations.³⁸⁰ The Panel expressed no doubt that Treasury's actions to preserve GMAC/Ally Financial played a major role in supporting the domestic automotive industry.³⁸¹ These same actions, however, reinforced GMAC/Ally Financial's dominance in automotive floor plan financing, perhaps obstructing the growth of a more competitive lending market. The report also examined the great public expense incurred by this rescue, noting that the federal government had spent \$17.2 billion to bail out GMAC/Ally Financial and now owned 56.3 percent of the company. At the time, OMB estimated that \$6.3 billion or more may never be repaid.

The Panel also noted that Treasury's avowed hands-off approach to managing its sizeable stake in the company could have unintended consequences, such as creating a power vacuum that would allow smaller shareholders a disproportionate influence.³⁸² Because both GM and GMAC/Ally Financial were at the time majority-owned by Treasury and subject to its hands-off policy, the potential for a governance vacuum was amplified. This meant that the parties who wished to operate GMAC/Ally Financial in GM's interests had the potential to become proportionately more powerful, inasmuch as GM has extraordinary commercial influence over GMAC/Ally Financial, and there may not have been countervailing pressure from involved shareholders. The report repeated the suggestion made in the September 2009 report that Treasury consider placing the government's shares in a trust to help alleviate this concern. The Panel concluded, however, that although the rescue of GMAC/Ally Financial appeared to be one of the more baffling decisions made under the TARP, since the company itself posed no systemic risk, when viewed as a piece of either the automotive industry or the group of banks involved in the stress tests, Treasury's objectives become clearer.³⁸³

In its oversight report for January 2011, the Panel revisited Treasury's support of the domestic automotive industry as Treasury began the process of unwinding its stakes in GM, Chrysler, and GMAC/Ally Financial.³⁸⁴ Of those companies, GM is furthest along in the process of repaying taxpayers. It conducted an initial public offering (IPO) on November 18, 2010, and Treasury used the occasion to sell a portion of its GM holdings for \$13.5 billion. This sale represents a major recovery of taxpayer funds, but it is important to note that Treasury received a price of \$33.00 per share—well below the \$44.59 needed to be on track to recover fully taxpayers' money. Pricing the GM IPO below the break-even price likely had the effect of greatly reducing the likelihood that taxpayers will be fully repaid, as full repayment will not be possible unless the gov-

³⁸⁰ 2010 March Oversight Report, *supra* note 377, at 5.

³⁸¹ 2010 March Oversight Report, *supra* note 377, at 5.

³⁸² 2010 March Oversight Report, *supra* note 377, at 121.

³⁸³ 2010 March Oversight Report, *supra* note 377, at 122.

³⁸⁴ 2011 January Oversight Report, *supra* note 371, at 15–16.

ernment is able to sell its remaining shares at a far higher price. However, it is impossible to know if a longer-term investment horizon by the government (via an IPO at a later date) would have allowed Treasury to sell its shares at a more favorable price, closer to its breakeven cost basis. The Panel recognized that delaying the IPO would have exposed Treasury to the risk that the price that buyers were willing to pay for GM stock would fall. Moreover, such a delay would have run contrary to the government's stated objective of disposing of its shares "as soon as practicable."³⁸⁵

The report also discussed the status of Treasury's investments in Chrysler, Chrysler Financial, and GMAC/Ally Financial. The report noted that Treasury will likely require an IPO to redeem its investment in Chrysler. The need for an IPO presents a challenge since Treasury does not have a controlling stake in Chrysler and, even if it did, it is unlikely given Treasury's hands-off management approach that it would use this leverage. Meanwhile, it appears that GMAC/Ally Financial is moving closer to an IPO and Treasury has had significant leverage over the IPO's timing due to its preferred stock holdings. Regrettably, however, Treasury has been inconsistent in acknowledging this leverage. Treasury's reluctance to recognize its own influence may represent an effort to claim a coherent hands-off shareholder approach, despite the unique circumstances that apply to GMAC/Ally Financial.³⁸⁶ Finally, another source of concern explored in this report was Treasury's unwinding of its position in Chrysler Financial, in which taxpayer returns appear to have been sacrificed in favor of an accelerated exit, further compounded by apparently incomplete due diligence. Although Treasury's hands-off approach may have reassured market participants about the limited scope of government intervention, it may also have forced Treasury to leave unexplored options that would have benefited the public.

While the Panel had previously questioned the government's perception of its policy choices during various stages of the crisis, there is little doubt that in the absence of massive government assistance, GM, Chrysler, and GMAC/Ally Financial faced the prospect of bankruptcies and potential liquidation, given the apparent dearth of available financing from the private sector.³⁸⁷ The Panel noted that in the context of a fragile economy and the financial crisis (which severely restricted both corporate and consumer credit), the failure of these companies could have had significant near-term consequences in terms of job losses and the performance of the broader U.S. economy. Further, although the assets of GM and Chrysler (plants and equipment, employees, brand recognition) would have had value to other firms over the longer term, it was in the context of these adverse near-term consequences that both the Bush and Obama administrations provided assistance to the auto sector. As in its September 2009 report, the Panel took no position on the decision to support the auto industry. Despite the recent GM IPO and improving financials at the other companies, the Panel noted that there is still a long road ahead, particularly for

³⁸⁵ 2011 January Oversight Report, *supra* note 371, at 47.

³⁸⁶ 2011 January Oversight Report, *supra* note 371, at 5.

³⁸⁷ 2011 January Oversight Report, *supra* note 371, at 115.

GMAC/Ally Financial and Chrysler, before the final outcome of these programs can be determined.

C. Panel Recommendations and Updates

The Panel's recommendations in its three reports on the automotive industry and GMAC/Ally Financial focused on four key areas in need of improvement:

- Transparency on the part of Treasury and the companies' management;
- Accountability;
- Improved balance among Treasury's roles as shareholder in private enterprise and government policymaker; and
- Continuing oversight to ensure that the American people are not again called upon to rescue the automotive industry.

To date, only a handful of recommendations made by the Panel have been implemented and even those have been implemented only partially.

1. Transparency

The Panel consistently requested that Treasury and the automotive companies provide detailed information about Treasury's investments and the companies' management and strategic planning but has received only a partial response to these requests. In September 2009, the Panel recommended that Treasury ensure that the automotive companies' bylaws and policies provide for full disclosure of all dealings with significant shareholders, including the government, and that the two new companies, when filing their planned periodic reports with the U.S. Securities and Exchange Commission (SEC), ensure that these reports conform to the standards of disclosure required for SEC reporting companies. While GM and GMAC/Ally Financial have released such reports, Chrysler has reported only its consolidated financial statement and notes. In March 2010 and again in January 2011, the Panel also recommended that the administration enhance disclosure in the budget and financial statement for the TARP by reporting on the valuation assumptions for the individual companies. The Panel's recommendations in March 2010 focused on the specific lack of transparency with regard to the government's investment in GMAC/Ally Financial, encouraging Treasury to go to greater lengths to explain its approach to the treatment of legacy shareholders. Treasury has provided no such additional explanation. Finally, the Panel requested that Treasury provide a legal opinion justifying the use of TARP funds for the automotive industry rescue. In response, Treasury directed the Panel to certain materials associated with the automotive companies' bankruptcies. These materials did not provide a sufficiently robust analysis of Treasury's legal justification and so constitute, at most, only a partial response to the Panel's recommendation.

2. Accountability

In each of its three reports on the industry, the Panel called for Treasury to articulate clear goals and benchmarks by which progress could be measured. Treasury, however, has never articu-

lated a clear set of goals for these programs. Instead, it has articulated a number of goals at different times, many of which may ultimately be conflicting. For example, at a Panel hearing in June 2009, then-Panel Chair Elizabeth Warren asked Assistant Secretary Allison, “Can you explain in some general strokes, the strategic thinking on the part of your team in terms of what we are trying to accomplish with the auto industry?”³⁸⁸ Assistant Secretary Allison responded:

What we’re trying to do is to allow the automobile industry and encourage the automobile industry to restructure so that it is again a highly-competitive sector of our economy and can grow and create more jobs over time and that’s the reason why the Administration—actually, they were asked to take part in this. That’s the reason why they’ve decided it was necessary to do so. The outlook here is very important to the whole economy and I think that’s been the underlying reason why the Administration has acted in the way it has.³⁸⁹

In a later hearing on the automotive industry, senior Treasury advisor Ron Bloom defined success as primarily a question of return on investment: “the greater percentage of the money that we invested that we get back, the greater success.”³⁹⁰ These differing and potentially conflicting goals make it difficult to determine whether the TARP’s interventions in the auto industry should be judged to be successful. Instead, the articulation of multiple goals, without specification of their priority, allows Treasury to claim success if the program achieves any one of these goals.

The Panel also called on Treasury to provide a detailed plan for exiting its position in each company. In particular, in its March 2010 report, the Panel urged Treasury to require greater accountability on the part of GMAC/Ally Financial by insisting that the company produce a viable business plan showing a path toward profitability. Given that a GMAC/Ally Financial IPO, which is likely to occur later this year, would provide an opportunity for Treasury to sell its GMAC/Ally Financial holdings, Treasury should clearly outline its proposed strategy for divesting itself of some or all of its position as the IPO approaches. There remain, in addition, certain obstacles that Treasury must overcome before it can successfully and fully exit its position in all of these companies and, as discussed in the Panel’s January 2011 report, Treasury has yet to articulate a clear plan for addressing these challenges. The Panel also recommended that Treasury require that any entity receiving TARP funds be subject to more stringent criteria and due diligence to establish that it would become a profitable concern, and that any such entity be subject to use of funds disclosure requirements. Specifically, the Panel suggested that Treasury take

³⁸⁸ Congressional Oversight Panel, Testimony of Herbert M. Allison, Jr., assistant secretary for financial stability, U.S. Department of the Treasury, *Transcript: COP Hearing with Assistant Treasury Secretary Herb Allison*, at 23 (June 24, 2009) (online at cop.senate.gov/documents/transcript-062409-allison.pdf).

³⁸⁹ *Id.* at 24.

³⁹⁰ Congressional Oversight Panel, Testimony of Ron Bloom, senior advisor, U.S. Department of the Treasury, *Transcript: COP Field Hearing on the Auto Industry*, at 38 (July 27, 2009) (online at cop.senate.gov/documents/transcript-072709-detroithearing.pdf).

these steps retroactively with regard to its investment in GMAC/Ally Financial. Treasury has never acted to implement this recommendation.

3. Improved Balance among Treasury's Roles

While Treasury has insisted that it adheres to a hands-off policy in managing its TARP investments to assuage concerns about government intervention in private enterprise, the Panel warned against an unduly rigid policy that could jeopardize both taxpayers' investment and the longer-term goals of the TARP. In September 2009, the Panel recommended that Treasury provide more detail about its corporate governance policies, including how the government would deal with conflicts of interest between its role as an equity holder or creditor and as regulator. The Panel also suggested that Treasury establish policies prohibiting Treasury employees from accepting employment with the automotive companies for a period of at least one year following termination of their employment with Treasury. The Panel is not aware that Treasury has acted on any of these recommendations. The Panel also recommended that Treasury consider placing its holdings in a trust that could be managed by an independent trustee whose actions would not raise the same concerns that similar actions by Treasury might raise. There has not been any indication that Treasury seriously considered creating such a trust. In March 2010, the Panel recommended that Treasury consider affirmatively promoting a merger between GM and GMAC, a step that Treasury may have been unwilling to consider in light of its hands-off management policy. There has been no indication that Treasury has altered its stance on this issue.

While the Panel recommended in each of its reports that Treasury unwind its positions in the companies quickly, the Panel also cautioned against an exit that would be unduly detrimental to the value of the taxpayers' investment. Based on the steps it has taken thus far to sell portions of its holdings, it appears that Treasury has been mindful of this concern but, because of its avowed "hands-off" stance, may not have fully considered all options that would provide the best return.

4. Continued Oversight

In its last report on the industry in January 2011, the Panel recommended, in order to prevent the need for a future government rescue, that Congress commission independent researchers to periodically assess the long-term fallout from the collapse of the auto industry and the subsequent government intervention, including the risk to taxpayers stemming from future disruptions to the auto market from economic, credit market or other potential threats.

5. Updates

Since the Panel's most recent report on the industry in January 2011, Treasury announced on March 1, 2011, that it was planning a public offering of its trust preferred securities holdings in GMAC/

Ally Financial.³⁹¹ The offering is not to include any of Treasury's \$5.9 billion of mandatory convertible preferred stock in Ally nor does it include any of Treasury's current holdings of 74 percent of the shares of Ally's common stock. On March 2, 2011, Treasury announced the pricing of the offering, stating that the securities would be offered at par, for a total of \$2.7 billion.³⁹² This offering closed on March 7, 2011.

Also on March 1, 2011, GM released its annual report, showing the company made meaningful gains in 2010, posting a profit of \$4.7 billion for the year.³⁹³

D. Lessons Learned

It is clear that GM and Chrysler were in dire straits in late 2008. Although it is difficult to say whether government intervention was the best option, the TARP funds the companies received provided them with at least some short-term stability. Whether the programs aimed at helping the automotive industry can be called "successful" will be difficult to determine since Treasury has never clearly stated its goals in assisting the companies. To the extent that success is defined as a return of taxpayer money, it remains somewhat unlikely that all TARP funds invested will be returned. Although the outlook is currently much better than it was when the Panel released its first report on the industry in late 2009, certain factors, including the loss locked in by the GM IPO price, must be overcome before taxpayers see a complete return of the money invested.

Even if TARP funds are fully repaid, the government's intervention in this industry may have lasting effects. In an effort to reduce the impact of its intervention in private industry, Treasury has consistently stated that it is acting as a "reluctant shareholder" and has committed to maintaining a hands-off approach to management of the companies. This position, however, may have served principally to highlight the difficult role Treasury occupied as shareholder, creditor, and regulator of the companies. Furthermore, Treasury's unwillingness to influence management even in its role as a large shareholder may ultimately have put the government's investment at greater risk than was necessary. Finally, it is too soon to say what the TARP's ultimate impact on the automotive industry, and these companies in particular, will be. The domestic automotive industry was trending downward before the financial crisis hit and it is unclear whether the TARP will ultimately reverse that trend in the long term.

Even if these companies were to become extremely successful in the coming years, paying back the funds invested by Treasury and creating jobs and revenue for the American people, there may be lingering and potentially harmful effects from the programs. The Panel has frequently cited the potential moral hazard if large com-

³⁹¹ U.S. Department of the Treasury, *Treasury Announces Public Offering of Ally Financial, Inc., TruPS* (Mar. 1, 2011) (online at www.treasury.gov/press-center/press-releases/Pages/tg1081.aspx).

³⁹² U.S. Department of the Treasury, *Treasury Announces Pricing of \$2.7 billion of Ally TruPS* (Mar. 2, 2011) (online at www.treasury.gov/press-center/press-releases/Pages/tg1086.aspx).

³⁹³ General Motors Company, *Form 10-K for the Fiscal Year Ended December 31, 2010*, at 142 (Mar. 1, 2011) (online at www.sec.gov/Archives/edgar/data/1467858/000119312511051462/d10k.htm).

panies, and the markets in which they operate, believe that they will be rescued by the government if they falter. Although the TARP seemed originally to target only those companies whose financial operations made them a potential risk to systemic stability, the use of the TARP to support the automotive industry suggests that a company may be considered “systemically significant” merely because it employs a certain number of workers. Whether and to what extent these issues become manifest can only be determined as future events unfold.

VI. AIG

The magnitude of AIG’s operations and the company’s far-flung linkages across the global financial system led to multiple rounds of exceptional assistance from the government. Only Fannie Mae and Freddie Mac, institutions in government conservatorship, received more assistance during this period.³⁹⁴ Accordingly, AIG’s unique position in the financial system and the significant investment of taxpayer dollars required to avert the company’s collapse warranted particular scrutiny from the Panel relative to other recipients of TARP assistance. In addition to the Panel’s June 2010 report, which focused solely on AIG, the Panel also held a hearing to explore the rescue of AIG, its impact on the markets, and the outlook for the government’s significant investment in the company.³⁹⁵

A. Background

At its peak, AIG was one of the largest and most successful companies in the world. With over \$1 trillion in assets and a AAA credit rating, AIG generated over \$100 billion in annual revenues, serving 76 million customers in more than 130 countries. However, the scale of and linkages across AIG’s operations posed unique managerial and regulatory challenges. Accordingly, a poor risk management structure, combined with a lack of regulatory oversight, led AIG to accumulate staggering amounts of risk, especially in its Financial Products subsidiary, AIG Financial Products (AIGFP).³⁹⁶ Among its other operations, AIGFP sold credit default swaps to investors, instruments that would pay off if certain financial securities, particularly those made up of subprime mortgages, defaulted.

³⁹⁴ Unlike AIG, Fannie Mae and Freddie Mac were not TARP participants. See Section II.B for further discussion of the combined federal efforts.

³⁹⁵ See Congressional Oversight Panel, *June Oversight Report: The AIG Rescue, Its Impact on Markets, and the Government’s Exit Strategy* (June 10, 2010) (online at cop.senate.gov/documents/cop-061010-report.pdf) (hereinafter “2010 June Oversight Report”); Congressional Oversight Panel, *Transcript: COP Hearing on TARP and Other Assistance to AIG* (May 26, 2010) (online at cop.senate.gov/documents/transcript-052610-aig.pdf).

³⁹⁶ AIG’s product and regional diversity was predicated on maintaining an exceptional credit rating, which helped bolster its insurance operations and allowed the company to use its low cost of funds as leverage to boost non-insurance business lines, including aircraft leasing and consumer finance. AIG’s longtime AAA credit rating also increased its attractiveness as a counterparty in the capital markets, helping the company further expand its product base in the United States and around the world. The product and geographic breadth of AIG’s operations, however, were not matched by a coherent regulatory structure to oversee its business. The Office of Thrift Supervision (OTS), a federal agency that regulates the U.S. thrift industry, was specifically charged with overseeing the parent and it failed to do so. Whether the OTS or a more coherent regulatory framework could have prevented the build-up in risks that the company’s own management team failed to recognize or understand is unlikely, but this does not obscure the point that AIG’s holding company regulator had the power and the duty to spot and require the company to curtail its risk. 2010 June Oversight Report, *supra* note 395, at 21–24.

As long as the mortgage market remained sound and AIG's credit rating remained stellar, these instruments did not threaten the company's financial stability.

The financial crisis, however, fundamentally changed this equation. As subprime mortgages began to default, the complex securities based on those loans threatened to topple both AIG and other long-established institutions. During the summer of 2008, AIG faced increasing demands from its credit default swap customers for cash security—known as collateral calls—totaling tens of billions of dollars. These costs put AIG's credit rating under pressure, which in turn led to even greater collateral calls, creating even greater pressure on AIG's credit.

The trigger and primary cause of AIG's collapse came from inside AIGFP. This business unit was responsible for unrealized valuation losses and collateral calls that ultimately engulfed AIG. While the risk overhang in this business would have likely been sufficient to bring down the firm on its own, AIG's securities lending operations,³⁹⁷ which involved securities pooled from AIG's domestic life insurance subsidiaries, contributed to a “double death spiral.”³⁹⁸ The problems in AIGFP exacerbated the problems in securities lending, and vice versa, as collateral demands from both sets of counterparties quickly imperiled the company's liquidity position as it struggled to meet its cash demands. Meanwhile, the company's insurance operations were incapable of generating the requisite cash either through normal operations or asset sales to fund the parent company. The threats within both of these businesses emanated from outsized exposure to the deteriorating mortgage markets, owing to grossly inadequate valuation and risk controls, including insufficient capital buffers as losses and collateral calls mounted.

By early September 2008 AIG had reached a crisis point.³⁹⁹ AIG sought more capital in a desperate attempt to avoid bankruptcy. When the company could not arrange its own funding, then-FRBNY President Timothy Geithner told AIG that the government would attempt to orchestrate a privately funded solution in coordi-

³⁹⁷ Securities lending normally provides a low-risk mechanism for insurance companies and other long-term investors in the financial markets to earn modest sums of money on assets that would otherwise be sitting idle. However, rather than investing the cash collateral from borrowers in low-risk short-term securities in order to generate a modest yield, AIG invested in more speculative securities tied to the RMBS market. Consequently, these investments posed a duration mismatch (securities lending counterparties could demand a return of their collateral with very little notice) that was exacerbated by valuation losses and illiquidity in the mortgage markets that impaired AIG's ability to return cash to its securities lending counterparties. 2010 June Oversight Report, *supra* note 395, at 7, 271–272.

³⁹⁸ Assessment of Marshall Huebner of Davis Polk & Wardwell (a law firm that represented FRBNY). FRBNY and Treasury briefing with the Panel and Panel staff (Apr. 12, 2010).

³⁹⁹ These problems did not arrive out of the blue in mid-September. AIGFP had recognized \$11.1 billion in unrealized losses on CDS contracts as early as the fourth quarter of 2007. This was followed by an effort to raise capital on May 21, 2008, and an announcement on June 15, 2008 that CEO Martin Sullivan was being replaced. A further \$13.5 billion in unrealized losses on RMBS and other structured securities investments was recognized in late June, and on July 29, the new CEO, Robert Willumstad, spoke with then-FRBNY President Timothy Geithner about the possibility of getting access to the Federal Reserve's discount window, an idea which was dismissed by Mr. Geithner on the premise that this would only induce further panic among AIG's creditors. Various efforts to raise capital in other ways ensued. In late August, AIG contracted with JPMorgan Chase to help develop alternatives as the market and the company's condition worsened rapidly. A detailed timeline of the events leading up to the collapse of AIG is available in Annex II of COP's June 2010 AIG report. 2010 June Oversight Report, *supra* note 395, at 58, 238–250.

nation with JPMorgan Chase and Goldman Sachs. However, this approach failed to materialize, forcing the government's hand.

1. Government Assistance

In the wake of the collapse of Lehman Brothers, FRBNY abandoned its effort at a private solution, announcing an \$85.0 billion taxpayer-backed Revolving Credit Facility (RCF) for AIG on September 16, 2008.⁴⁰⁰ These funds would later be supplemented by \$49.1 billion from Treasury under the TARP, as well as additional funds from FRBNY, aggregating to total assistance of \$133.3 billion. At the height of the government support, AIG and its affiliates received \$89.5 billion in loans from the Federal Reserve, \$49.1 billion from Treasury, and \$43.8 billion from the Federal Reserve to capitalize two SPVs for AIG asset purchases (i.e., Maiden Lane II and III), totaling \$182.4 billion.⁴⁰¹ As discussed below, FRBNY underwrote the initial two rounds of government assistance (September and November 2008) before Treasury provided TARP funds for subsequent efforts by the government (November 2008 and April 2009).

The rescue of AIG was initially led by FRBNY, acting on behalf of FRB and in close consultation with Treasury. While FRB had no role in supervising or regulating AIG and was also not lending to the company, it was the only governmental entity at the time with the legal authority to provide liquidity to the financial system in emergency and exigent circumstances.⁴⁰² Treasury had little if any authority to provide funds to AIG at the time given that EESA was not enacted until October 3, 2008.⁴⁰³ Similarly, other AIG regulatory bodies, such as state insurance regulators and the OTS, pos-

⁴⁰⁰ Revolving Credit Facility (RCF) is a credit facility that allows the company to draw and repay loans to meet its funding requirements. As a part of a broader restructuring of the Government's assistance to AIG, on November 10, 2008, the RCF ceiling was lowered to \$60.0 billion and the TARP made its initial investment of \$40.0 billion in preferred stock. Fed Regulatory Reform: AIG, Maiden Lane II and III, *supra* note 40.

⁴⁰¹ The announced assistance to AIG exceeded the cost of the EU's sovereign bailouts of Greece (€110 billion) and Ireland (€85 billion). International Monetary Fund, *Europe and IMF Agree €110 Billion Financing Plan With Greece* (May 2, 2010) (online at www.imf.org/external/pubs/ft/survey/so/2010/car050210a.htm); International Monetary Fund, *IMF Reaches Staff-level Agreement with Ireland on €22.5 Billion Extended Fund Facility Arrangement* (Nov. 28, 2010) (online at www.imf.org/external/np/sec/pr/2010/pr10462.htm). See also 2010 August Oversight Report, *supra* note 213.

⁴⁰² The Federal Reserve's ability to act was dependent upon the Board's authorization to invoke Section 13(3) of the Federal Reserve Act, which was provided on September 16, 2008. For further discussion of the legal options available to AIG in September 2008, see 2010 June Oversight Report, *supra* note 395, at 79–83.

⁴⁰³ At the time FRBNY provided AIG with the \$85 billion RCF, Treasury only provided a very short statement, with then-Secretary Paulson noting that “[t]hese are challenging times for our financial markets. We are working closely with the Federal Reserve, the SEC and other regulators to enhance the stability and orderliness of our financial markets and minimize the disruption to our economy. I support the steps taken by the Federal Reserve tonight to assist AIG in continuing to meet its obligations, mitigate broader disruptions and at the same time protect the taxpayers.” U.S. Department of the Treasury, *Statement by Secretary Henry M. Paulson, Jr., on Federal Reserve Actions Surrounding AIG* (Sept. 16, 2008) (online at www.treasury.gov/press-center/press-releases/Pages/hp1143.aspx). In a subsequent letter to Timothy F. Geithner, then-president and CEO of FRBNY, Secretary Paulson stressed that “the situation at AIG presented a substantial and systemic threat” to our financial markets, and that the government's decision to assist AIG “was necessary to prevent the substantial disruption to financial markets and the economy that could well have occurred from a disorderly wind-down of AIG.” Letter from Henry M. Paulson, Jr., secretary, U.S. Department of the Treasury, to Timothy F. Geithner, president and chief executive officer, Federal Reserve Bank of New York (Oct. 8, 2008) (online at www.federalreserve.gov/monetarypolicy/files/letter_aig.pdf).

sessed oversight authority but lacked any legal authority to step in and provide funds to the parent company.⁴⁰⁴

Through internal discussions and a dialogue with AIG and its state insurance regulators, FRB and FRBNY, with input from Treasury, ultimately chose to provide AIG with assistance after identifying the systemic risks associated with the company and contemplating the consequences of an AIG bankruptcy or partial rescue.⁴⁰⁵ FRB determined that, in the then-existing environment, “a disorderly failure of AIG could add to already significant levels of financial market fragility and lead to substantially higher borrowing costs, reduced household wealth, and materially weaker economic performance.”⁴⁰⁶

Secretary Geithner has stated that “[t]he decision to rescue AIG was exceptionally difficult and enormously consequential.”⁴⁰⁷ Chairman Bernanke noted that the Federal Reserve’s decision-making was driven by the “prevailing market conditions and the size and composition of AIG’s obligations,”⁴⁰⁸ as well as “AIG’s central role in a number of markets other firms use to manage risks, and the size and composition of AIG’s balance sheet.”⁴⁰⁹ The Federal Reserve’s actions, with the support of Treasury, were also informed by its judgment that an AIG collapse would have been much more severe than that of Lehman Brothers because of its global operations, substantial and varied retail and institutional customer base, and the various types of financial services it provided.⁴¹⁰

a. Initial Government Assistance (Non-TARP Initiatives)

As noted, on September 16, 2008, the FRB, with the full support of Treasury, announced that, using its authority under Section 13(3) of the Federal Reserve Act,⁴¹¹ it had authorized FRBNY to

⁴⁰⁴ It is similarly worth noting that OTS, although it was AIG’s primary regulatory, approached AIG from a bottom-up perspective, focused primarily on ensuring that no harm would be done to AIG’s relatively small thrift institution, as opposed to taking a top-down approach that reviewed the overall safety and soundness of the holding company. Given that AIG’s thrift represented well under 1 percent of the holding company’s assets, this approach seems misguided at best and raises questions about whether this is the most effective way to regulate complex companies and monitor their systemic risks. 2010 June Oversight Report, *supra* note 395, at 23.

⁴⁰⁵ FRBNY and Treasury briefing with Panel and Panel staff (Apr. 12, 2010).

⁴⁰⁶ Board of Governors of the Federal Reserve System, *Press Release* (Sept. 16, 2008) (online at www.federalreserve.gov/newsevents/press/other/20080916a.htm) (hereinafter “Fed Press Release on AIG Assistance”).

⁴⁰⁷ House Committee on Oversight and Government Reform, Written Testimony of Timothy F. Geithner, secretary, U.S. Department of the Treasury, *The Federal Bailout of AIG*, at 3 (Jan. 27, 2010) (online at [oversight.house.gov/images/stories/Hearings/Committee on Oversight/TESTIMONY-Geithner.pdf](http://oversight.house.gov/images/stories/Hearings/Committee%20on%20Oversight/TESTIMONY-Geithner.pdf)) (hereinafter “Geithner Written Testimony before House Committee on Oversight”).

⁴⁰⁸ Senate Committee on Banking, Housing, and Urban Affairs, Written Testimony of Ben S. Bernanke, chairman, Board of Governors of the Federal Reserve System, *Turmoil in U.S. Credit Markets: Recent Actions Regarding Government Sponsored Entities, Investment Banks and Other Financial Institutions*, at 2 (Sept. 23, 2008) (online at banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=bbba8289-b8fa-46a2-a542-b65065b623a1).

⁴⁰⁹ Ben S. Bernanke, chairman, Board of Governors of the Federal Reserve System, Remarks at the National Association for Business Economics, 50th Annual Meeting, Washington, DC, *Current Economic and Financial Conditions* (Oct. 7, 2008) (online at www.federalreserve.gov/newsevents/speech/bernanke20081007a.htm).

⁴¹⁰ Ben S. Bernanke, chairman, Board of Governors of the Federal Reserve System, Speech at the Morehouse College, Atlanta, GA, *Four Questions About the Financial Crisis* (Apr. 14, 2009) (online at www.federalreserve.gov/newsevents/speech/bernanke20090414a.htm).

⁴¹¹ The Federal Reserve Act, enacted December 23, 1919, created the Federal Reserve System. Section 13(3) of the Act gives the Board of Governors of the Federal Reserve the power to authorize any regional Federal Reserve bank to provide funding in unusual or exigent cir-

establish an \$85.0 billion RCF for AIG.⁴¹² This facility would be secured by AIG's assets and "assist AIG in meeting its obligations as they come due and facilitate a process under which AIG will sell certain of its businesses in an orderly manner, with the least possible disruption to the overall economy."⁴¹³ In exchange for the provision of the credit facility by the federal government, AIG provided Treasury with preferred shares and warrants that, if exercised, would give the government a 79.9 percent ownership stake in AIG.⁴¹⁴

By September 30, 2008, just 14 days after FRB approved the \$85.0 billion RCF, AIG had already drawn down approximately \$61.3 billion of that money.⁴¹⁵ It became apparent that the facility would be inadequate to meet all of AIG's obligations.⁴¹⁶ FRB and FRBNY worried about further ratings downgrades, which would—among other adverse effects—trigger more collateral calls on AIGFP.

On October 6, 2008, FRB approved an additional Securities Borrowing Facility to allow FRBNY to lend up to \$37.8 billion to AIG.⁴¹⁷ The lending would occur on an overnight basis, with FRBNY borrowing investment-grade fixed income securities from AIG's life insurance subsidiaries in return for cash collateral.⁴¹⁸ The facility allowed AIG to replenish liquidity to its securities lending program—by extending its then-outstanding lending obligations where those obligations were not rolled over or replaced by transactions with other private market participants—while giving FRBNY possession and control of the securities.

b. Additional Government Assistance (Treasury Action)

As discussed above, Treasury's participation in the initial rescue of AIG was limited to an advisory role. It is clear, however, that all actions taken by FRBNY were in close consultation with Treas-

cumstances, provided that evidence is obtained that a participant is unable to secure adequate credit accommodations from other banking institutions. Board of Governors of the Federal Reserve System, *Federal Reserve Act: Section 13. Powers of Federal Reserve Banks* (online at www.federalreserve.gov/aboutthefed/section13.htm) (accessed Mar. 11, 2011).

⁴¹² Fed Press Release on AIG Assistance, *supra* note 406. See also Henry M. Paulson, Jr., *On the Brink* (2010).

⁴¹³ Board of Governors of the Federal Reserve System, *Report Pursuant to Section 129 of the Emergency Economic Stabilization Act of 2008: Securities Borrowing Facility for American International Group*, at 2 (Oct. 14, 2008) (online at www.federalreserve.gov/monetarypolicy/files/129aigsecborrowfacility.pdf) (hereinafter "Fed Report Pursuant to Section 129 of the EESA").

⁴¹⁴ *Id.* at 2.

⁴¹⁵ AIG used these funds for the following: \$35.3 billion to cover loans to AIGFP for collateral postings, Guaranteed Investment Agreements, and other maturities; \$13.3 billion in capital contributions for insurance subsidiaries; \$3.1 billion to repay securities lending obligations; \$2.7 billion for AIG funding commercial paper maturities; \$1.5 billion for intercompany loan repayment; \$1.0 billion each in contributions for AIG Consumer Finance Group's subsidiaries and debt repayments; and \$2.7 billion in additional borrowing. Including paid in kind interest and fees on the amount borrowed, AIG's total balance outstanding on the facility was \$62.96 billion at the end of September 2008. American International Group, Inc., *Form 10-Q for the Quarterly Period Ended September 30, 2008*, at 52 (Nov. 10, 2008) (online at www.sec.gov/Archives/edgar/data/5272/000095012308014821/y72212e10vq.htm).

⁴¹⁶ Fed Report Pursuant to Section 129 of the EESA, *supra* note 413, at 2.

⁴¹⁷ Fed Report Pursuant to Section 129 of the EESA, *supra* note 413, at 2. The Federal Reserve Board publicly announced the Securities Borrowing Facility on October 8, 2008, the day that FRBNY established it. See Board of Governors of the Federal Reserve System, *Press Release* (Oct. 8, 2008) (online at www.federalreserve.gov/newsevents/press/other/20081008a.htm).

⁴¹⁸ These securities were previously lent by AIG's insurance subsidiaries to third parties. The maximum amount of credit that FRBNY could extend at any one time was \$37.8 billion. The Board made this authorization under Section 13(3) of the Federal Reserve Act. Fed Regulatory Reform: AIG, Maiden Lane II and III, *supra* note 40.

ury. After passage of EESA in October 2008, Treasury took on a greater role in the AIG rescue as the government expanded and restructured its aid to the company. Additional assistance was necessitated by an ongoing decline in asset values and AIG's mounting debt burden, both of which raised concern with credit rating agencies.

The credit rating agencies advised AIG that the company's upcoming November 10 report of third quarter earnings results—which would reveal a loss of \$24.5 billion⁴¹⁹—would likely trigger a ratings downgrade in the absence of a “parallel announcement of solutions to its liquidity problems.”⁴²⁰ AIG was having difficulty selling assets to pay down debt from the RCF and meet anticipated liquidity needs, particularly in light of continuing collateral calls under its credit default swap contracts.⁴²¹ Consequently, in the days leading up to AIG's earnings announcement, the Federal Reserve and Treasury hurried to put together additional financial assistance from the federal government that would address AIG's growing debt burden.

This resulted in the November 10, 2008 announcement by FRBNY and Treasury of a comprehensive multi-pronged plan to address AIG's liquidity issues, create a “more durable capital structure,” and provide AIG with more time and increased flexibility to sell assets and repay the government.⁴²² Significantly, Treasury's TARP equity facilities allowed AIG to access capital without drawing on credit lines, avoiding an increase in the company's outstanding debt (and thus further pressure on its credit ratings).⁴²³ As Secretary Geithner later stated, “[a]voiding any downgrade of AIG's credit rating was absolutely essential to sustaining the firm's viability and protecting the taxpayers' investment.”⁴²⁴

As part of the announcement, Treasury said it planned to use \$40 billion of TARP money to purchase newly issued AIG perpetual preferred shares and warrants to purchase AIG common stock.⁴²⁵ This initiative was known as the Systemically Significant Failing Institutions program (SSFI), and AIG was its only beneficiary. At the same time, FRBNY reduced AIG's line of credit under the RCF

⁴¹⁹Of which \$19 billion was due to the securities lending program and AIGFP's CDS exposure. Board of Governors of the Federal Reserve System, *Report Pursuant to Section 129 of the Emergency Economic Stabilization Act of 2008: Restructuring of the Government's Financial Support to the American International Group, Inc. on November 10, 2008*, at 4 (Nov. 10, 2008) (online at federalreserve.gov/monetarypolicy/files/129aigrestructure.pdf).

⁴²⁰House Committee on Oversight and Government Reform, Written Testimony of Thomas C. Baxter, executive vice president and general counsel, Federal Reserve Bank of New York, *The Federal Bailout of AIG*, at 8–9 (Jan. 27, 2010) (online at oversight.house.gov/images/stories/Hearings/pdfs/20100127baxter.pdf); FRBNY and Treasury briefing with Panel and Panel staff (Apr. 12, 2010).

⁴²¹Congressional Oversight Panel, Joint Written Testimony of Thomas C. Baxter, Jr., general counsel and executive vice president of the legal group, and Sarah Dahlgren, executive vice president of special investments management and AIG monitoring, Federal Reserve Bank of New York, *COP Hearing on TARP and Other Assistance to AIG*, at 9 (May 26, 2010) (online at cop.senate.gov/documents/testimony-052610-baxter.pdf).

⁴²²Board of Governors of the Federal Reserve System, *Federal Reserve Board and Treasury Department Announce Restructuring of Financial Support to AIG* (Nov. 10, 2008) (online at www.federalreserve.gov/newsevents/press/other/20081110a.htm).

⁴²³FRBNY and Treasury briefing with Panel and Panel staff (Apr. 12, 2010).

⁴²⁴Geithner Written Testimony before House Committee on Oversight, *supra* note 407, at 8.

⁴²⁵The perpetual preferred shares were also known as the Series D Preferred Stock Purchase Agreement. American International Group, Inc., *U.S. Treasury, Federal Reserve and AIG Establish Comprehensive Solution for AIG*, at 1 (Nov. 10, 2008) (online at media.corporate-ir.net/media_files/irol/76/76115/reports/Restructuring10Nov08LTR.PDF) (hereinafter “U.S. Treasury & Federal Reserve Craft Solution for AIG”).

to \$60 billion from \$85 billion. FRBNY also announced that it was restructuring the facility by extending the loan from two to five years and lowering the interest rate and fees charged.⁴²⁶

Also on that day, Treasury and FRB announced a major initiative to increase and restructure federal assistance to AIG; FRBNY would be authorized to create two SPVs—Maiden Lane II and Maiden Lane III—to purchase troubled assets from AIG and its subsidiaries. Maiden Lane II was designed to address AIG's liquidity problems by purchasing RMBS assets from its securities lending collateral portfolio.⁴²⁷ Maiden Lane III was authorized to provide up to \$30.0 billion (\$24.3 billion from FRBNY and \$5.0 billion from AIG) to purchase the collateralized debt obligations (held by the firm's counterparties) underlying AIG's credit swap contracts.⁴²⁸

Although Maiden Lane II, Maiden Lane III, and Treasury's initial TARP capital infusion helped relieve AIG's financial pressures, asset valuations continued to decline, and AIG's losses increased through the end of 2008.⁴²⁹ These losses raised the prospect of another round of rating agency downgrades and collateral calls that would require further cash postings from AIG. In response, the Federal Reserve and Treasury announced on March 2, 2009, that they would again restructure their existing aid to AIG and provide additional assistance in order to stabilize AIG and protect financial markets and the existing investment.⁴³⁰

Under the March 2009 restructuring, Treasury substantially increased its involvement in AIG, with the goal of reducing AIG's leverage, or debt load.⁴³¹ Treasury announced a new five-year standby \$29.8 billion TARP preferred stock facility, which would allow AIG to make draw-downs as needed.⁴³² Treasury also exchanged its November 2008 cumulative preferred stock interest for non-cumulative preferred stock, which more closely resembles common

⁴²⁶ See Fed Regulatory Reform: AIG, Maiden Lane II and III, *supra* note 40.

⁴²⁷ Initially \$22.5 billion was authorized, of which \$19.5 billion was lent in order to purchase \$39.3 billion (at par value) of RMBS at the then-current market price of \$20.8 billion. See 2010 June Oversight Report, *supra* note 395, at 87–88; Board of Governors of the Federal Reserve System, *Monthly Report on Credit and Liquidity Programs and the Balance Sheet*, at 22 (Jan. 2011) (online at www.federalreserve.gov/monetarypolicy/files/monthlyclbsreport201101.pdf) (hereinafter "Fed Monthly Report on Credit, Liquidity Programs, and Balance Sheet").

⁴²⁸ See 2010 June Oversight Report, *supra* note 395, at 91; Fed Monthly Report on Credit, Liquidity Programs, and Balance Sheet, *supra* note 427, at 23.

⁴²⁹ The company reported a net loss of \$61.7 billion for the fourth quarter of 2008 on March 2, 2009, capping off a year in which AIG incurred approximately \$99 billion in total net losses. 2010 June Oversight Report, *supra* note 395, at 94.

⁴³⁰ See U.S. Department of the Treasury, *U.S. Treasury and Federal Reserve Board Announce Participation in AIG Restructuring Plan* (Mar. 2, 2009) (online at www.treasury.gov/press-center/press-releases/Pages/tg44.aspx). See also House Committee on Financial Services, Written Testimony of William C. Dudley, president and chief executive officer, Federal Reserve Bank of New York, *Oversight of the Federal Government's Intervention at American International Group*, at 5 (Mar. 24, 2009) (online at www.house.gov/apps/list/hearing/financialsvcs_dem/hr03240923.shtml).

⁴³¹ FRBNY also took several actions at this time with respect to the terms and structure of the RCF. First, it announced the creation of SPVs for American International Assurance Company, Limited (AIA) and American Life Insurance Company (ALICO), two of AIG's foreign insurance company subsidiaries, through which AIG would contribute the equity of AIA and ALICO in exchange for preferred and common interests in the SPVs. FRBNY received preferred interests of \$16 billion in the AIA SPV and \$9 billion in the ALICO SPV. AIG would then transfer the preferred interests in the SPVs to FRBNY in exchange for a \$25 billion reduction in the outstanding balance of the RCF, to \$35 billion. 2010 June Oversight Report, *supra* note 395, at 95, 97.

⁴³² The total amount of credit made available under the second TARP intervention was \$30.0 billion, which included \$165 million dedicated for retention bonuses of AIGFP employees. See 2010 June Oversight Report, *supra* note 395, at 95; Treasury Transactions Report, *supra* note 36.

stock and is, therefore, viewed more favorably as a source of funding by the credit rating agencies.⁴³³

These March 2009 announcements represented the final round of government support prior to the publication of the Panel's June 2010 report on AIG.

B. Summary of COP Report and Findings⁴³⁴

1. AIG Changed a Fundamental Market Relationship

By providing a complete bailout that called for no shared sacrifice among AIG and its creditors, FRBNY and Treasury fundamentally changed the rules of America's financial marketplace.

U.S. policy has long drawn a distinction between two different types of investments. The first type is "safe" products, such as checking accounts, which are highly regulated and are intended to be accessible and relatively risk free to even unsophisticated investors. Banks that offer checking accounts must accept a substantial degree of regulatory scrutiny, offer standardized features, and pay for FDIC insurance on their deposits. In return, the bank and its customers benefit from an explicit government guarantee: within certain limitations, no checking account in the United States will be allowed to lose even a penny of value.

By contrast, "risky" products, which are more loosely regulated, are aimed at more sophisticated players. These products often offer much higher profit margins for banks and much higher potential returns to investors, but they have never benefited from any government guarantee.

Before the AIG bailout, the derivatives market appeared to fall cleanly in the second category. Yet by bailing out AIG and its counterparties, the federal government signaled that the entire derivatives market—which had been explicitly and completely de-regulated by Congress through the Commodities Futures Modernization Act⁴³⁵—would now benefit from the same government safety net provided to fully regulated financial products. In essence, the government distorted the marketplace by transforming highly risky derivative bets into fully guaranteed transactions, with the American taxpayer standing as guarantor.

The Panel believes that the moral hazard problem unleashed by making whole AIG's counterparties in unregulated, unguaranteed transactions undermined the credibility of specific efforts at addressing the financial crisis that followed, including the entirety of the TARP, as well as America's system of financial regulation.

⁴³³Non-cumulative preferred stock is more like common stock largely because its dividends are non-cumulative, which means missed dividend payments do not accumulate for later payment. At the time, the \$1.6 billion in dividends AIG did not pay were capitalized and added as an obligation to be repaid prior to the company redeeming the newly issued Series E preferred stock. U.S. Treasury & Federal Reserve Craft Solution for AIG, *supra* note 425, at 1; Treasury Transactions Report, *supra* note 36.

⁴³⁴For a more complete discussion of the Panel's findings, see Section K and the conclusions of the Panel's June 2010 oversight report. 2010 June Oversight Report, *supra* note 395, at 230–235.

⁴³⁵The Commodities Futures Modernization Act was passed by Congress and signed into law by President Bill Clinton in December 2000. For a further discussion of AIG's regulatory scheme, see 2010 June Oversight Report, *supra* note 395, at 19–24.

2. The Powerful Role of Credit Rating Agencies

Considerations about credit rating agencies were central to FRBNY's, and later Treasury's, decision to assist AIG, and shaped many of the decisions that had to be made during the course of the rescue.⁴³⁶ Indeed, it is no exaggeration to say that concerns about rating downgrades drove government policy in regard to AIG.

As the market's most widely followed judges of financial soundness, credit rating agencies wield immense power, whether they consciously use it or not. In this case, government decision makers felt compelled to follow a particular course of action out of a fear of what credit rating agencies might do if they acted otherwise. The fact that this small group of private firms was able to command such deference from the federal government raises questions about their role within the marketplace and how effectively and accountably they have wielded their power.⁴³⁷

3. The Options Available to the Government⁴³⁸

FRBNY and Treasury justify AIG's extraordinary bailout by saying that they faced a "binary choice" between allowing AIG to fail, which would have resulted in chaos, or rescuing the entire institution, including all of its business partners.⁴³⁹ The Panel was skeptical of this reasoning. The evidence suggested that government had more than two options at its disposal, and that some of the alternatives would not have involved payment in full of the counterparties and other AIG creditors.

In interviews and meetings with participants on all sides in these events, the Panel identified a key decision point: the period between Sunday afternoon, September 14, 2008, and Tuesday morning, September 16, 2008. This was the period during which FRBNY sought to encourage a private effort to lend sufficient funds to AIG to address its liquidity crisis, while at the same time trying to determine what the consequences would be of the bankruptcy of AIG's holding company.

The Panel is concerned that the government put the effort to organize a private AIG rescue in the hands of only two banks—banks with severe conflicts of interest given that they would have been among the largest beneficiaries of a taxpayer bailout.⁴⁴⁰ By failing to bring in other players, the government neglected to use all of its negotiating leverage. There is no doubt that a private rescue would have been difficult, perhaps impossible, to arrange, but the Panel concluded that if the effort had succeeded, the impact on market confidence would have been extraordinary, particularly for a solution that avoided putting taxpayer dollars at risk.

⁴³⁶ See 2010 June Oversight Report, *supra* note 395, at 52–53, 150, and 230–231.

⁴³⁷ Credit rating agencies are private companies subject to the appropriate registration and approval of the SEC as nationally recognized statistical rating organizations (NRSROs). A complete list of NRSROs—including Moody's Investor Services, Standard & Poor's Ratings Services, and Fitch—can be found on the SEC's website. See U.S. Securities and Exchange Commission, *Commission Orders Granting NRSRO Registration* (online at www.sec.gov/divisions/marketreg/ratingagency.htm#nrsroorders) (accessed March 4, 2011).

⁴³⁸ For a more complete discussion of the Panel's findings, see Section F.1.b of the Panel's June 2010 oversight report. 2010 June Oversight Report, *supra* note 395, at 139–164.

⁴³⁹ According to Thomas Baxter Jr., FRBNY's general counsel, the government officials faced "a binary choice to either let AIG file for bankruptcy or to provide it with liquidity." 2010 June Oversight Report, *supra* note 395, at 69.

⁴⁴⁰ 2010 June Oversight Report, *supra* note 395, at 74–75.

Further, even after the Federal Reserve and Treasury had decided that a public rescue was the only choice, they still could have pursued options other than paying every creditor and every counterparty at 100 cents on the dollar. Arrangements in which different creditors accept varying degrees of loss are common in bankruptcy proceedings or other negotiations when a distressed company is involved, and in this case the government failed to use its significant negotiating leverage to extract such compromises. As Martin Bienenstock of Dewey & LeBoeuf testified to the Panel, “FRBNY was saving AIG with taxpayer funds due to the losses sustained by the business divisions transacting business with these creditor groups, and a fundamental principle of workouts is shared sacrifice, especially when creditors are being made better off than they would be if AIG were left to file bankruptcy.” As such, “it was very plausible to have obtained material creditor discounts from some creditor groups as part of that process without undermining its overarching goal of preventing systemic impairment of the financial system and without compromising the Federal Reserve Board’s principles.”⁴⁴¹

Ultimately, it is impossible to stand in the shoes of those who had to make decisions during those hours, to weigh the risks of accelerated systemic collapse against the profound need for AIG and its counterparties to share in the costs and the risks of that rescue, and to weigh those considerations not today in an atmosphere of relative calm, but in the middle of the night in the midst of a financial collapse. All the Panel can do is observe the costs to the public’s confidence in our public institutions from the failure to require that AIG’s counterparties in the financial sector share the burden of the AIG rescue.

4. The Government’s Authorities in a Financial Crisis

The Federal Reserve and Treasury have explained the haphazard nature of the AIG rescue by noting that they lacked specific tools to handle the collapse of such a complex, multisector, multinational financial corporation.⁴⁴² To some extent this argument is a red herring: the relevant authorities should have monitored AIG more closely, discovered its vulnerability earlier, and sought any needed new authorities from Congress in advance of the crisis. Even after AIG began to unravel, the Federal Reserve and Treasury could have used their existing authority more aggressively.

5. Conflicts

The AIG rescue illustrated the tangled nature of relationships on Wall Street. People from the same small group of law firms, investment banks, and regulators appear in the AIG saga (and many other aspects of the financial crisis) in many roles, and sometimes representing different and conflicting interests.⁴⁴³ The lawyers who

⁴⁴¹ See Congressional Oversight Panel, Written Testimony of Martin J. Bienenstock, partner and chair of business solutions and government department, Dewey & LeBoeuf, *COP Hearing on TARP and Other Assistance to AIG*, at 1, 3 (May 26, 2010) (online at cop.senate.gov/documents/testimony-052610-bienenstock.pdf).

⁴⁴² See Section B.2 of the Panel’s June 2010 oversight report for an overview of the company’s operations and regulatory framework. See 2010 June Oversight Report, *supra* note 395, at 19–24.

⁴⁴³ See 2010 June Oversight Report, *supra* note 395, at 72–76.

represented banks trying to put together a rescue package for AIG became the lawyers to FRBNY, shifting sides in a matter of minutes. Those same banks appear first as advisors, then potential rescuers, then as counterparties to several different kinds of agreements with AIG, and thereby as the direct and indirect beneficiaries of the government rescue. Many of the regulators and government officials (in both administrations) are former employees of the entities they oversee or that benefited from the rescue.

The government justified its decision to draw from a limited pool of lawyers and advisors by citing the need for expertise from Wall Street insiders familiar with AIG. Even so, the government entities should have recognized that at a time when the American taxpayer was being asked to bear extraordinary burdens, they had a special responsibility to ensure that their actions did not undermine public trust by failing to address all potential conflicts and the appearance of conflicts that could arise. The need to address conflicts and the appearance of conflicts by government actors, counterparties, lawyers, and all other agents involved in this drama was wrongly treated largely as a detail that could be subjugated to the primary goal of keeping the financial system up and running.

Even setting aside concerns about actual or apparent conflicts of interest, the limited pool of people involved in AIG's rescue raises a broader concern. Everyone involved in AIG's rescue had the mindset of either a banker or a banking regulator. The discussions did not include other voices that might have brought different ideas and a broader view of the national interest. It is unsurprising, then, that the American public remains convinced that the rescue was designed by Wall Street to help fellow Wall Streeters, with less emphasis given to protecting the public trust.

The Panel recognized that government officials were confronting an immediate crisis and had to act in haste. Yet it is at moments of crisis that the government has its most acute obligation to protect the public interest by avoiding even the appearance of impropriety. As Mr. Baxter of FRBNY told the Panel, “[i]f we should go through this again, we [would] need to be more mindful of how our actions can be perceived. The lesson learned for me personally here is that we need to be mindful of that and perhaps change our behavior as a result of the perception, not the actuality.”⁴⁴⁴

C. Panel Recommendations

1. Government Exit Strategy/Equity Market Risk Mitigation

In its June 2010 report, the Panel recommended that Treasury should explore options aimed at accelerated sales of smaller portions of its stake in AIG sooner rather than later, to help mitigate longer term equity market risks, and transfer some of the risk from the taxpayer to the public markets.⁴⁴⁵ While the Panel recognized the danger in a prolonged investment strategy, political expediency should not trump the opportunity for taxpayers to realize as much value as possible from their investment. Thus, the Panel cautioned

⁴⁴⁴ Congressional Oversight Panel, Testimony of Thomas C. Baxter, Jr., general counsel and executive vice president of the legal group, Federal Reserve Bank of New York, *COP Hearing on TARP and Other Assistance to AIG*, at 102 (May 26, 2010) (online at cop.senate.gov/documents/transcript-052610-aig.pdf).

⁴⁴⁵ 2010 June Oversight Report, *supra* note 395, at 202.

against a rapid exit in the absence of clearly defined parameters for achieving the maximum risk-adjusted return to the taxpayer. Nonetheless, given the significant equity market and company execution risks involved in a long-term, back-end-loaded exit strategy, the Panel noted that the government's exposure to AIG should be minimized (and shifted to private shareholders) where possible via accelerated sales of a small minority of the government's holdings, provided this could be done with limited harm to the share price. In this sense, the interests of AIG's government and private shareholders would be aligned, as the taxpayer would be best served by enhancing value before a broader exit strategy via the public markets could be executed.

2. Status of COP Recommendations

The Panel's recommendation that Treasury should explore options aimed at reducing its equity market exposure to AIG remains something of a work in progress.⁴⁴⁶ In September 2010, AIG and Treasury reached an agreement to restructure AIG's obligations under the TARP, in which Treasury exchanged its preferred stock for 1.1 billion shares of AIG common stock on January 14, 2011 (discussed in more detail below). While AIG's improving outlook facilitated this announcement, these actions have not mitigated long-term equity market risk from Treasury's holdings. Although this recapitalization temporarily increases Treasury's equity market exposure to AIG (given the conversion of its preferred equity stake to common equity), the transaction does provide a path for the government to pursue share sales in the public markets that would reduce its exposure, potentially as soon as the second quarter of 2011. The assumption of FRBNY's preferred interest in AIG SPVs serves to increase Treasury's overall exposure to AIG, but via a mechanism that fully collateralizes this exposure, without assuming additional equity market risks.

D. Updates

1. Recent Developments

On September 30, 2010, AIG, Treasury, FRBNY, and the AIG Credit Facility Trust (Trust) announced their intent to enter into a series of transactions that would ultimately allow the government to exit AIG.⁴⁴⁷ The timing and substance of this announcement clarifying the government's exit strategy was generally con-

⁴⁴⁶ 2010 June Oversight Report, *supra* note 395, at 170.

⁴⁴⁷ American International Group, Inc., *AIG Announces Plan To Repay U.S. Government* (Sept. 30, 2010) (online at www.aigcorporate.com/newsroom/2010_September/AIGAnnouncesPlanToRepay30Sept2010.pdf). This agreement was supplemented by a master transaction agreement on December 8, 2010. American International Group, Inc., *AIG Files Master Agreement on Recapitalization Plan* (Dec. 8, 2010) (online at ir.aigcorporate.com/External.File?item=g7rqBLVLuv81UAmrh20Mp3rr7YtG5aXEd/NUihOaDRM1TgAKUfcNQqWNGO+veYq18TQTV4xM1BjE/CQAuJPw==). While largely similar to the recapitalization plan released on September 30, it contains two new pieces of material information. First, the terms of Treasury's role as a selling shareholder have been somewhat clarified. Treasury has the right to participate in any registered stock offering and can demand twice in a year that AIG effect a registered market offering of shares after the earlier of August 15, 2011 or AIG's completion of a primary equity offering. Treasury can also dictate the terms and frequency of any sales of new AIG shares until the government's ownership falls to under 33 percent. Finally, the agreement provides additional clarity on future AIG capital raises. AIG may raise up to \$3 billion of common equity by August 15, 2011 (and can raise an additional \$4 billion with Treasury's consent, for a total of \$7 billion in additional equity).

sistent with the expectations outlined in the Panel’s June report.⁴⁴⁸ The aggregate effect of this agreement, which was subsequently executed, was to repay all outstanding obligations to FRBNY, consolidate AIG’s government ownership with Treasury, and provide the government with a pathway to monetize its holdings. The integrated steps involved in the execution of AIG’s recapitalization plan on January 14, 2011—the most significant being the repayment of FRBNY in full and Treasury exchanging its preferred equity interests for common stock—are outlined below.⁴⁴⁹

- Repayment and Termination of the FRBNY Credit Facility: FRBNY, which has repayment priority over Treasury, received approximately \$21 billion in cash to redeem its outstanding balance and accrued interest and fees. AIG used funds from asset sales—the IPO of American International Assurance Company (AIA) and sale of American Life Insurance Company (ALICO)—to facilitate the repayment of amounts owed under the FRBNY Credit Facility.⁴⁵⁰
- Repurchase and Exchange of SPV Preferred Interests: AIG drew down an additional \$20.3 billion in TARP funds (Series F) towards the repurchase of SPV interests from FRBNY. In consideration for this new funding, AIG transferred \$20.3 billion of FRBNY’s former SPV Preferred interests to Treasury.⁴⁵¹

⁴⁴⁸ 2010 June Oversight Report, *supra* note 395, at 222.

⁴⁴⁹ American International Group, Inc., *AIG Executes Plan to Repay U.S. Government* (Jan. 14, 2011) (online at ir.aigcorporate.com/External.File?%t=2&item=g7rqBLVLuv81UAmrh20Mp31WhknkljLRVwaPIA8x40UnwpUYeTWqNeJMSo+ju5ThNwA5rr5tEDobelzmAXWiow==); U.S. Department of the Treasury, *Treasury Announces Completion of the American International Group Recapitalization Transaction* (Jan. 14, 2011) (online at www.treasury.gov/press-center/press-releases/Pages/tg1024.aspx); Federal Reserve Board of New York, *New York Fed Ends AIG Assistance with Full Repayment* (Jan. 14, 2011) (online at www.newyorkfed.org/newsevents/news/aboutthefed/2011/oa110114.html).

⁴⁵⁰ As described in a regulatory filing AIG made with the SEC on January 14, 2011: “[a]t the Closing, AIG repaid FRBNY approximately \$21 billion in cash, representing complete repayment of all amounts owing under the Credit Agreement (as amended, the “FRBNY Credit Facility”), dated as of September 22, 2008, and the FRBNY Credit Facility was terminated. The funds for the repayment came from the net cash proceeds from AIG’s sale of 67 percent of the ordinary shares of AIA Group Limited (“AIA”) in its initial public offering and from AIG’s sale of American Life Insurance Company (“ALICO”). These funds were loaned to AIG, in the form of secured limited recourse debt (the “SPV Intercompany Loans”), from the SPVs that hold the proceeds of the AIA IPO and the ALICO sale. The SPV Intercompany Loans are secured by pledges by AIG and certain of its subsidiaries of, among other collateral, certain of their equity interests in Nan Shan Life Insurance Company, Ltd. (“Nan Shan”), AIG Star Life Insurance Co. Ltd. (“AIG Star”), AIG Edison Life Insurance Company (“AIG Edison”) and International Lease Finance Corporation (collectively with Nan Shan, AIG Star and AIG Edison, the “Designated Entities”), as well as the remaining AIA ordinary shares held by the AIA SPV and certain of the MetLife, Inc. securities received from the sale of ALICO held by the ALICO SPV. The proceeds from any sale or disposition of the equity of such Designated Entities and such other assets will be used to repay the SPV Intercompany Loans and the recourse on the SPV Intercompany Loans is generally limited to foreclosing on the pledged collateral, except to the extent of the fair market value of equity interests of the Designated Entities that cannot be pledged because of regulatory or tax considerations.” American International Group, Inc., *Form 8-K for the Period Ended January 14, 2011* (Jan. 14, 2011) (online at www.sec.gov/Archives/edgar/data/5272/000095012311003061/y88987e8vk.htm) (hereinafter “AIG: Form 8-K Period Ended January 14, 2011”).

⁴⁵¹ As outlined in a company filing on January 14, 2011: “[a]t the Closing, AIG drew down approximately \$20 billion (the “Series F Closing Drawdown Amount”) under the Treasury Department’s commitment (the “Treasury Department Commitment”) pursuant to the Securities Purchase Agreement, dated as of April 17, 2009 (the “Series F SPA”), between AIG and the Treasury Department relating to AIG’s Series F Fixed Rate Non-Cumulative Perpetual Preferred Stock, par value \$5.00 per share (the “Series F Preferred Stock”). The Series F Closing Drawdown Amount was the full amount remaining under the Treasury Department Commitment, less \$2 billion that AIG designated to be available after the Closing for general corporate purposes under a commitment relating to AIG’s Series G Cumulative Mandatory Convertible Preferred Stock, par value \$5.00 per share (the “Series G Preferred Stock”), described below (the

Continued

- **Exchange of AIG Preferred for Common Stock:** In the aggregate, Treasury converted \$47.5 billion in TARP preferred stock at \$45 per share for an equivalent amount of equity (representing approximately 1.1 billion shares).⁴⁵² Additionally, the Trust's Series C preferred shares were converted into approximately 563 million shares of AIG common equity. These conversions resulted in Treasury holding a 92.1 percent equity stake in AIG.
- **Warrants to Purchase Common Stock:** AIG distributed 10-year warrants on 75 million shares of AIG common stock with an exercise price of \$45.00 per share to the existing public shareholders. These warrants, aimed at softening the significant dilution from the government's common share conversion, were not provided to Treasury or other government shareholders.⁴⁵³

"Series G Drawdown Right"). The right of AIG to draw on the Treasury Department Commitment (other than the Series G Drawdown Right) was terminated.

AIG applied certain proceeds from asset sales to retire a portion of FRBNY's preferred interests in the ALICO SPV and used the Series F Closing Drawdown Amount to repurchase the remainder of FRBNY's preferred interests in the ALICO SPV and all of FRBNY's preferred interests in the AIA SPV ("SPV Preferred Interests"). AIG transferred the SPV Preferred Interests to the Treasury Department as part of the consideration for the exchange of the Series F Preferred Stock, described below.

Under the Master Transaction Agreement, the Treasury Department, so long as it holds SPV Preferred Interests, will have the right, subject to existing contractual restrictions, to require AIG to dispose of the remaining AIA ordinary shares held by the AIA SPV and certain of the MetLife, Inc. securities received from the sale of ALICO held by the ALICO SPV. The consent of the Treasury Department, so long as it holds SPV Preferred Interests, will also be required for AIG to take specified significant actions with respect to the Designated Entities, including initial public offerings, sales, significant acquisitions or dispositions and incurrence of significant levels of indebtedness. If any SPV Preferred Interests are outstanding on May 1, 2013, the Treasury Department will have the right to compel the sale of all or a portion of one or more of the Designated Entities on terms that it will determine.

As a result of these transactions, the SPV Preferred Interests will no longer be considered permanent equity on AIG's balance sheet, and will be classified as redeemable noncontrolling interests in partially owned consolidated subsidiaries." AIG: Form 8-K Period Ended January 14, 2011, *supra* note 450.

⁴⁵²This figure includes \$40.0 billion of Series E preferred stock converted to equity and \$7.5 billion of Series F preferred stock converted to equity. Treasury Transactions Report, *supra* note 36.

As outlined in a company filing on January 14, 2011: "[a]t the Closing, AIG and the Treasury Department amended and restated the Series F SPA to provide for the issuance of 20,000 shares of Series G Preferred Stock by AIG to the Treasury Department. The Series G Preferred Stock initially has a liquidation preference of zero, which will increase by the amount of any funds drawn down by AIG under the Series G Drawdown Right from the Closing until March 31, 2012 (or the earlier termination of the Series G Drawdown Right).

At the Closing (i) the shares of AIG's Series C Perpetual, Convertible, Participating Preferred Stock, par value \$5.00 per share (the "Series C Preferred Stock"), held by the Trust were exchanged for 562,868,096 shares of AIG common stock, par value \$2.50 per share ("AIG Common Stock"), which were subsequently transferred by the Trust to the Treasury Department; (ii) the shares of AIG's Series E Fixed Rate Non-Cumulative Perpetual Preferred Stock, par value \$5.00 per share (the "Series E Preferred Stock"), held by the Treasury Department were exchanged for 924,546,133 shares of AIG Common Stock; and (iii) the shares of the Series F Preferred Stock held by the Treasury Department were exchanged for (a) the SPV Preferred Interests, (b) 20,000 shares of the Series G Preferred Stock, and (c) 167,623,733 shares of AIG Common Stock. As a result of the Recapitalization, the Treasury Department holds 1,655,037,962 shares of newly issued AIG Common Stock, representing ownership of approximately 92 percent of the outstanding AIG Common Stock, and 20,000 shares of Series G Preferred Stock. After this share exchange and distribution were completed, the Trust terminated pursuant to the terms and conditions of the Trust Agreement.

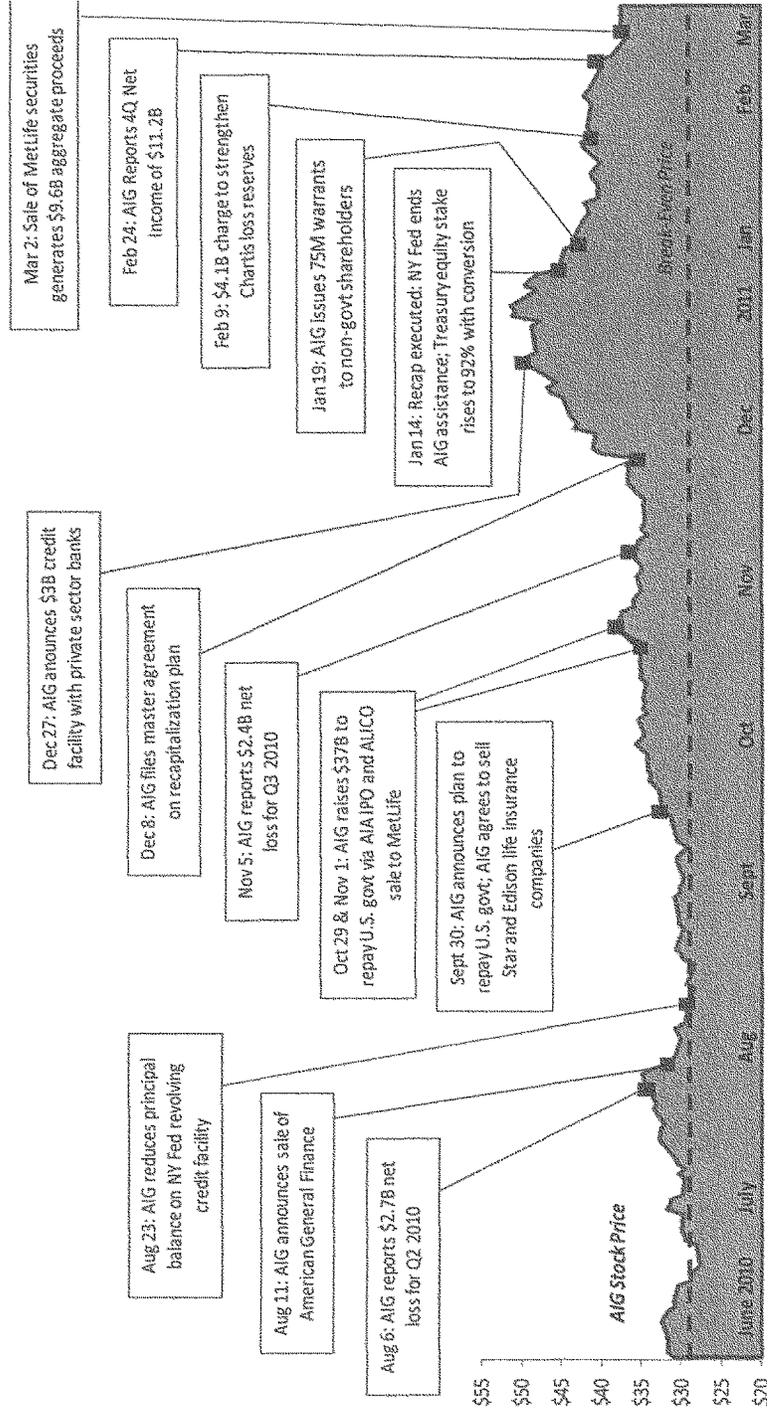
The issuance of AIG Common Stock in connection with the exchange for the Series C Preferred Stock, the Series E Preferred Stock and the Series F Preferred Stock will significantly affect the determination of net income attributable to common shareholders and the weighted average shares outstanding, both of which are used to compute earnings per share." AIG: Form 8-K Period Ended January 14, 2011, *supra* note 450.

⁴⁵³As described in a company filing on January 14, 2011: "[a]s part of the Recapitalization, on January 19, 2011, AIG will distribute to the holders of record of AIG Common Stock on January 13, 2010, by means of a dividend, 10-year warrants to purchase a total of up to 75 million shares of AIG Common Stock at an exercise price of \$45.00 per share. None of the Trust, the Treasury Department or the FRBNY will receive these warrants. For more information on these

Figure 27 below provides a timeline of recent AIG-related announcements following the publication of our June 2010 report.

warrants, see AIG's Current Reports on Form 8-K dated January 7, 2011 and January 12, 2011." AIG: Form 8-K Period Ended January 14, 2011, *supra* note 450.

FIGURE 27: AIG TIMELINE



The composition of the government's assistance to AIG has evolved from debt to equity as the company's financial condition has changed. Initially, the Federal Reserve was the only government entity to provide assistance to AIG, which was limited to large lines of credit. Following the enactment of EESA, Treasury authorized \$70 billion of preferred equity facilities for AIG. Since TARP assistance was in the form of preferred equity, it did not count against the company's outstanding debt, thereby providing a more attractive form of capital which helped improve AIG's leverage, or risk levels, in the eyes of the rating agencies. Currently, the only debt instruments outstanding as part of the government rescue of AIG are the loans to the Maiden Lane II and Maiden Lane III SPVs, which are not AIG liabilities. At present, Treasury holds exclusively common or preferred equity interests in AIG.

FIGURE 28: GOVERNMENT ASSISTANCE TO AIG OUTSTANDING
[Dollars in millions]

	November 5, 2008	June 24, 2010 ⁴⁵⁴	March 8, 2011 ⁴⁵⁵
FRBNY			
Revolving Credit Facility ⁴⁵⁶	\$80,257	\$25,756	\$0
Maiden Lane II ⁴⁵⁷	N/A	14,668	12,832
Maiden Lane III ⁴⁵⁸	N/A	16,290	13,008
Preferred interest in AIA Aurora LLC	N/A	16,453	0
Preferred interest in ALICO SPV	N/A	9,255	0
Total FRBNY	80,257	82,422	25,840
TARP			
Series E Non-Cumulative Preferred Stock (converted to common equity) ⁴⁵⁹	N/A	40,000	40,000
Series F Non-Cumulative Preferred Stock ⁴⁶⁰	N/A	461 7,543	462 18,763
Total TARP	N/A	47,543	58,763
Total Assistance	\$80,257	\$129,965	\$84,609

⁴⁵⁴ See Board of Governors of the Federal Reserve System, *Federal Reserve Statistical Release H.4.1: Factors Affecting Reserve Balances* (June 24, 2010) (online at www.federalreserve.gov/releases/h41/20100624/) (hereinafter "June 2010 Fed Statistical Release H.4.1").

⁴⁵⁵ Treasury Transactions Report, *supra* note 36.

⁴⁵⁶ Board of Governors of the Federal Reserve System, *Data Download Program* (Instrument Used: Factors Affecting Reserve Balances, Credit extended to American International Group, Inc., Net: week average) (online at www.federalreserve.gov/data/download/).

⁴⁵⁷ Outstanding principal amount of loan extended by FRBNY (including accrued and payable interest to FRBNY). Board of Governors of the Federal Reserve System, *Federal Reserve Statistical Release H.4.1: Factors Affecting Reserve Balances* (June 24, 2010 and Mar. 10, 2011) (online at www.federalreserve.gov/releases/h41/). On March 11, 2011, FRBNY announced that AIG had formally offered to purchase the assets in Maiden Lane II. There was no further news regarding the offer at the time this report was published. See Federal Reserve Bank of New York, *Statement Related to Offer by AIG to Purchase Maiden Lane II LLC* (Mar. 11, 2011) (online at www.newyorkfed.org/newsevents/news/markets/2011/an110311.html).

⁴⁵⁸ Outstanding principal amount of loan extended by FRBNY (including accrued and payable interest to FRBNY). June 2010 Fed Statistical Release H.4.1, *supra* note 454; Board of Governors of the Federal Reserve System, *Federal Reserve Statistical Release H.4.1: Factors Affecting Reserve Balances* (Mar. 10, 2011) (online at www.federalreserve.gov/releases/h41/20110310/) (hereinafter "March 2011 Fed Statistical Release H.4.1").

⁴⁵⁹ The initial direct TARP assistance was the \$40 billion purchase of Series D (cumulative) preferred stock. AIG missed \$1.6 billion of dividend payments on this investment. Consequently, when the Series D preferred stock was converted to Series E non-cumulative preferred stock in April 2009, the missed dividends were capitalized as part of the newly issued Series E preferred shares. Prior to the conversion to equity, the Series E shares could not be redeemed by AIG until the \$1.6 billion in capitalized dividends were repaid. Following the conversion of the preferred interests to equity, however, the claims to the capitalized interest were also exchanged, thereby eliminating the potential for a payment from the missed dividends. Treasury Transactions Report, *supra* note 36.

⁴⁶⁰ The funds available under the Series F stock facility were reduced by \$165 million in March 2009 in order to pay retention bonuses to AIGFP employees, thus leaving \$29.8 billion available. Immediately following the recapitalization, the components of the \$29.8 billion of TARP Series F preferred stock were: the newly created \$2.0 billion of Series G preferred credit facility (available but currently undrawn by AIG to date), a \$16.9 billion investment in AIA preferred units, a \$3.8 billion investment in ALICO junior preferred units, and the \$7.5 billion from the Series F preferred stock facility that were subsequently converted into 167,623,733 common equity shares. As of March 8, 2011, \$9.1 billion of Treasury's holdings in the AIA and ALICO SPVs had been redeemed. Treasury Transactions Report, *supra* note 36.

⁴⁶¹ American International Group, Inc., *Form 10-Q for the Quarterly Period Ended June 30, 2010*, at 107 (Aug. 6, 2010) (online at www.sec.gov/Archives/edgar/data/5272/000104746910007097/a2199624z10-q.htm).

⁴⁶² This figure is comprised of the \$7.5 billion in Series F preferred stock that was converted to common stock and the \$11.2 billion invested in the AIA SPV holdings. This figure does not reflect the \$2.0 billion Series G preferred stock credit facility, which is available to AIG, but has yet to be drawn. Treasury Transactions Report, *supra* note 36.

As summarized above, with the execution of AIG's recapitalization plan, FRBNY retired its claims on the company, centralizing the remaining government holdings in AIG with Treasury in the

form of AIG common stock and preferred interests in certain AIG assets through SPVs. While Treasury increased its assistance to AIG, the incremental commitment to each SPV is fully secured, putting the government ahead of other creditors in the (unlikely) event of a default on these obligations. More broadly, a key hurdle to the ultimate government exit has been removed as a result of the conversion of its claims to more liquid, but higher risk common stock, paving the way for an eventual exit via share sales in the public equity market. The government's exit is expected to parallel the emergence of AIG as a standalone A-rated credit, no longer reliant on government support to sustain its credit rating at a level sufficient for independent access to private capital market funding.

Treasury now owns 1.655 billion shares of AIG's common stock, representing 92 percent of the company's outstanding shares.⁴⁶³

FIGURE 29: OWNERSHIP PROFILE OF AMERICAN INTERNATIONAL GROUP⁴⁶⁴

	Outstanding Shares of AIG Common Stock (in millions)	Percentage of Outstanding Shares (Percent)
Series C Preferred Stock	562.9	31.3
Series E Preferred Stock	924.5	51.4
Series F Preferred Stock	167.6	9.3
<i>Subtotal</i>	1,655.0	92.0
Non-Government AIG Common Stock Holders ⁴⁶⁵	143.3	8.0
Total	1,798.4	100.0

⁴⁶⁴ Figures affected by rounding. Treasury Transactions Report, *supra* note 36; U.S. Department of the Treasury, *AIG Recapitalization: Summary of Terms September 30, 2010*, at 2 (Sept. 30, 2010) (online at www.treasury.gov/initiatives/financial-stability/investment-programs/AIG/Documents/Recapitalization.Summary.Terms.Executed.pdf) (hereinafter "AIG Recapitalization Summary"); Treasury conversations with Panel staff (Mar. 7, 2011).

⁴⁶⁵ This figure assumes that 2,854,069 additional shares will be converted and held by non-Treasury participants stemming from a conversion of equity units to common shares. American International Group, Inc., *Financial Supplement: Fourth Quarter 2010*, at 15 (Feb. 25, 2011) (online at www.aigcorporate.com/investors/2011_February/Financial_Supplement_4Q10_Revised_2-24-11.pdf) (hereinafter "AIG Financial Supplement: 4Q 2010"); AIG Recapitalization Summary, *supra* note 464, at 2.

In addition to this equity—valued at \$61.9 billion based on the stock's current price of \$37.39—Treasury has also invested approximately \$11.2 billion in AIG-related preferred interests.⁴⁶⁶ While the price of AIG common equity shares has fluctuated significantly since the recapitalization plan was announced on September 30, 2010, taxpayers are poised to recognize a gain on the government's assistance to AIG at current market prices.⁴⁶⁷ The total value of Treasury's equity and preferred interests in AIG is currently \$73.2

⁴⁶³ The total number of shares owned is comprised of 924,546,133 shares exchanged from the Series E preferred stock and the associated unpaid dividends, 167,623,733 shares of common stock exchanged from the Series F preferred stock, and 562,868,096 common shares that are connected to FRBNY's original assistance. Although the common shares derived from the FRBNY credit facility are not directly connected to the TARP assistance, they are included here as part of the total Treasury holdings in AIG. In total, Treasury holds 1,655,037,962 shares of AIG common stock. Treasury Transactions Report, *supra* note 36.

⁴⁶⁶ Treasury's investment in the AIA SPV is \$11.2 billion, although the current value of this holding is \$11.3 billion due to the payment of accrued interest. As outlined in Section IV.D.1, AIG opted to exercise its right to classify \$2.0 billion of funds into the newly created Series G preferred stock. This facility is not accounted for here because although the funds are available to AIG, the company has not drawn on the facility to date. On March 8, 2011, Treasury announced that its interests in the ALICO SPV, which were \$3.4 billion following the recapitalization, had been fully redeemed by AIG. Treasury Transactions Report, *supra* note 36; U.S. Department of the Treasury, *Treasury: With \$6.9 Billion Repayment Today from AIG, 70 Percent of TARP Disbursements Now Recovered* (Mar. 8, 2011) (online at www.treasury.gov/press-center/press-releases/Pages/tg1096.aspx) (hereinafter "Treasury: \$6.9 Billion Repayment from AIG").

⁴⁶⁷ Between September 30, 2010 and January 19, 2011, AIG shares traded within a dividend-adjusted range of \$34.22 and \$51.25. Bloomberg Data Service (Mar. 8, 2011); AIG: Form 8-K Period Ended January 14, 2011, *supra* note 450.

billion.⁴⁶⁸ This equates to a \$14.3 billion net gain based on Treasury's \$58.8 billion cost-basis, or the amount of TARP funds spent to secure the government's current outstanding common and preferred equity interests. Of note, the Series C shares—representing a current market value of \$21.0 billion—were obtained at no cost to the taxpayer (or Treasury), and reflect consideration provided by AIG for FRBNY's initial lending facility in September 2008. Thus, based on current valuations, this stake, which is now held for the benefit of Treasury, is offsetting a current loss on the direct TARP assistance provided by Treasury. The break-even threshold for the value of the government's stake, including the common stock derived from the Series C shares, is approximately \$28.73 per share, which means that should the share price drop below this level, representing a 23 percent decline versus its current share price, Treasury's holdings in AIG would imply a net loss to the government.⁴⁶⁹

FIGURE 30: VALUATION OF TREASURY'S COMMON STOCK HOLDINGS IN AIG⁴⁷⁰
[In billions]

	TARP	Series C	Total Treasury Position (TARP + Series C)
Funds Provided	\$47.5	N/A	\$47.5
Common Equity:			
No. of Shares	1.1	0.6	1.7
Implied Value	\$40.8	\$21.0	\$61.9
Implied Net Gain on Common Stock	\$(6.7)	\$21.0	\$14.3

⁴⁷⁰This figure reflects Treasury's common stock position only, and does not account for Treasury's other holdings in AIG: \$11.2 billion interest in the AIA SPV, the \$2 billion Series G preferred stock credit facility (available but undrawn). Similarly, it does not account for the \$9.1 billion in repayments Treasury has received on its preferred holdings. Bloomberg Data Service (Mar. 9, 2011). Based on a March 4, 2011 closing stock price of \$37.39 per share. Treasury Transactions Report, *supra* note 36.

2. Outlook

a. Key Swing Factor: AIG's Execution of Strategy

Based on a share price of \$37.39, the equity market currently values AIG at \$67.2 billion.⁴⁷¹ While down considerably from the firm's peak split-adjusted share price of \$1,456, the stock is trading significantly above the lows witnessed in late 2008 and early 2009, and has gained 52 percent in value since the beginning of 2010.⁴⁷² Not surprisingly, this rebound has coincided with increased optimism concerning the potential for the government to recoup a significant portion of its investment. (The recent spike and subsequent decline in AIG shares corresponded with the September 30, 2010 recapitalization announcement and January 19, 2011 issuance of

⁴⁶⁸Based on a March 4, 2011 closing stock price of \$37.39 per share. Bloomberg Data Service (Mar. 8, 2011). This includes the current market price of the common equity as well as the value of Treasury's holdings in the AIA SPV. Treasury's investment in the AIA SPV is \$11.2 billion; this figure references the current value of \$11.3 billion, which includes accrued interest. Bloomberg Data Service (Mar. 8, 2011); Treasury Transactions Report, *supra* note 36; Treasury: \$6.9 Billion Repayment from AIG, *supra* note 466.

⁴⁶⁹The breakeven price assumes the following cost basis for the 1,655,037,962 common shares Treasury holds: \$40.0 billion investment in Series E preferred shares and \$7.5 billion in Series F preferred stock draws. Treasury Transactions Report, *supra* note 36.

⁴⁷¹AIG's market capitalization is based on a March 4, 2011 closing price of \$37.39 and a total of 1,798,357,785 common shares outstanding. Bloomberg Data Service (Mar. 9, 2011); This figure assumes that 2,854,069 additional shares will be converted and held by non-Treasury participants stemming from a conversion of equity units to common shares. AIG Financial Supplement: 4Q 2010, *supra* note 465, at 15.

⁴⁷²This calculation uses dividend-adjusted stock prices for AIG on January 5, 2010 and March 4, 2011. Bloomberg Data Service (Mar. 9, 2011).

10-year warrants to non-government shareholders. Market analysts estimated that these warrants equated to a value of approximately \$8–10/share.)⁴⁷³

In this context, both AIG and Treasury continue to express varying degrees of optimism on repayment prospects. AIG expects to repay fully its obligations to the government, while Treasury is increasingly confident on the outlook for a return of the taxpayer's investment. Secretary Geithner noted in a December 2010 appearance before the Panel that AIG's recapitalization plan "will accelerate the government's exit on terms that are likely to lead to an overall profit on the government's support for AIG, including the value of Treasury's interests in AIG held outside of the TARP."⁴⁷⁴ Acting Assistant Secretary of the Treasury for the Office of Financial Stability Timothy Massad noted in a March 2011 appearance before the Panel that the government is "potentially in position to recover every dollar we invested."⁴⁷⁵

The outlook for the taxpayer is dependent on the successful execution of AIG's strategy, which will inform the public market's assessment of AIG's valuation over the next 12–18 months. This relationship was evidenced by the recent announcement by AIG of a \$4.1 billion charge to cover increased loss reserves in its insurance operations.⁴⁷⁶ This charge could have weakened the company's capital position. In response, Treasury agreed to waive the right to \$2.0 billion or proceeds from the sale of Star Life and Edison Life insurance subsidiaries for use in AIG's reserve strengthening, thereby delaying the payment of proceeds from asset sales Treasury was entitled to as collateral for its SPV Preferred Interests.⁴⁷⁷

This allowed AIG to stabilize its capital ratios in a cost-effective manner (e.g., without relying on market funding). Importantly, this agreement does not represent a direct loss to Treasury. The only "concession" by the government was the nominal forfeiture of interest income that it would have otherwise earned on the sale proceeds. However, this is more than offset by the 5 percent dividend on the government's preferred interest in the SPVs. Further, since Treasury's preferred equity investment is over-collateralized (the value of Treasury's claims on AIG's assets is in excess to the value of the funds provided by Treasury), the government remains well-positioned to be paid in full as AIG transfers payments received

⁴⁷³ Analysis of Bloomberg adjusted vs. unadjusted share price data. Bloomberg Data Service (Mar. 9, 2011). See also Andrew Kligerman, UBS Investment Research, *American International Group: Staying Neutral, but with Short-term Buy* (Oct. 18, 2010).

⁴⁷⁴ Geithner Testimony to the Panel, *supra* note 119.

⁴⁷⁵ COP Hearing on the TARP's Impact on Financial Stability, *supra* note 311, at 7.

⁴⁷⁶ AIG "announced today that, following completion of its annual comprehensive loss reserve review, it expects to record a \$4.1 billion charge, net of \$446 million in discount and loss sensitive business premium adjustments, for the fourth quarter of 2010 to strengthen loss reserves in its Chartis property and casualty insurance subsidiaries." American International Group, Inc., *AIG Expects to Record \$4.1 Billion Net Charge in Fourth Quarter 2010 to Strengthen Loss Reserves Associated with Long-Tail Lines in P&C Business* (Feb. 9, 2011) (online at ir.aigcorporate.com/External.File?t=2&item=g7rqBLVLuv81UAmrh_20Mpz0DS1SXuRN3WmkCRZUb5ppzF78O70yv_CeQf98suqlxnez_2NAoHFpNpDPDhNydglxz0w==). The actual charge reported on February 24, 2011 was \$4.2 billion. American International Group, *AIG Reports Fourth Quarter Net Income of \$11.2 billion* (Feb. 24, 2011) (online at www.aigcorporate.com/investors/2011_February/4Q2010PR02242010LTR.pdf).

⁴⁷⁷ Treasury's investment in the AIA SPV is \$11.2 billion; however, its current holdings in this SPV are \$11.3 billion due to the payment of accrued interest. American International Group, Inc., *Form 8-K for the Period Ended February 8, 2011* (Feb. 9, 2011) (online at www.sec.gov/Archives/edgar/data/5272/000095012311010653/y89586e8vk.htm); Treasury Transactions Report, *supra* note 36.

from subsequent asset sales to Treasury. In fact, this process continues, with the recent sale of AIG equity in MetLife conducted ahead of schedule, netting Treasury \$6.9 billion in proceeds, reducing the outstanding amount of Treasury's preferred interests in AIG assets to \$11.2 billion from \$20.3 billion immediately following the recapitalization.⁴⁷⁸

Thus, AIG's financial health remains dependent on the government, the company's dominant shareholder, while the outlook for the government's investment is to a large degree dependent on AIG's successful execution of its business strategy. AIG is seeking to balance asset sales and risk reduction with a credible and focused ongoing business strategy. This strategy has been some time in the making, as difficult market conditions and management turnover may have frustrated earlier efforts at charting a course for repaying the taxpayer prior to CEO Robert Benmosche's arrival at the firm in August of 2009.⁴⁷⁹ Thus, a greatly improved market backdrop and a longer-term investment mentality on the part of AIG's principal shareholder have facilitated a strategy aimed at repaying the government *and* cultivating a sustainable independent business strategy.

Specifically, in addition to asset sales, the firm is focused on strengthening its global property and casualty franchise and its domestic life insurance and retirement services operations, while continuing to reduce the firm's legacy exposure within AIGFP. After the company's restructuring and asset sales are complete, the vast majority of AIG's businesses will be housed within its global property and casualty and commercial insurance operation, which has been rebranded as Chartis, and its domestic life insurance and retirement services segment, rebranded as SunAmerica.⁴⁸⁰

b. Exit Strategy and Timing

The government is unlikely to wait for the successful execution of this strategy. According to press reports, Treasury intends to commence the sale of an initial stake in AIG via a secondary share offering after AIG's 1Q 2011 earnings are released in May 2011.⁴⁸¹ Media reports indicate the government could sell up to \$20 billion worth of stock, representing approximately one-third of the government's holdings in AIG. The balance of the government's stake in

⁴⁷⁸Treasury Transactions Report, *supra* note 36; Treasury: \$6.9 Billion Repayment from AIG, *supra* note 466.

⁴⁷⁹In the wake of the government's rescue in the fall of 2008, the math simply did not provide a way forward for the company (and, as became evident in subsequent months, for the government). Market conditions and the terms of the government's rescue provided little hope of a full recovery, beyond seeking to mitigate the magnitude of expected losses on the government's assistance and to reduce the systemic risk posed by the company. Potential buyers in the insurance sector suffered through significant valuation declines, dampening their appetite for acquisitions of AIG's most marketable assets. Cash purchases were problematic during this period, owing to the dearth of available funding, even to highly rated borrowers. In this environment, core operating fundamentals of key insurance businesses suffered amidst the deteriorating market, further clouding the mergers and acquisitions outlook.

⁴⁸⁰These businesses include General Insurance (Chartis), Domestic Life Insurance & Retirement Services, and Foreign Life Insurance & Retirement Services.

Additionally, the company must continue to make progress on streamlining its operations and untangling the cross-linkages throughout its vast operations. In turn, greater transparency into individual business lines will help facilitate more beneficial terms from the capital markets for financing core operations as well as advancing the prospects for the sale of non-core businesses at more attractive valuations.

⁴⁸¹*See, e.g.,* Serena Ng, *AIG to Start Marketing "Re-IPO" in May*, Wall Street Journal (Feb. 25, 2011), online.wsj.com/article/SB10001424052748704150604576166360234955504.html (by subscription only).

AIG would then likely be sold through additional secondary offerings, automated sales through a prearranged written trading plan, or some combination of both.⁴⁸²

The government's disposition of its shares in Citigroup is likely to be the model for AIG.⁴⁸³ However, the AIG disposition may prove more difficult for Treasury to execute, given the value of AIG's publicly traded float of \$5.4 billion and a government equity stake that currently amounts to approximately \$61.9 billion.⁴⁸⁴ Institutional investor ownership in AIG is relatively limited, whereas Citigroup enjoyed broad institutional ownership prior to the government's share sales.⁴⁸⁵ Thus, absent a capital raise by AIG to repay Treasury directly, a protracted wind-down of Treasury's stake seems inevitable.

In a briefing for TARP oversight bodies, Jim Millstein, Treasury's chief restructuring officer, noted that the government's exit from AIG could take anywhere from six months to two years, following the execution of the recapitalization plan.⁴⁸⁶ In any case, as the Panel has noted previously in the case of other asset dispositions, Treasury is likely to do what it can to accelerate the timetable for its exit. While six months may be overly aggressive, a two-year time horizon is probably overly cautious, assuming a normalized market backdrop. For his part, Mr. Benmosche believes the government may not fully exit AIG until mid-year 2012.⁴⁸⁷

This exit timeline, of course, involves substantial equity market risk and will rely heavily on AIG building a sustainable franchise

⁴⁸²Treasury employed both methods to dispose of its Citigroup holdings—large secondary offerings were supplemented by smaller and more frequent automated sales of stock in the marketplace.

⁴⁸³The differences between the AIG rescue and the government's investment in Citigroup and the subsequent exit strategy is discussed in Section F.8 of the Panel's June 2010 oversight report. See 2010 June Oversight Report, *supra* note 395, at 181. In June 2009, Treasury exchanged \$25 billion in Citigroup preferred stock for 7.7 billion shares of the company's common stock at \$3.25 per share. As of February 8, 2011, Treasury had sold the entirety of its Citigroup common shares and warrants for \$31.91 billion in gross proceeds. The Panel's January 2010 oversight report contains a discussion of the government's since-executed Citigroup exit strategy, including the monetization of the preferred shares under the CPP. See 2010 January Oversight Report, *supra* note 153, at 34–64.

⁴⁸⁴The value of AIG's public float is based on the closing price of the common shares on March 4, 2011 of \$37.39 and 143,319,823 shares held by non-government investors. This assumes 2,854,069 shares will be converted from equity units to common shares. AIG Financial Supplement: 4Q 2010, *supra* note 465, at 15; AIG Recapitalization Summary, *supra* note 464, at 2.

⁴⁸⁵Few actively managed investment funds own sizable long positions in AIG shares. The top five shareholders, outside of the U.S. government are: Fairholme Capital Management, which owns approximately 2.5 percent of AIG shares; Starr International, Hank Greenberg's company, which owns 0.8 percent; two index funds, Vanguard Group Inc. and State Street Corp., which own 0.7 percent in the aggregate; and Blackrock Institutional Trust, which owns 0.2 percent. These five shareholders account for over half the 8 percent of AIG's shares not owned by the U.S. government. Fairholme Capital Management, LLC, *Schedule 13D Statement of Acquisition of Beneficial Ownership by Individuals* (Jan. 14, 2011) (online at www.sec.gov/Archives/edgar/data/5272/000091957411000237/d1164162_13d-a.htm); American International Group, Inc., *Form 4 Statement of Changes in Beneficial Ownership of Securities* (Jan. 20, 2011) (online at www.sec.gov/Archives/edgar/data/5272/000114036111003441/xslF345X03/doc1.xml); Vanguard Group Inc., *Form 13F for Quarterly Period Ending December 31, 2010* (Dec. 31, 2010) (online at www.sec.gov/Archives/edgar/data/102909/000093247111000241/dec2010vgi13fl.txt); State Street Corp., *Form 13F for Quarterly Period Ending December 31, 2010* (Dec. 31, 2010) (online at www.sec.gov/Archives/edgar/data/93751/000119312511032288/d13fhr.txt); Blackrock Institutional Trust, *Form 13F for Quarterly Period Ending December 31, 2010* (Dec. 31, 2010) (online at www.sec.gov/Archives/edgar/data/913414/000108636411004275/blkinstrustco.txt); Data accessed through Bloomberg Data Service.

⁴⁸⁶Oversight briefing on AIG recapitalization (Oct. 6, 2010).

⁴⁸⁷See Andrew Frye and Hugh Son, *AIG Repays Fed, Swaps Treasury Investment for Common as U.S. Unwinds Stake*, Bloomberg News (Jan. 14, 2011) (online at www.bloomberg.com/news/2011-01-14/aig-repays-fed-swaps-treasury-investment-for-common-stock.html) ("Treasury may need 18 months to divest its stake, Benmosche told CNBC today.")

value over the medium term in order to support the placement of a significant supply of additional shares (at relatively attractive valuations) on the market. As noted, based on the stock's current valuation, taxpayers would see a positive return on their investment in AIG. However, near-term paper gains do not always equate to longer-term realized gains. Accordingly, the long-term horizon for a full government exit, with attendant equity market and company operating risks, still presents potential downside risks to the taxpayer.

E. Lessons Learned

The Panel noted that the government has no well-defined legal process to wind down a company like AIG in the same way that it winds down banks through the FDIC resolution process or non-financial companies through bankruptcy. As a result, the Federal Reserve and Treasury had to repurpose powers that were originally intended for other circumstances, leading to a bailout that was improvised, imperfect, and in many ways deeply unfair.

While issues surrounding AIG's failure provide an exhaustive list of lessons for regulators, Congress and the financial industry ("too-big-to-fail," moral hazard, systemic risk oversight, over-the-counter transparency/centralized clearing, risk management, etc.), the government's (both Treasury and FRBNY) management of its AIG engagement offers a host of specific lessons. These include:

- **Transparency:** Decisions made by government officials behind closed doors that put taxpayer dollars at risk must be subject to elevated transparency to assure fair dealing on behalf of the taxpayer. FRBNY's failure to be more sensitive with respect to potential conflicts of interest and the way in which the public and members of Congress would view its actions has colored all the dealings between the government and AIG in the eyes of the public.⁴⁸⁸

- **Reluctant Shareholder versus Maximizing Taxpayer Value:** As the Panel has previously noted, particularly in conjunction with accelerated exits of the government's other assets (e.g., GM and Chrysler Financial), Treasury should be careful not to sacrifice its mandate to maximize the value of its investment in favor of an expedited exit strategy consistent with its "reluctant shareholder" philosophy. AIG represents a notable example of Treasury successfully taking a longer-term view on its investment horizon to provide the greatest opportunity to realize a meaningful return.

- **Moral Hazard:** Given the absence of a resolution authority to assist with a controlled liquidation of the firm, AIG's vast interconnectedness across the financial landscape served as a mechanism to broaden the risk of moral hazard to the firm's creditors and counterparties. The absence of shared sacrifice by private parties undermined the government's ability to respond to the financial crisis, while also seeding longer-term risks for the effective functioning of the financial markets.

⁴⁸⁸ 2010 June Oversight Report, *supra* note 395, at 105.

VII. Administration of the TARP

A. Treasury's Use of Its Contracting Authority

1. Background

The TARP was an unprecedented intervention into the markets and as a result, Treasury did not always have the in-house capabilities needed to implement the programs it wished to establish. To meet these needs, Treasury employed outside contractors and agents.

Treasury is authorized by EESA and pre-existing law to employ private parties to provide goods and services using two separate mechanisms. First, the Secretary may enter into contracts, which are used to acquire goods and services from the market. This process is governed by the Federal Acquisition Regulation, and though EESA authorizes the Secretary to waive specific provisions of the regulation if needed, Treasury has not done so.⁴⁸⁹ Second, the Secretary may designate “financial institutions” as financial agents to perform “all such reasonable duties related to this Act . . . as may be required.”⁴⁹⁰ Financial agents “serve as an extension of Treasury to act on behalf of the Government.”⁴⁹¹ Historically, financial agents could be employed to perform only “inherently governmental” functions, although it may be the case that EESA eliminated this limitation. Treasury is not bound by the Federal Acquisition Regulation when it hires a financial agent. As a result, there are essentially no restrictions on the process Treasury may use for selecting financial agents. Once selected, however, a financial agent must abide by the principles of agency law.⁴⁹²

a. Treasury Action

At the time of the Panel's October 2010 report, *Examining Treasury's Use of Financial Crisis Contracting Authority*, Treasury had awarded 81 TARP-related procurement contracts and 15 financial agency agreements. Under these arrangements, there were a total of 98 subcontracts, 40 from procurement contracts and 58 from financial agency agreements.⁴⁹³

The obligated value of these contracts and agreements was \$436.7 million, with \$109.3 million attributable to procurement contracts and \$327.4 million attributable to financial agency agreements. The expended value under these contracts and agreements totaled \$363.0 million, with procurement contracts accounting for \$87.0 million and financial agency agreements accounting for the remaining \$276.0 million.⁴⁹⁴

⁴⁸⁹ Congressional Oversight Panel, *October Oversight Report: Examining Treasury's Use of Financial Crisis Contracting Authority*, at 10 (Oct. 14, 2010) (online at cop.senate.gov/documents/cop-101410-report.pdf) (hereinafter “2010 October Oversight Report”).

⁴⁹⁰ 12 U.S.C. § 5211(c)(3). For a definition of “financial institutions,” see 2010 October Oversight Report, *supra* note 489, at 39 n.143.

⁴⁹¹ Congressional Oversight Panel, Joint Written Testimony of Gary Grippio, deputy assistant secretary for fiscal operations and policy, and Ronald W. Backes, director of procurement services, U.S. Department of the Treasury, *COP Hearing on Treasury's Use of Private Contractors*, at 2–3 (Sept. 22, 2010) (online at cop.senate.gov/documents/testimony-092210-treasury.pdf). For a discussion comparing contracting to financial agency agreements, see 2010 October Oversight Report, *supra* note 489, at 42.

⁴⁹² 2010 October Oversight Report, *supra* note 489, at 11.

⁴⁹³ 2010 October Oversight Report, *supra* note 489, at 24.

⁴⁹⁴ 2010 October Oversight Report, *supra* note 489, at 24–25.

In terms of obligated value, Fannie Mae was the largest financial agent, with \$126.7 million, while PricewaterhouseCoopers LLP was the largest contractor, with \$25.8 million. Seven categories of work were performed under the TARP procurement contracts, the largest of which was legal advisory. Legal advisory work accounted for 35 contracts as well as for the largest obligated and potential contract values of \$55.6 million and \$203.4 million, respectively.⁴⁹⁵

In addition, to govern potential conflicts of interest arising from these contracts and agreements, Treasury issued an Interim Final Rule on TARP Conflicts of Interest (IFR-COI) on January 21, 2009. The rule establishes two separate schemes to govern two different types of conflicts: organizational conflicts of interest,⁴⁹⁶ and personal conflicts of interest.⁴⁹⁷ The IFR-COI also regulates many traditional ethical issues, such as acceptance of gifts and other sorts of “bribes” during the contract solicitation process and the handling of nonpublic information.⁴⁹⁸

2. Summary of COP Report and Findings

The Panel’s October 2010 report, *Examining Treasury’s Use of Financial Crisis Contracting Authority*, applauded Treasury’s significant efforts to ensure that it used contractors and agents appropriately, noting that in testimony to the Panel, some outside experts had praised Treasury for going above and beyond the usual standards for government contracting.⁴⁹⁹ However, the report cautioned that there still remained important areas of concern.⁵⁰⁰

For example, the Panel was concerned that while Treasury had disclosed some information, such as the texts of the contracts and agreements, the date each contract was awarded, and the value of the arrangements, material information still had not been released. Specifically, the report noted that Treasury does not release task orders to the public, despite the fact that for many arrangements critical specifics typically appear in task orders, rather than in the contracts themselves. Similarly, Treasury does not publicly disclose detailed information with respect to the names and duties of subcontractors, nor does it publish the subcontracts themselves. In addition, Treasury publishes almost no information on the perform-

⁴⁹⁵ 2010 October Oversight Report, *supra* note 489, at 25, 31.

⁴⁹⁶ The IFR defines an organizational conflict of interest as “a situation in which the retained entity has an interest or relationship that could cause a reasonable person with knowledge of the relevant facts to question the retained entity’s objectivity or judgment to perform under the arrangement, or its ability to represent the Treasury.” 31 CFR §31.201. Organizational conflicts of interest are prohibited unless they are disclosed to Treasury and either mitigated under a Treasury-approved plan or waived by Treasury.

⁴⁹⁷ The rule defines a personal conflict of interest as a “personal, business, or financial interest of an individual, his or her spouse, minor child, or other family member with whom the individual has a close personal relationship, that could adversely affect the individual’s ability to perform under the arrangement, his or her objectivity or judgment in such performance, or his or her ability to represent the interests of the Treasury.” 31 CFR §31.201. A retained entity must ensure that “all management officials” working on the contract or agreement not have personal conflicts of interest unless the conflict has been either neutralized by mitigation measures or waived by Treasury. 2010 October Oversight Report, *supra* note 489, at 13–14, 62–63.

⁴⁹⁸ 2010 October Oversight Report, *supra* note 489, at 15.

⁴⁹⁹ Congressional Oversight Panel, Testimony of Steven Schooner, professor of law and co-director of the government procurement law program, The George Washington University School of Law, *Transcript: COP Hearing on Treasury’s Use of Private Contractors* (Sept. 22, 2010) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-092210-contracting.cfm); 2010 October Oversight Report, *supra* note 489, at 5.

⁵⁰⁰ 2010 October Oversight Report, *supra* note 489, at 5.

ance of contractors and financial agents during the life of the arrangement.⁵⁰¹

The report expressed further concern with regard to Treasury's post-award management of its contracts and agreements. The Panel acknowledged that the procedures for post-award management of contracts followed well-established government contracting norms. By contrast, however, the Panel observed that the procedures for financial agent management had failed to detect at least one serious failing by an agent.⁵⁰²

More troublingly, the report noted that although Treasury's consent was required before any contractor or financial agent could engage a subcontractor, Treasury had limited oversight ability after the subcontract was awarded and instead relied upon the prime contractor or the financial agent to ensure their subcontractors' compliance. As a result, Treasury lacked critical basic information about subcontractors, such as the text of the subcontracts themselves and the dates on which they were awarded. Furthermore, the Panel found that Treasury would have difficulty both ensuring they received the best value from subcontractors and detecting violations of contract terms not related to work product, such as whether or not a subcontractor has maintained the confidentiality of information or that there are no conflicts of interest.⁵⁰³

The Panel was also concerned about the scope of Treasury's conflict of interest rules. Though the IFR-COI took a robust approach to organizational conflicts of interest, personal conflicts of interest, and the traditional ethical issues, the Panel noted that the regulations did not address all situations in which conflicts of interest could arise. In particular, the report noted with concern the potential that a conflict of interest could develop in the following situations:

- Treasury treats a retained entity differently in Treasury's exercise of its public responsibilities;
- A retained entity carries out its assignments in a manner that serves its interest and not the public interest;
- A retained entity carries out its assignments in a manner that serves the interest of the entity's other clients;
- A retained entity uses information it obtains from its work for the TARP in a manner that benefits itself or its other clients.⁵⁰⁴

The Panel was especially concerned with the potential conflicts of interest arising from Treasury's financial agency agreements with Fannie Mae and Freddie Mac to administer and to enforce compliance with HAMP, respectively. The report noted that because the majority of modifications involved mortgages that the GSEs held or guaranteed, the GSEs were in the position of both overseeing the program and using it to modify mortgages at the same time.⁵⁰⁵ In addition, Freddie Mac had indicated that it may not attempt to enforce its contractual rights against servicers who violated their contracts by using "robo-signers" because doing so

⁵⁰¹ 2010 October Oversight Report, *supra* note 489, at 55–59.

⁵⁰² 2010 October Oversight Report, *supra* note 489, at 47, 49.

⁵⁰³ 2010 October Oversight Report, *supra* note 489, at 49–50.

⁵⁰⁴ For further discussion of these potential conflicts of interest, see 2010 October Oversight Report, *supra* note 489, at 63–70.

⁵⁰⁵ 2010 October Oversight Report, *supra* note 489, at 82–86.

would jeopardize their relationships with these servicers. The Panel noted that if Freddie Mac was hesitant to jeopardize their relationships with servicers to enforce its rights in its own book of business, it was reasonable to worry that it may be similarly unwilling to risk these relationships on Treasury's behalf by aggressively overseeing HAMP servicers.⁵⁰⁶ It is worth noting that the GSEs and Treasury took a number of measures to mitigate these conflicts, such as establishing a fiduciary relationship, placing a firewall around material non-public information, and creating separate entities in the GSEs to handle all HAMP work.⁵⁰⁷ Despite these efforts, the Panel remained deeply concerned about the significant potential conflicts of interest that spring from using Fannie Mae and Freddie Mac as financial agents.⁵⁰⁸

3. Panel Recommendations and Updates

The Panel recommended that Treasury publish more information, including its rationale in selecting contractors and agents, contract and agreement task orders, the results of monitoring efforts, and descriptions of its plans to hold contractors and agents accountable. The Panel further recommended that Treasury require all contractors to disclose the names and duties of all subcontractors, the values of the subcontracts, and the subcontracts themselves. The Panel released some of this information, such as the names of all subcontractors and the values of the subcontracts, in the October report. Finally, the Panel recommended that Treasury adopt a final rule on conflicts of interest, disclose ongoing conflicts-of-interest findings and compliance costs, and consider alternatives that would make it less reliant on the retained entities for factual information, such as conducting intensive spot checks on individual entities.

Since the Panel made these recommendations, Treasury has begun on-site reviews of financial agents' conflict-of-interest regimes, making it less reliant on self-reporting by retained entities. To date, Treasury has done one such review and plans to complete three to five more in 2011. The examinations focus on agents' conflict-of-interest controls, such as their policies and procedures, the information firewalls around confidential information, and the non-disclosure agreements. In addition, Treasury has been working to finalize the IFR-COI, including doing a high-level review of a possible final rule, though there is no timeline for publishing the final rule.⁵⁰⁹ Outside of these two areas, Treasury has not acted on the Panel's other recommendations.

Since it last provided data to the Panel for its October report, Treasury has awarded 13 more contracts worth \$1.8 million in obligated value and \$265,637 in expended value. Eight of these contracts have been to Management Concepts for administrative support. The other five contracts are with the Association of Government Accountants, Reed Elsevier, Inc., Addx Corporation, MITRE

⁵⁰⁶ 2010 December Oversight Report, *supra* note 283, at 82.

⁵⁰⁷ For a more complete discussion of the mitigating factors, see 2010 October Oversight Report, *supra* note 489, at 82–86.

⁵⁰⁸ 2010 October Oversight Report, *supra* note 489, at 82–86.

⁵⁰⁹ Treasury conversations with Panel staff (Feb. 24, 2011).

Corporation, and the Hispanic Association of Colleges & Universities.⁵¹⁰

Treasury has also awarded two additional financial agency agreements to Greenhill & Co., LLC and Perella Weinberg Partners & Co. on November 18, 2010 and January 18, 2011, respectively. The agreements were for structuring and disposition services and have a combined obligated value of \$13,050,000 and expended value of \$1,400,000.⁵¹¹ In addition, two agreements, with Morgan Stanley and with KBW Asset Management, have been successfully completed.⁵¹²

In total, Treasury has now awarded 94 TARP-related procurement contracts and 17 financial agency agreements.⁵¹³ The total obligated value of these arrangements, including both new arrangements and new expenses under existing arrangements, is \$697.5 million, with procurement contracts accounting for \$134.2 million and financial agency agreements accounting for the remaining \$563.3 million. The total expended value of these arrangements is \$454.5 million, with \$96.7 million attributable to procurement contracts and \$357.8 million attributable to financial agency agreements.⁵¹⁴

In addition, since the Panel's October report, Treasury's conflict-of-interest monitoring regime has been changed. Previously, the Office of Financial Stability-Compliance was primarily responsible for such monitoring. Since October, the Contract and Agreement Review Board and the contracting officer technical representatives have also been tasked with reviewing conflict-of-interest issues.

Finally, Treasury is in the process of consolidating Procurement Services with the corresponding body in the Internal Revenue Service (IRS). All Procurement Services employees are scheduled to become employees of the IRS on March 13, 2011. Procurement Services employees working in the Office of Financial Stability are scheduled to move physically to the IRS facility on Oxon Hill on June 30, 2011. As a result of this consolidation, Procurement Services is in the process of reviewing their policies and procedures and will update them as needed once this review is completed.⁵¹⁵

⁵¹⁰Data provided by Treasury (Mar. 1, 2011). Data on procurement contracts is current through January 31, 2011.

⁵¹¹Data provided by Treasury (Mar. 1, 2011). Data on financial agency agreements is current through January 31, 2011.

⁵¹²Treasury conversations with Panel staff (Feb. 17, 2011).

⁵¹³Base contracts, novations, modifications, and task orders all count as a single contract. However, task orders under Treasury contracts for Phacil Inc. and the MITRE Corporation were counted as separate contracts. There were two novations, a contract with the law firm Thacher Proffitt & Wood was novated to a contract with Sonnenschein Nath & Rosenthal LLP, and a contract with McKee Nelson LLP was novated to Bingham McCutchen LLP. For the purposes of this analysis, the novations count as a single contract. The total number of procurement contracts includes eight contracts, which were awarded by other branches within the Procurement Services Division pursuant to a common Treasury service level and subject to a reimbursable agreement with the Office of Financial Stability, or were awarded by other agencies on behalf of the Office of Financial Stability and not administered by the Procurement Services Division.

⁵¹⁴Data provided by Treasury (Mar. 1, 2011). The majority of the total growth in both obligated value and expended value is due to increases in the financial agency agreements with Fannie Mae and Freddie Mac. The obligated and expended values of the agreements with the GSEs have grown by \$192.7 million and \$61.5 million, respectively, since the Panel's October report. Data provided by Treasury (Mar. 1, 2011).

⁵¹⁵Treasury conversations with Panel staff (Feb. 17, 2011).

4. Lessons Learned

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. 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 improvements can still be made.

In particular, the Panel noted the need for increased transparency. For example, 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. As work moves farther and farther from Treasury's direct control, it becomes less and less transparent and thus impedes accountability.

B. Executive Compensation Restrictions in the TARP

1. Background

a. Overview

Since well before the financial crisis, executive compensation has been a contentious issue. From the early 1950s through the mid-1970s, executive pay remained at a fairly steady level in terms of real dollars. From the 1980s onward, however, executive compensation has generally increased, often swiftly. For instance, during the 1970s, the average pay for a CEO was approximately 30 times the average annual pay of a production worker. Just before the economic crisis in 2007, the average compensation for a CEO was approximately \$21 million, nearly 300 times that of a production worker.⁵¹⁶

Though a good deal of research has been done on why executive pay has risen over the past three decades, there is still no real consensus. Executive mobility, managerial bargaining power, executive control over boards of directors, the low values assigned to stock options along with the perception that stock options are a low-cost method to pay employees, the effects of the bull market and government regulation, and deregulation have all been cited as contributing to this phenomenon. Commentators across the spectrum do agree that changing the structure of pay to include stock-based compensation during a thriving stock market contributed to the increase in compensation.⁵¹⁷

Since the onset of the financial crisis, much attention has focused on how executive compensation practices contributed to corporate risk-taking. Some have argued that compensation packages created incentives for executives to focus on short-term results, even at the cost of taking excessively large risks of later catastrophe. Many commentators have a particular interest in the effect of mismatches between executive compensation and the time horizon

⁵¹⁶ Congressional Oversight Panel, *February Oversight Report: Executive Compensation Restrictions in the Troubled Asset Relief Program*, at 10 (Feb. 10, 2011) (online at cop.senate.gov/documents/cop-021011-report.pdf) (hereinafter "2011 February Oversight Report").

⁵¹⁷ *Id.* at 13.

for assessments of risk.⁵¹⁸ Chairman Bernanke stated that compensation practices “led to misaligned incentives and excessive risk taking, contributing to bank losses and financial instability.”⁵¹⁹ On the other hand, this link between compensation and risk taking has been contested by some scholars who note that the value of executives’ stock holdings fell precipitously during the crisis. Given this potential for loss, they argue, there is no reason compensation structures would lead to excessive risk taking. Some commentators note, however, that stock options in particular do not necessarily create an exposure to losses for executives symmetric with that of ordinary shareholders.⁵²⁰ As one of these commentators puts it, “stock options—where executives only participate in the gains, but not the losses—and even more so, analogous bonus schemes prevalent in financial markets, provide strong incentives for excessive risk taking.”⁵²¹ Although there is no academic consensus on the relationship between compensation practices and risk, or whether compensation practices contributed to the financial crisis,⁵²² Treasury’s view is that compensation practices did in fact contribute to the crisis. Secretary Geithner has stated that executive compensation played a “material role” in causing the crisis because it encouraged excessive risk taking.⁵²³

In addition, commentators have also examined how the government’s implicit “too big to fail” guarantee may further distort executive compensation practices. As a result of providing a “too-big-to-fail” backstop, the government may have eliminated certain disincentives for pay arrangements that encourage excessive risk taking. Too-big-to-fail status permits shareholders and executives to accept substantial amounts of risk, since they can reap the benefits but will not suffer the consequences if the gambles are unsuccessful.⁵²⁴

b. Treasury’s Legal Framework

Congress entered the executive compensation debate with the passage of EESA. After a series of revelations about bonuses at

⁵¹⁸ *Id.* at 17–18. The Panel discussed the role of misaligned incentives on risk-taking in its Special Report on Regulatory Reform. The Panel noted “the unnecessary risk that many compensation schemes introduce into the financial sector,” and stated that “[a]ltering the incentives that encourage this risk . . . will help mitigate systemic risk in future crises. . . . Executive pay should . . . incentivize financial executives to prioritize long-term objectives, and to avoid both undertaking excessive, unnecessary risk and socializing losses with the help of the federal taxpayer.” Congressional Oversight Panel, *Special Report on Regulatory Reform: Modernizing the American Financial Regulatory System: Recommendations for Improving Oversight, Protecting Consumers, and Ensuring Stability*, at 37–40 (Jan. 29, 2009) (online at cop.senate.gov/documents/cop-012909-report-regulatoryreform.pdf) (hereinafter “COP: Special Report on Regulatory Reform”).

⁵¹⁹ Board of Governors of the Federal Reserve System, *Press Release* (Oct. 22, 2009) (online at www.federalreserve.gov/newsevents/press/bcreg/20091022a.htm).

⁵²⁰ 2011 February Oversight Report, *supra* note 516, at 17–18.

⁵²¹ Joseph E. Stiglitz, *The Financial Crisis of 2007/2008 and its Macroeconomic Consequences*, at 1 (online at unpan1.un.org/intradoc/groups/public/documents/apcity/unpan033508.pdf) (accessed Feb. 8, 2011). See also Financial Crisis Inquiry Commission, *Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States*, at 63 (Jan. 2011) (online at www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf) (“Stock options had potentially unlimited upside, while the downside was simply to receive nothing if the stock didn’t rise to the predetermined price. The same applied to plans that tied pay to return on equity: they meant that executives could win more than they could lose. These pay structures had the unintended consequence of creating incentives to increase both risk and leverage, which could lead to larger jumps in a company’s stock price.”).

⁵²² 2011 February Oversight Report, *supra* note 516, at 17–18.

⁵²³ Geithner Testimony to the Panel, *supra* note 119.

⁵²⁴ 2011 February Oversight Report, *supra* note 516, at 19–20, 89–91.

several major TARP recipients, ARRA subsequently amended EESA (EESA as amended) and put additional restrictions on pay practices at TARP recipients. These included, among others, a prohibition on golden parachutes, the requirement that TARP recipients establish compensation committees composed entirely of independent directors, the adoption of “clawback” provisions, and annual “say on pay” votes, and a requirement that bonuses not exceed one-third of total compensation.⁵²⁵ EESA as amended required the Secretary of the Treasury to issue implementing regulations, which resulted in the Interim Final Rule on TARP Standards for Compensation and Corporate Governance (IFR–Comp) in June 2009. For all TARP recipients, the IFR–Comp includes a number of specific limitations, such as prohibiting paying tax gross-ups to the top 25 most highly compensated employees, and then requiring them annually to certify their compliance with the IFR–Comp. Treasury’s Office of Internal Review monitors these certifications for completeness. Some of the smaller TARP institutions have failed to meet their reporting deadlines or to provide complete information. The Office of Internal Review works with these recipients to ensure that these reports are eventually filed and that all information is accurate.⁵²⁶

In addition to the provisions applicable to all TARP recipients, the IFR–Comp created the Office of the Special Master and placed seven exceptional assistance recipients under its jurisdiction. These exceptional assistance recipients were AIG, Bank of America, Citigroup, Chrysler, Chrysler Financial, General Motors, and GMAC/Ally Financial. The Special Master determined the compensation packages for the 25 most highly paid employees at these companies and the structure of compensation for the 26th-100th most highly compensated employees.⁵²⁷

c. Special Master’s Determinations

To date, the Special Master has released compensation determinations for 2009 and 2010, as well as a number of supplemental determinations.

In general, the Special Master awarded compensation to executives in the form of cash, stock salary, and incentive payments, and generally targeted total compensation amounts at the 50th percentile of compensation for comparable employees at comparable companies. Cash compensation was typically limited to \$500,000. The amount of stock salary was not restricted but it was not immediately redeemable. Incentive payments were also not immediately redeemable. In addition, the Special Master limited incentive payments to no more than one-third of total compensation and required that they be paid only if specific observable performance metrics were met. All other types of compensation, such as severance plans or perquisites, were limited to a maximum of \$25,000.⁵²⁸

In making these determinations, the Special Master is required by the IFR–Comp to use six guiding principles: (1) minimize exces-

⁵²⁵ 2011 February Oversight Report, *supra* note 516, at 23.

⁵²⁶ 2011 February Oversight Report, *supra* note 516, at 26.

⁵²⁷ 2011 February Oversight Report, *supra* note 516, at 22.

⁵²⁸ 2011 February Oversight Report, *supra* note 516, at 34.

sive risk; (2) maximize the capacity to repay TARP obligations; (3) appropriately allocate compensation between types of compensation; (4) use performance-based compensation; (5) award pay that is consistent with compensation for similar employees at similar entities; and (6) base compensation on an employee's contributions. The IFR-Comp also created a "safe harbor" for employees who will receive less than \$500,000 in annual compensation. Institutions are not required to obtain approval of compensation structures from the Special Master for employees who fall within this safe harbor.⁵²⁹

For a detailed description of the specific determinations made for each of the seven exceptional assistance recipients, see the Panel's February 2011 report.⁵³⁰

In addition to approving specified compensation payments and structures, the Special Master is authorized to interpret and issue non-binding advisory opinions on Section 111 of EESA as amended and the IFR-Comp. Furthermore, the IFR-Comp authorized the Special Master to review compensation paid by each TARP recipient from the day it first received TARP funding to February 17, 2009, the date of ARRA's passage, to determine whether such payments were contrary to the public interest. If any payments met this standard, the Special Master was required to seek to negotiate with the offending company for reimbursement.⁵³¹ The Special Master found that TARP recipients had paid \$1.7 billion in "disfavored" compensation that was "inappropriate,"⁵³² but not contrary to the public interest.⁵³³

d. Non-TARP Initiatives

Although Treasury has not regulated executive compensation outside of the TARP, a number of other agencies have begun developing guidance on executive compensation. For example, on June 21, 2010, the Office of the Comptroller of the Currency, the Federal Reserve, the FDIC, and the Office of Thrift Supervision adopted final guidance that establishes three core principles for executive compensation designed to maintain the safety and soundness of banking organizations. In addition, the FDIC is developing enhanced examination procedures to use in evaluating incentive compensation at institutions under its supervision. Furthermore, the SEC recently adopted regulations that require shareholder approval of executive compensation and "golden parachute" compensation arrangements, and is in the process of formulating regulations that require institutional investment managers to disclose how they vote on these compensation arrangements.⁵³⁴

Moreover, Congress took further action on executive compensation. Signed into law on July 21, 2010, the Dodd-Frank Act includes several provisions that will govern executive compensation at financial institutions in the future. For example, it includes pro-

⁵²⁹ 2011 February Oversight Report, *supra* note 516, at 28.

⁵³⁰ 2011 February Oversight Report, *supra* note 516, at 36–48.

⁵³¹ 2011 February Oversight Report, *supra* note 516, at 36–48.

⁵³² Congressional Oversight Panel, Testimony of Kenneth R. Feinberg, former special master for TARP executive compensation, *Transcript: COP Hearing on the TARP and Executive Compensation Restrictions* (Oct. 21, 2010) (publication forthcoming) (online at cop.senate.gov/hearings/library/hearing-102110-compensation.cfm).

⁵³³ 2011 February Oversight Report, *supra* note 516, at 6.

⁵³⁴ 2011 February Oversight Report, *supra* note 516, at 31.

visions that permit clawbacks in certain situations, require increased disclosures, and impose more stringent requirements with respect to independent compensation committees.⁵³⁵

2. Summary of COP Report and Findings

The Panel first considered executive compensation in its January 2009 report when it noted that executive pay should “incentivize financial executives to prioritize long-term objectives, and to avoid both undertaking excessive, unnecessary risk and socializing losses with the help of the federal taxpayer.”⁵³⁶ The Panel again examined compensation practices in March 2010, when it stated that the levels of compensation set for GMAC/Ally Financial’s CEO “raise significant questions, which the Panel will continue to study.”⁵³⁷ In its June 2010 report, the Panel reiterated its concern that compensation levels “raise significant unanswered questions.”⁵³⁸ In addition, on October 21, 2010, the Panel held a hearing on executive compensation, which included testimony from former Special Master for TARP Executive Compensation Kenneth Feinberg, among others.⁵³⁹

The Panel’s primary study of executive compensation, though, was in its February 2011 report, *Executive Compensation Restrictions in the Troubled Asset Relief Program*, which primarily examined the Office of Internal Review and the Office of the Special Master. The report expressed concern that the Office of Internal Review had not released a single document to the public, despite having far-reaching jurisdiction to monitor compliance with executive compensation restrictions at all TARP recipients. In addition, the Panel was troubled that the Office did not review compliance with all relevant compensation restrictions.⁵⁴⁰

With regard to the Special Master, the Panel praised the changes the Special Master had made to compensation practices at the seven exceptional assistance companies. In particular, the Panel noted that in 2009 the Special Master reduced total direct compensation by 55 percent overall and had altered the form of compensation executives received. Nevertheless, the Panel concluded that the Special Master’s impact was likely to be limited, noting rebounding pay on Wall Street, including at some of the institutions that had previously been under the Special Master’s jurisdiction. However, the report acknowledged that it is difficult to develop a precise assessment of the Special Master’s impact because there

⁵³⁵ 2011 February Oversight Report, *supra* note 516, at 29.

⁵³⁶ COP: Special Report on Regulatory Reform, *supra* note 518, at 38.

⁵³⁷ 2010 March Oversight Report, *supra* note 377, at 57 (“These [significant questions] include whether particular levels of compensation are either necessary or appropriate, the nature of the incentives the compensation creates, and the manner in which Treasury is exercising its authority under the EESA compensation restrictions as amended by the American Recovery and Reinvestment Act of 2009 (ARRA).”).

⁵³⁸ 2010 June Oversight Report, *supra* note 395, at 229.

⁵³⁹ Other witnesses at the Panel’s hearing included Kevin Murphy, Kenneth L. Treftz, Chair in Finance and professor of corporate finance, University of Southern California Marshall School of Business; Fred Tung, Howard Zhang Faculty Research Scholar and professor of law, Boston University School of Law; Rose Marie Orens, senior partner, Compensation Advisory Partners LLC; and Ted White, strategic advisor, Knight Vinke Asset Management. Congressional Oversight Panel, *COP Hearing on the TARP and Executive Compensation Restrictions* (Oct. 21, 2010) (online at cop.senate.gov/hearings/library/hearing-102110-compensation.cfm).

⁵⁴⁰ 2011 February Oversight Report, *supra* note 516, at 5.

are so many different factors that contribute to setting executive pay.⁵⁴¹

The Panel also expressed concern with the Special Master's level of transparency. The report described the Special Master's process for making determinations as a "black box" that was not capable of replication by any interested outsider. In particular, the report noted that the Special Master had not explained how he resolved conflicts between the six principles of the public interest standard, how he crafted the general rules he used, and how he applied these rules to specific circumstances. This lack of transparency, the Panel stated, helped prevent the Special Master's work from becoming a model for compensation in the future.⁵⁴²

The Panel was also troubled by the general uniformity of the Special Master's determinations. The report questioned whether one size truly fits all and, for example, whether the same redemption schedule for salary stock should apply to both employees of an automotive company and employees of a large bank.⁵⁴³

A separate concern in the February 2011 report was the Special Master's aforementioned "Look Back Review" of payments to executives at TARP recipients prior to February 17, 2009. Because the Special Master concluded that payments totaling \$1.7 billion were "inappropriate" but not "contrary to the public interest," he did not attempt to claw back the payments. The Panel found the Special Master's conclusion troublesome for several reasons: it may have appeared to the public to be excessively legalistic, it may have represented an end-run around Congress' determination that the Special Master should make every effort to claw back wrongful payments, and it may have given the impression that the government condoned inappropriate compensation to executives whose actions contributed to the financial crisis.⁵⁴⁴

3. Panel Recommendations and Updates

In its February 2011 report, the Panel recommended that both the Office of Internal Review and the Office of the Special Master provide more information to the public. In particular, the report called for the Office of the Special Master to publish the specific rationales that led to individual determinations. In addition, the report suggested publishing executive turnover data, the companies' compensation proposals, and specific information on the performance goals set for incentive compensation. For the Office of Internal Review, the Panel recommended that it issue a report on compensation at non-exceptional assistance companies and also publish information on its monitoring activities. The Office of Internal Review was also called upon to expand its monitoring activities to encompass all of the compensation restrictions set by EESA as amended, the IFR-Comp, and the Special Master. Finally, the Panel recommended that Treasury release a guide outlining best practices for executive compensation.⁵⁴⁵

⁵⁴¹ 2011 February Oversight Report, *supra* note 516, at 79.

⁵⁴² 2011 February Oversight Report, *supra* note 516, at 6.

⁵⁴³ 2011 February Oversight Report, *supra* note 516, at 59 & n. 241.

⁵⁴⁴ 2011 February Oversight Report, *supra* note 516, at 6.

⁵⁴⁵ 2011 February Oversight Report, *supra* note 516, at 81.

Since the Panel's February 2011 report, several companies have released their 2010 compensation data, which showed that executive compensation increased.⁵⁴⁶ In total, the New York State Comptroller calculated that overall compensation increased by 6 percent in 2010. The structure of this compensation has changed, however. Base salaries and deferred compensation increased while cash bonuses declined by 8 percent.⁵⁴⁷ Also, in a step away from the structures established by the Special Master, Citigroup stated that "it does not intend to award salary stock in 2011 or future years, as it is no longer a TARP company."⁵⁴⁸

In addition, on March 2, 2011, the SEC proposed a new rule requiring certain financial institutions to disclose the structure of their incentive compensation and prohibiting pay arrangements that encourage excessive risk-taking. The rule is now open for public comment and therefore may change before becoming final.⁵⁴⁹

4. Lessons Learned

The Panel's recommendations from its February 2011 report focused on a common theme: transparency. In the more than two years since EESA was passed, exceptional assistance institutions have altered their cash compensation and their compensation structures. The Office of the Special Master has been at the center of these two reforms. But despite these achievements, the public knows very little about how the government has implemented the compensation rules or about the impact of these measures. The Office of Internal Review has not published a single document to the public and aspects of the Special Master's work are "black boxes."

This lack of transparency limits the impact of the executive compensation restrictions. It makes it very difficult, if not impossible, for any board of directors, shareholder, or government agency to use the Special Master's public determination letters as the basis for mimicking those decisions. So long as compensation experts on Wall Street and elsewhere lack the information needed to use the Special Master's deliberations as a model, what seemed an opportunity for sweeping reform will be destined to leave a far more modest legacy.

VIII. General TARP Assessment

The preceding sections have provided an issue-specific look at the various pieces of the TARP. But this program, an unprecedented \$700 billion response to a panic in the financial markets, is more than just the sum of its parts. In four of its previous reports, the Panel evaluated the TARP as a whole. This section includes a re-

⁵⁴⁶ For example, J.P. Morgan CEO James Dimon received a 22 percent increase in restricted stock payout. J.P. Morgan Chase & Co., *Form 4: Statement of Change in Beneficial Ownership* (Feb. 17, 2011) (online at sec.gov/Archives/edgar/data/19617/000122520811006335/xslF345X03/doc4.xml).

⁵⁴⁷ Office of the New York State Comptroller Thomas P. DiNapoli, *DiNapoli: Wall Street Bonuses Declined in 2010* (Feb. 23, 2011) (online at www.osc.state.ny.us/press/releases/feb11/022311a.htm). Though applauding the changes to compensation that have occurred to date, a Moody's report expressed pessimism that such changes would last. See Moody's Investor Service, *Bank Compensation Reform: Short-Term Improvements, Long-Term Questions* (Mar. 9, 2011).

⁵⁴⁸ Citigroup, Inc., *Schedule 14(a)*, at 56 (Feb. 28, 2011) (online at sec.gov/Archives/edgar/data/831001/000119312511050132/dpre14a.htm).

⁵⁴⁹ U.S. Securities and Exchange Commission, *SEC Proposes Rules on Disclosure of Incentive-Based Compensation Arrangements at Financial Institutions* (Mar. 2, 2011) (online at www.sec.gov/news/press/2011/2011-57.htm).

view of the findings in those reports, as well as an update on the current status of the TARP.

A. Summary of COP Reports and Findings

The Panel's April 2009 report, *Assessing Treasury's Strategy: Six Months of TARP*, provided a framework for evaluating the TARP's success.⁵⁵⁰ The report gave an overview of past banking crises in the United States and in other countries, as well as the responses of other countries to the current crisis. It concluded that each successful resolution of a financial crisis involved: (1) swift action to ensure the integrity of bank accounting; (2) a willingness to take aggressive action to address failing institutions; (3) a willingness to hold management accountable either by firing them or, where appropriate, prosecuting them; and (4) transparency in the reporting of the use of public sector funds. The report also stated that if a future course change proved necessary, Treasury might consider liquidation or conservatorship of distressed banks as an alternative to subsidizing them through the TARP.⁵⁵¹

The Panel's December 2009 report, *Taking Stock: What Has the Troubled Asset Relief Program Achieved?*, evaluated the TARP a little more than one year after its enactment. The report noted that the TARP should be judged as part of a larger series of extraordinary actions taken by the federal government to stem the panic in the financial markets in the fall of 2008, and stated that there is a consensus that these programs stabilized the U.S. financial system by renewing the flow of credit and averting a more acute crisis. The report also found, though, that credit availability remained low, questions remained about the capitalization of many banks, the foreclosure crisis continued to grow, CRE remained a looming problem, and the government's actions resulted in implicit guarantees of financial institutions, which posed the most difficult long-term problem to emerge from the crisis. As Columbia University economist Charles Calomiris stated in testimony before the Panel, "If financial institutions know that the government is there to share losses, risk-taking becomes a one-sided bet, and so more risk is preferred to less."⁵⁵²

In its January 2010 report, *Exiting TARP and Unwinding Its Impact on the Financial Markets*, the Panel focused on Treasury's strategy for exiting the TARP.⁵⁵³ The report was released following Secretary Geithner's December 9, 2009, exercise of his authority to extend the TARP until October 3, 2010.⁵⁵⁴ Secretary Geithner had recently explained this decision in testimony before the Panel, stating: "We need to continue to find ways to help mitigate foreclosures for responsible homeowners and to get credit to small business. We

⁵⁵⁰ 2009 April Oversight Report, *supra* note 88.

⁵⁵¹ The Panel also explored these questions in an associated hearing. See generally Congressional Oversight Panel, *Transcript: Learning from the Past: Lessons from the Banking Crises of the 20th Century* (Mar. 19, 2009) (online at cop.senate.gov/documents/transcript-031909-bankingcrises.pdf).

⁵⁵² Congressional Oversight Panel, Written Testimony Charles Calomiris, Henry Kaufman Professor of Financial Institutions, Columbia Business School, *Taking Stock: Independent Views on TARP's Effectiveness*, at 4 (Nov. 19, 2009) (online at cop.senate.gov/documents/testimony-111909-calomiris.pdf).

⁵⁵³ 2010 January Oversight Report, *supra* note 153.

⁵⁵⁴ TARP funds had to be legally obligated to a program by October 3, 2010, but they could continue to be disbursed after that date.

also must maintain the capacity to address potential threats to our financial system, which could undermine the recovery we have seen to date.”⁵⁵⁵ The Panel noted that while Treasury’s formal cutoff from further TARP commitments was October 3, 2010, its final exit from the TARP and divestiture of all TARP-related holdings, potentially worth billions of dollars, would be an ongoing process that would extend well into the future.⁵⁵⁶ Treasury’s exit strategy sought to balance an emphasis on maintaining the stability of the financial system, preserving the stability of individual financial institutions, and maximizing the return on the taxpayers’ investment. The Panel concluded that Treasury’s three goals were potentially conflicting and sufficiently broad to justify any strategy. The report also focused on the continuing market effects created by the TARP, specifically the implicit guarantee that has created the perception that certain institutions will be protected by the government. The Panel noted two means of counteracting the effects of implicit guarantees: regulation of implicitly guaranteed institutions and the creation of a financial system in which those institutions could be liquidated or reorganized to allow for failure.

The Panel’s September 2010 report, *Assessing the TARP on the Eve of Its Expiration*, provided a summation of Treasury’s use of TARP funds and how its TARP programs have performed. The Panel noted that while Secretary Geithner’s extension of the TARP in December 2009 was meant to allow for continued use of TARP funds and preserve Treasury’s authority to intervene swiftly should financial markets exhibit signs of another meltdown, Treasury provided no further funding to address the areas it highlighted at the time the extension occurred. Thus, the report noted, the extension of the TARP functioned as a means to extend the government’s implicit guarantee of the financial system. The report also noted that over time a public stigma has attached to the TARP, which is seen as a bailout of Wall Street banks and domestic auto manufacturers that had little impact on the unemployed and homeowners at risk of foreclosure. Alan Blinder, a Princeton economist, told the Panel that “in the near term, the extreme unpopularity of TARP will make it hard to do anything even remotely like it again, should the need arise.”⁵⁵⁷ The Panel’s report noted that Treasury did little to remove this stigma, as it struggled with transparency and communications and failed to collect key data that would have allowed for greater understanding of the use and impact of TARP funds. The Panel consulted with outside economic experts who, while disagreeing on various points, generally agreed that the TARP was necessary to stabilize the financial system, but that it created significant moral hazard. The report noted that any evaluation of the TARP ultimately must take into account the goals stated in EESA: protecting home values, college funds, retirement accounts, and life

⁵⁵⁵ Congressional Oversight Panel, Written Testimony of Timothy F. Geithner, secretary, U.S. Department of the Treasury, *COP Hearing with Treasury Secretary Timothy Geithner* (Dec. 10, 2009) (online at cop.senate.gov/documents/testimony-121009-geithner.pdf).

⁵⁵⁶ EESA provided the Treasury Secretary with the authority to “hold the assets to maturity or for resale for and until such time as the Secretary determines that the market is optimal for selling such assets, in order to maximize the value for taxpayers” and “sell such assets at a price that the Secretary determines, based on available financial analysis, will maximize return on investment for the Federal Government.” 12 U.S.C. § 5223(a)(2).

⁵⁵⁷ Alan Blinder, Written Answers to Questions Posed by the Congressional Oversight Panel (Aug. 2010). See 2010 September Oversight Report, *supra* note 53, at 96, 112–114.

savings; preserving homeownership and promoting jobs and economic growth; and maximizing overall returns to U.S. taxpayers.⁵⁵⁸

B. Panel Recommendations

In its reports evaluating the TARP as a whole, several of the Panel's recommendations have focused on transparency. Specifically, the Panel has encouraged Treasury to provide more detailed, useful information in its TARP accounting statements, in order to show how it has managed TARP resources. The Panel has encouraged Treasury to produce quarterly TARP financial statements with an improved Management's Discussion and Analysis section. The Panel also recommended that Treasury disclose to the public more information about its plans for disposing of TARP assets. And in January 2010 the Panel urged Treasury to require any future TARP recipients to be more transparent about their use of taxpayer funds.⁵⁵⁹

Treasury has made some progress in this area, but the Panel believes that Treasury can and should be more transparent. Treasury has produced annual financial statements and a TARP Two Year Retrospective that more clearly articulated the metrics by which Treasury was evaluating the TARP's effectiveness;⁵⁶⁰ these have been useful for oversight of the program. Treasury now provides daily updates on its financial positions and releases some of its data in a spreadsheet format, making it more easily analyzed and evaluated.⁵⁶¹ Treasury released a semi-annual TARP financial statement in early 2010 and has been providing more frequent accounting for the status of TARP resources, but it has not adopted the Panel's recommendation of producing quarterly financial reports. Treasury did not take meaningful steps to require more transparency by new TARP recipients.

In light of the government's dual roles as investor in and overseer of the financial industry, the Panel recommended that Treasury consider holding its TARP assets in a trust that is insulated from political pressure and government interference, as long as care is taken to ensure that the trust assets are managed in the best interests of taxpayers. Treasury has maintained that the drawbacks of such a trust outweigh the benefits. One drawback that Treasury has cited is that the trust structure would make it difficult to balance Treasury's goal of maximizing the benefit to taxpayers with the goal of maintaining financial stability.⁵⁶²

Finally, the Panel, both in its January 2009 Special Report on Regulatory Reform and in subsequent reports, recommended that Treasury take steps to resolve the problem of an implicit government guarantee of too-big-to-fail financial institutions.⁵⁶³ The

⁵⁵⁸ 2010 September Oversight Report, *supra* note 53, at 106.

⁵⁵⁹ 2010 January Oversight Report, *supra* note 153.

⁵⁶⁰ TARP: Two Year Retrospective, *supra* note 246.

⁵⁶¹ For instance as of December 7, 2009, Treasury began releasing the Transaction reports in excel format. *See, e.g.*, U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending December 3, 2009* (Dec. 7, 2009) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/Pages/default.aspx?page=8).

⁵⁶² 2010 January Oversight Report, *supra* note 153, at 32, 142.

⁵⁶³ COP: Special Report on Regulatory Reform, *supra* note 518, at 76 ("We should all know by now that whenever government subsidizes risk, either by immunizing parties from the consequences of their behavior or allowing them to shift risk to others at no cost, we produce a

Dodd-Frank Act takes a variety of approaches to address this problem. The law empowers the FDIC to resolve financial institutions whose failure poses a risk to the nation's financial stability. The law also requires systemically significant institutions with more than \$50 billion in assets to submit so-called "living wills," or plans for their resolution in times of severe financial distress. And the law creates a Financial Stability Oversight Council charged with identifying and responding to systemic risks in the U.S. economy. In recent months, federal regulatory agencies have begun the process of implementing these provisions. Nonetheless, the implicit guarantee of the TARP is proving difficult to unwind.⁵⁶⁴

C. Financial Status of the TARP

EESA authorized the expenditure of up to \$700 billion under the TARP, and by the end of 2008 Treasury had used roughly \$250 billion of that sum, mostly in assistance to banks. In February 2009, the Obama administration proposed a budget that raised the possibility that as much as \$750 billion more would be needed.⁵⁶⁵ Those additional funds were never requested. As 2009 continued, it became clear that unless Treasury expanded TARP programs or introduced new ones, it would not spend the entire \$700 billion that Congress had authorized in October 2008. The stress tests, which raised the possibility of substantial additional TARP funds going to the banking sector, ultimately resulted in a TARP expenditure of only \$3.8 billion.⁵⁶⁶ Treasury initially announced that it would spend \$100 billion in TARP funds on the PPIP, but later lowered the program's ceiling to \$22.4 billion. Likewise, the ceiling for TARP spending on the TALF was dropped from \$55 billion to \$4.3 billion.⁵⁶⁷ On the eve of the TARP's potential expiration in December 2009, nearly \$300 billion of the original \$700 billion in TARP funds was still available. Then on December 9, 2009, Secretary Geithner exercised his statutory authority to extend the TARP for

clear moral hazard that furthers risky behavior, usually with disastrous consequences."); 2010 January Oversight Report, *supra* note 153, at 142 ("There are multiple options available and there is broad agreement that a new approach to systemic risk regulation is necessary so that businesses are not insulated from the effects of their own bad decisions."). See also Congressional Oversight Panel, Written Testimony of Sarah Bloom Raskin, commissioner, Maryland Office of Financial Regulation, *Modernizing America's Financial Regulatory Structure*, at 6 (Jan. 14, 2009) (online at cop.senate.gov/documents/testimony-011409-raskin.pdf) ("While this crisis has demanded a dramatic response from the federal government, the short-term result of many of these programs, including the TARP, has been to create even larger and more complex institutions and greater systemic risk. These responses have created extreme disparity in the treatment of financial institutions, with the government protecting those deemed to be too big or too complex to fail at the expense of smaller institutions, and perhaps of the diversity of our financial system.").

⁵⁶⁴ 2010 September Oversight Report, *supra* note 53, at 11–12. The four economists who testified at the Panel's March 4th hearing—Prof. Joseph E. Stiglitz, Prof. Simon Johnson, Prof. Allan H. Meltzer, and Prof. Luigi Zingales—were all skeptical as to whether the Dodd-Frank Act will prove effective in limiting the too-big-to-fail guarantee that TARP has served to strengthen. See generally Congressional Oversight Panel, *COP Hearing on Assessing the TARP* (Mar. 4, 2011) (online at cop.senate.gov/hearings/library/hearing-030411-cre.cfm).

⁵⁶⁵ Office of Management and Budget, *A New Era of Responsibility: Renewing America's Promise*, at 37 (Feb. 26, 2009) (online at www.whitehouse.gov/sites/default/files/omb/assets/fy2010_new_era/A_New_Era_of_Responsibility2.pdf) ("Although the Administration is not requesting additional funds from the Congress at this point and although it is not yet possible to provide a precise estimate of how much additional Federal action may be involved should the Administration need to request such funds, the President's Budget nonetheless includes a \$250 billion contingent reserve for further efforts to stabilize the financial system. . . . The \$250 billion reserve would support \$750 billion in asset purchases.").

⁵⁶⁶ See the discussion of GMAC's participation in the SCAP in Section V.A.1, *supra*.

⁵⁶⁷ 2009 May Oversight Report, *supra* note 227, at 72–73; 2011 February Oversight Report, *supra* note 516, at 107.

roughly nine more months. Secretary Geithner explained at the time that barring an immediate and substantial threat to the economy stemming from financial instability, Treasury would limit new TARP commitments to mitigating home foreclosures, providing capital to small and community banks, along with other efforts aimed at facilitating small business lending, and potentially increasing Treasury's commitment to the TALF.⁵⁶⁸ In the end Treasury did not allocate any additional TARP funds beyond those it had allocated in December 2009. In the summer of 2010, Congress reduced the TARP's ceiling—or the amount that Treasury could spend before accounting for repayments—to \$475 billion. Treasury's spending authority under the TARP expired on October 3, 2010.

Over the life of the TARP, final loss estimates have sharply decreased. In March 2009, CBO estimated that the TARP would end up costing \$356 billion. By January 2011, that latest loss estimate for the TARP is \$25 billion, while OMB's latest estimate is \$48 billion.⁵⁶⁹ OMB's cost estimates reflect the Administration's policy on HAMP and other programs, have similarly declined sharply since 2009. Figure 31 illustrates three trends: the total TARP funds outstanding, which rose over the early months of the program before falling in 2010; CBO's loss estimates, which rose sharply in early 2009 before declining; and OMB's loss estimates, which also rose precipitously before falling off.

⁵⁶⁸ U.S. Department of the Treasury, *Treasury Department Releases Text of Letter from Secretary Geithner to Hill Leadership on Administration's Exit Strategy for TARP* (Dec. 9, 2009) (online at www.treasury.gov/press-center/press-releases/Pages/tg433.aspx).

⁵⁶⁹ The main reason for the difference between CBO's estimate and the Administration's estimate is that CBO projects a total of \$12 billion in expenditures on HAMP, the Hardest Hit Fund, and the FHA Short Refinance Program, while the Administration projects \$45.6 billion in spending on those programs. The Panel believes that CBO's assumption is more realistic. CBO Report on TARP—November 2010, *supra* note 341, at 5; Office of Management and Budget, *FY 2012 Budget, Economic and Budget Analyses*, at 47 (Feb. 14, 2011) (online at www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/econ_analyses.pdf).

FIGURE 31: TARP FUNDS OUTSTANDING VS. CBO AND OMB SUBSIDY COST ESTIMATES⁵⁷⁰

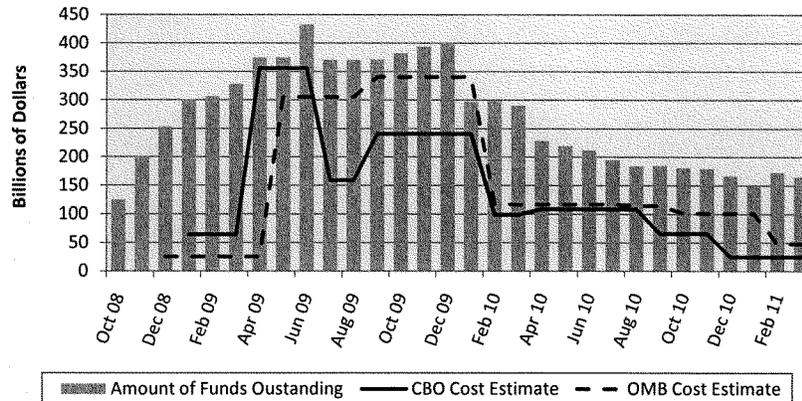


Figure 32 shows the current status of the government's investments for the 13 programs that have used TARP funds. This table only shows the status of principal invested by Treasury. Any dividends, interest payments, and other proceeds that may allow Treasury to earn a return on its TARP investments are accounted for separately in Figure 33.

The first five programs listed in Figure 32—CPP, TIP, AGP, AIGIP, and CDCI—collectively represent the TARP's direct assistance to financial institutions. Out of \$320 billion provided to these firms, about \$92.3 billion remains outstanding, including \$30.9 billion in the CPP and \$60.9 billion to AIG. The Panel believes that the eventual losses in the CPP are likely to be relatively small. Consequently, most of Treasury's exposure to losses on its invest-

⁵⁷⁰ For current and past CBO cost estimates of TARP, see Congressional Budget Office, *Report on the Troubled Asset Relief Program*, at 2 (Jan. 16, 2009) (online at cbo.gov/ftpdocs/99xx/doc9961/01-16-TARP.pdf); Congressional Budget Office, *Report on the Troubled Asset Relief Program*, at 7 (June 2009) (online at www.cbo.gov/ftpdocs/100xx/doc10056/06-29-TARP.pdf); Douglas Elmendorf, *Troubled Asset Relief Program*, Congressional Budget Office Director's Blog (Apr. 17, 2009) (online at cboblog.cbo.gov/?p=231); Congressional Budget Office, *Report on the Troubled Asset Relief Program*, at 2 (June 2009) (online at www.cbo.gov/ftpdocs/100xx/doc10056/06-29-TARP.pdf); Congressional Budget Office, *The Budget and Economic Outlook: An Update*, at 18 (Aug. 2009) (online at www.cbo.gov/ftpdocs/105xx/doc10521/08-25-BudgetUpdate.pdf); Congressional Budget Office, *The Budget and Economic Outlook: Fiscal Years 2010 to 2020*, at 104 (Jan. 2010) (online at www.cbo.gov/ftpdocs/108xx/doc10871/01-26-Outlook.pdf); Congressional Budget Office, *Report on the Troubled Asset Relief Program*, at 3 (Mar. 2010) (online at cbo.gov/ftpdocs/112xx/doc11227/03-17-TARP.pdf); Douglas Elmendorf, *CBO's Latest Projections for the TARP*, Congressional Budget Office Director's Blog (Aug. 20, 2010) (online at cboblog.cbo.gov/?p=1322); Congressional Budget Office, *Report on the Troubled Asset Relief Program*, at 5 (Nov. 2010) (online at cbo.gov/ftpdocs/119xx/doc11980/11-29-TARP.pdf); Congressional Budget Office, *The Budget and Economic Outlook: Fiscal Years 2011 to 2021*, at 67 (Jan. 2011) (online at cbo.gov/ftpdocs/120xx/doc12039/01-26_FY2011Outlook.pdf).

For current and past OMB cost estimates of TARP, see Office of Management and Budget, *OMB Report Under the Emergency Economic Stabilization Act, Section 202*, at 4 (Dec. 5, 2008) (online at www.whitehouse.gov/sites/default/files/omb/assets/omb/legislative/eesa_120508.pdf); Office of Management and Budget, *Analytical Perspectives: Budget of the U.S. Government—Fiscal Year 2010*, at 66 (Feb. 26, 2009) (online at www.gpoaccess.gov/usbudget/fy10/pdf/spec.pdf); Office of Management and Budget, *Analytical Perspectives: Budget of the U.S. Government—Fiscal Year 2011*, at 40 (Feb. 1, 2010) (online at www.gpoaccess.gov/usbudget/fy11/pdf/spec.pdf); Office of Management and Budget, *OMB Report Under the Emergency Economic Stabilization Act, Section 202*, at 3 (Oct. 15, 2010) (online at www.whitehouse.gov/sites/default/files/OMB212Sharp_omb_eop_gov_20101015_175127.pdf); Office of Management and Budget, *Analytical Perspectives: Budget of the U.S. Government—Fiscal Year 2012*, at 45 (Feb. 14, 2011) (online at www.gpoaccess.gov/usbudget/fy12/pdf/BUDGET-2012-PER.pdf).

ments in financial institutions involves AIG. The outcome of the AIG investment will depend on the price that Treasury can eventually obtain for its common stock, including its Series C shares, which were not actually received as part of any TARP initiative.⁵⁷¹

The next two programs listed in the table—AIFP and ASSP—represent the TARP’s assistance to automotive companies.⁵⁷² About 60 percent of the \$81.3 billion that Treasury provided to automotive companies remains outstanding, including large investments in GM, Chrysler, and GMAC/Ally Financial. There is still uncertainty about the outcome of each of those investments. The next three TARP programs listed in the table—TALF, PPIP, and the SBA 7(a) Securities Purchase Program—represent targeted efforts to revive lending. Though very little of this money has been repaid, the Panel expects losses on these programs to be minimal.

Finally, the last three programs listed in the table—HAMP, HHF, and the FHA Short Refinance Program—represent the TARP’s foreclosure-prevention efforts. By design, all three of these programs will result in net losses to the TARP, since the funds are being used to provide financial incentives to prevent foreclosures, and are not meant to be repaid. So the size of the eventual losses will be negatively correlated with the success of the programs. In other words, the more foreclosures that the program prevents, the greater the losses to the TARP. The Panel expects the eventual losses to be far smaller than the \$45.6 billion allocated for the programs, because usage of the programs to date is far below initial projections.

Overall, Treasury has spent \$419.9 billion of the \$475 billion that it is currently authorized to spend. Of the total amount spent, \$255.9 billion has been repaid. Roughly \$6 billion in losses have been recorded. For particular TARP programs, those losses on principal may be partially or fully offset by dividends, interest payments, and other proceeds collected by Treasury. Since the TARP expired in October 2010, Treasury has no longer been able to make new funding commitments, but it can continue to provide funding for TARP programs for which it has existing contracts and previous legal commitments. As Figure 32 shows, \$55.1 billion in TARP funding is still available to Treasury, reserved mostly for the three TARP foreclosure-prevention programs.

⁵⁷¹The Series C shares—discussed in Section VI.F.1, *supra*—were provided by AIG to the U.S. Treasury in consideration for FRBNY’s \$85 billion lending facility. This happened in September 2008, prior to the TARP investments in AIG.

⁵⁷²This category includes assistance to GMAC/Ally Financial, which Treasury chose to fund as part of AIFP due to the companies’ interconnectedness to the future viability of the automotive manufacturers.

FIGURE 32: TARP ACCOUNTING (AS OF MARCH 10, 2011)

[Dollars in billions]^{ix}

Program	Maximum Amount Allotted ^x	Actual Funding	Total Repayments/ Reduced Exposure	Total Losses	Funding Currently Outstanding	Funding Available ^{xi}
Capital Purchase Program (CPP)	\$204.9	\$204.9	xii \$(171.5)	xiii \$(2.6)	\$30.8	\$0
Targeted Investment Program (TIP)	40.0	40.0	(40.0)	0	0	0
Asset Guarantee Program (AGP) ..	5.0	xiv 5.0	xv (5.0)	0	0	0
AIG Investment Program (AIGIP) ..	xvi 70.0	70.0	xvii (9.1)	0	60.9	0
Community Development Capital Initiative (CDCI)	0.6	xviii 0.6	0	0	0.6	0
Auto Industry Financing Program (AIFP)	81.3	81.3	xix (29.0)	xx (3.4)	48.9	0
Auto Supplier Support Program (ASSP) xxi	0.4	0.4	(0.4)	0	0	0
Term Asset-Backed Securities Loan Facility (TALF)	xxii 4.3	xxiii 0.1	0	0	0.1	4.2
Public-Private Investment Program (PPIP) xxiv	22.4	xxv 15.9	xxvi (0.7)	0	15.2	6.5
SBA 7(a) Securities Purchase Program	0.4	xxvii 0.4	xxviii 0	0	0.4	0
Home Affordable Modification Program (HAMP)	29.9	xxix 1.0	0	0	1.0	28.9
Hardest Hit Fund (HHF)	xxx 7.6	xxxi 0.1	0	0	0.1	7.5
FHA Short Refinance Program	8.1	xxxii 0.1	0	0	0.1	8.1
Total	\$475.0	\$419.9	\$(255.8)	\$(6.0)	\$158.1	\$55.1

See endnote references in Annex III: Endnotes

A quantitative assessment of the TARP must also include any profit earned or loss incurred on actual fund outlays. The terms of TARP transactions created the possibility for Treasury to profit from its investments after repayment, but Treasury has also suffered losses related to both investments that are unrecoverable and those never intended for repayment.

Most of the TARP programs hold at least the potential for the taxpayers to make a profit. So far, those programs have earned a profit, net of losses, of \$30.3 billion.⁵⁷³ The losses to date include \$2.6 billion from CPP investments and \$3.4 billion from the AIFP. The CPP losses relate to the bankruptcies of CIT Group and Pacific Coast National Bank and the sales of the preferred stock (and any related warrants) of South Financial Group, TIB Financial Corporation, the Bank of Currituck, Treaty Oak Bancorp, and Cadence Financial Corporation. The AIFP losses were derived from a \$1.9 billion settlement payment for Treasury's \$3.5 billion loan to Chrysler Holding⁵⁷⁴ and the net loss from the \$1.9 billion debtor-in-possession loan provided to Old Chrysler.⁵⁷⁵ Figure 33 shows the

⁵⁷³ These figures do not include the amount currently outstanding of \$157.9 billion. Treasury Transactions Report, *supra* note 36.

⁵⁷⁴ On May 14, 2010, Treasury accepted a \$1.9 billion settlement payment for its \$3.5 billion loan to Chrysler Holding. The payment represented a \$1.6 billion loss from the termination of the debt obligation. See U.S. Department of the Treasury, *Chrysler Financial Parent Company Repays \$1.9 Billion in Settlement of Original Chrysler Loan* (May 17, 2010) (online at www.treasury.gov/press-center/press-releases/Pages/tg700.aspx); Treasury Transactions Report, *supra* note 36.

⁵⁷⁵ Following the bankruptcy proceedings for Old Chrysler, which extinguished the \$1.9 billion debtor-in-possession loan provided to Old Chrysler, Treasury retained the right to recover the proceeds from the liquidation of specified collateral. Although Treasury does not expect a significant recovery from the liquidation proceeds, Treasury is not yet reporting this loan as a loss

Continued

profits and losses for each TARP program. It is important to note that this table represents a snapshot in time, and shows only recorded profits and losses; the TARP's net profit or loss changes with the finalization of each transaction. Additional profits and losses are inevitable. As noted earlier, CBO currently estimates a final net loss of \$25 billion, although this represents a discounted present value estimate rather than a simple accounting summation of net profits and losses as discussed here.⁵⁷⁶

FIGURE 33: TARP PROFIT AND LOSS

[Dollars in millions]

TARP Initiative ^{xxxiii}	Dividends ^{xxxiv} (as of 2/28/2011)	Interest ^{xxxv} (as of 2/28/2011)	Warrant Disposition Proceeds ^{xxxvi} (as of 3/8/2011)	Other Proceeds (as of 2/28/2011)	Losses ^{xxxvii} (as of 3/8/2011)	Total
Total	\$16,482	\$1,256	\$8,681	\$10,014	(\$6,018)	\$30,415
CPP	10,570	68	7,069	xxxviii 6,852	(2,578)	21,981
TIP	3,004	—	1,446	—	—	4,450
AIGIP	—	—	—	xxxix 18	—	18
AIFP	2,461	1,061	xi 99	xii 43	xiii (3,440)	224
ASSP	—	15	—	xiii 101	—	116
AGP	443	—	67	xiv 2,246	—	2,756
PPIP	—	107	—	xv 477	—	583
SBA 7(a)	—	5	—	xvi 0	—	5
Bank of America Guarantee	—	—	—	xvii 276	—	276
CDCI	3	2	—	—	—	5

See endnote references in Annex III: Endnotes

Beyond the basic profit and loss calculation, an additional determination of the profitability of investments is the investment's return. As mentioned above, some TARP programs were not designed to create a return, and thus it would not make sense to calculate one for those expenditures. But for the other TARP programs, the return offers one way to assess their effectiveness. The Panel has consistently employed the IRR as a measure of profitability, as it incorporates cash outflows and inflows while taking into consideration the time value of money. Treasury, in contrast, has utilized several measures to assess the government's return on particular TARP programs as well as the TARP as a whole.⁵⁷⁷

For the warrants associated with the CPP investment, Treasury utilizes a non-annualized absolute return, which is calculated simply as money in divided by money out, without any consideration

in the TARP Transactions Report. As of March 8, 2011, Treasury had collected \$48.1 million in proceeds from the sale of collateral. Treasury included these proceeds as part of the funds repaid under the AIFP. U.S. Department of the Treasury, *Troubled Assets Relief Program Monthly 105(a) Report—September 2010* (Oct. 12, 2010) (online at [www.treasury.gov/initiatives/financial-stability/briefing-room/reports/105/Documents105/September%20105\(a\)%20report_FINAL.pdf](http://www.treasury.gov/initiatives/financial-stability/briefing-room/reports/105/Documents105/September%20105(a)%20report_FINAL.pdf)); Treasury conversations with Panel staff (Aug. 19, 2010 and Nov. 29, 2010); Treasury Transactions Report, *supra* note 36.

⁵⁷⁶ CBO Report on TARP—November 2010, *supra* note 341, at 5.

⁵⁷⁷ One criticism of the IRR approach is that it assumes reinvestment of the earnings and repaid principal at the same rate as that calculated for the overall IRR for the program. See e.g., John S. Walker, Henry F. Check, and Karen L. Randall, *Does the Internal Rate of Return Calculation Require a Reinvestment Rate Assumption?—There Is Still No Consensus* (online at www.abe.sju.edu/check.pdf) (accessed Mar. 11, 2011). In the case of Treasury, the more appropriate assumption may be that Treasury's return covers only its cost of issuing new debt for the comparable period.

for the timing of cash flows.⁵⁷⁸ The Panel's calculation includes a consideration for the time value of money. Further, Treasury includes only CPP and TIP investments that have been fully repaid, and excludes investments lost due to bankruptcy or partial repayment. The Panel, however, includes all CPP and TIP investments that have been repaid or in which Treasury has concluded it will take a loss, ensuring that the total return is not inflated by exclusion of known losses. As of December 31, 2010, Treasury measured the return on CPP investments fully repaid to be 9.8 percent, including both dividends and warrants.⁵⁷⁹ The Panel, by comparison, calculates a return of 8.4 percent on CPP investments as of January 3, 2011.⁵⁸⁰

Neither Treasury nor the Panel have calculated an overall rate of return for TARP as a whole, given the disparate nature of the separate programs involved—including housing programs for which no return was expected—and the fact that most have not been completely closed out. The only other TARP program for which Treasury calculates a rate of return is the PPIP, for which Treasury calculates a return on equity alone, excluding the debt portion.⁵⁸¹ While calculating a return on equity is standard industry practice in the private sector, for the purpose of a return on taxpayer dollars, this practice does not reflect the government's true financial exposure. While Treasury makes clear that its PPIP return is for equity only, and is useful for private investors in the program, the total return on debt and equity would be lower than the return on equity alone. Based on its method of calculating a return for PPIP, Treasury currently shows a return of 27.0 percent.⁵⁸² When calculated as a blended return on both equity and debt, the total return is only 9.7 percent.⁵⁸³

IX. Conclusions and Lessons Learned

In order to evaluate the TARP's impact, one must first recall the extreme fear and uncertainty that infected the financial system in late 2008. The stock market had endured triple-digit swings. Major financial institutions, including Bear Stearns, Fannie Mae, Freddie Mac, and Lehman Brothers, had collapsed, sowing panic throughout the financial markets. The economy was hemorrhaging jobs, and foreclosures were escalating with no end in sight. Chairman Bernanke, looking back on the events of late 2008, has said that

⁵⁷⁸Treasury notes that this method was chosen because at the time they first issued a CPP return, most of the investments and disposed warrants had only been held for a year or less, which would have inflated an annualized return. They have continued with this calculation for consistency. Treasury conversations with Panel staff (Mar. 7, 2011).

⁵⁷⁹December 2010 Warrant Disposition Report, *supra* note 152, at 1.

⁵⁸⁰The 8.4 percent return calculated by the Panel also includes the additional warrants received from Treasury's investment in Bank of America through the TIP. The Panel calculates a return of 10.0 percent on CPP investments as of March 9, 2011.

⁵⁸¹According to Treasury, their rationale for using a return on only equity is because under the terms of the PPIP agreement, only the equity financing was truly at risk. Treasury conversations with Panel staff (Feb. 11, 2011). Also, the debt portion of the PPIP investment carries a financing rate of LIBOR plus 1 percent. U.S. Department of the Treasury, *Letter of Intent*, at Exhibit A (July 8, 2009) (online at www.treasury.gov/initiatives/financial-stability/investment-programs/ppip/s-ppip/Documents/S-PPIP_LOI_Term-Sheets.pdf).

⁵⁸²Treasury's Legacy Securities Public-Private Investment Program: Program Update, *supra* note 102, at 8.

⁵⁸³Ben Protess, *Bad Asset Purchase Program Turning a Profit*, The New York Times Dealbook Blog (Jan. 24, 2011) (online at dealbook.nytimes.com/2011/01/24/toxic-asset-purchase-program-turning-a-profit/).

the nation was on course for “a cataclysm that could have rivaled or surpassed the Great Depression.”

It is now clear that, although America has endured a wrenching recession, it has not experienced a second Great Depression. America’s financial system has survived. Its economy is recovering.

The TARP does not deserve full credit for preventing a depression; indeed, the TARP in isolation may have been insufficient to make much of a difference to the broader economy. But the TARP provided critical support at a moment of profound uncertainty. At the peak of the 2008 financial crisis, when the markets questioned the stability of virtually every bank in the country, the TARP restored a measure of calm and stability. It achieved this effect in part by providing capital to banks but, more significantly, by demonstrating that the United States would take any action necessary to prevent the collapse of its financial system. Through a combined display of political resolve and financial force, the TARP quelled the immediate panic and helped to avert an even more severe crisis.

At the time that Congress established the TARP in October 2008, CBO declined to provide a cost estimate, saying that the program’s extremely broad and vague mandates rendered its final cost unknowable. One number, however, caught the public imagination: \$700 billion, the total amount of money that Treasury requested and Congress authorized to bail out the financial system. As the *New York Times* reported following Treasury’s initial TARP proposal, “A \$700 billion expenditure on distressed mortgage-related assets would roughly be what the country has spent so far in direct costs on the Iraq war and more than the Pentagon’s total yearly budget appropriation. Divided across the population, it would amount to more than \$2,000 for every man, woman and child in the United States.” It is important to note, however, that even at the time the TARP was created, CBO considered it unlikely that the program would cost taxpayers \$700 billion, as Treasury always stood to recover at least some portion of its investments. Nonetheless, \$700 billion was the most precise figure available to the public as the TARP was enacted, and it remains the figure indelibly associated with the program.

Several months after the TARP’s creation, in April 2009, CBO finally had enough information to estimate what the TARP would ultimately cost taxpayers: \$356 billion, or roughly half of the oft-cited \$700 billion figure. Since then, CBO’s estimates have grown progressively less grim as the economy has recovered and TARP investments have been repaid. CBO today estimates that the TARP will cost \$25 billion—an enormous sum, but vastly less than anyone expected in the dark days of late 2008 and early 2009.

Although CBO’s falling cost estimates are in many ways encouraging, they do not necessarily validate Treasury’s administration of the TARP. To be sure, Treasury deserves credit for lowering costs to taxpayers through its diligent management of TARP assets and, in particular, its careful restructuring of AIG, Chrysler, and GM. However, a separate reason for the TARP’s falling costs is that Treasury’s foreclosure prevention programs, which could have cost \$50 billion, have largely failed to get off the ground. Viewed from this perspective, the TARP will cost less than expected in part be-

cause it will accomplish far less than envisioned for American homeowners. Another reason for the TARP's falling costs is that non-TARP government programs, such as the FDIC's efforts to allow banks to borrow at below-market rates and the Federal Reserve's efforts to support the RMBS market, have shifted some of the costs of the financial rescue off of the TARP's balance sheet and onto the balance sheets of other programs that are subject to significantly less oversight. Still another reason that costs have fallen is that the value of the government's stock holdings in the financial sector have sharply rebounded—a rebound that has, unfortunately, not been accompanied by increased lending to consumers and small businesses, nor by increased hiring in the broader economy, both of which were among the TARP's explicit goals.

Further, the Panel has always emphasized that the TARP's cost cannot be measured merely in dollars. The TARP's implicit guarantee of “too big to fail” financial firms has entrenched moral hazard in the financial system, and the TARP's unpopularity in the public eye has created a lingering stigma that may hinder future rescue efforts. Further, accounting for the TARP from today's vantage point—at a time when the financial system has made great strides toward recovery—obscures the risk that existed in the depths of the financial crisis. At one point, the federal government guaranteed or insured \$4.4 trillion in face value of financial assets. If the financial system had suffered another shock on the road to recovery, taxpayers would have faced staggering losses.

Finally, the TARP's incomplete transparency creates a real cost as well: an enduring public suspicion that taxpayers' money was not managed as effectively and accountably as possible.

A. “Too Big to Fail” and Moral Hazard

The TARP did not create the idea of “too big to fail.” Commentators had suggested for years that the U.S. government would intervene to prevent the collapse of any sufficiently large and interconnected financial institution. The government had even demonstrated a willingness in the past—for example, in the 1998 Federal Reserve-supervised bailout of Long Term Capital Management, a hedge fund whose failure the government believed would threaten financial stability—to play at least a limited role in preventing a panic. It is possible that these relatively small-scale interventions created a market expectation that the government would intervene in a more sweeping manner in the event of a crisis.

Yet although the notion of “too big to fail” had existed for years, the TARP and other extraordinary government interventions in 2008 transformed it into stark reality. At the height of the financial crisis, 18 very large financial institutions received \$208.6 billion in TARP funding almost overnight, in many cases without having to apply for funding or to demonstrate any ability to repay taxpayers. Three particularly weak and systemically significant firms—Citigroup, Bank of America, and AIG—received even greater amounts of assistance under improvised programs that were not available to smaller, less significant institutions. The AIG rescue was particularly extraordinary in that it appears to have extended the “too big to fail” guarantee beyond AIG itself and into the broader derivatives market in which the company was entrenched. In es-

sence, by bailing out AIG and its counterparties, the government transformed highly risky derivative bets into fully guaranteed transactions, with the American taxpayer standing as guarantor.

The parameters of “too big to fail” gained greater clarity in early 2009, when Treasury and the Federal Reserve announced that the nation’s 19 largest banks would undergo stress tests and that, if any of these banks were found to be potentially insolvent, it would receive further TARP capital as needed. In essence, the federal government announced that taxpayers would bear any burden and pay any price to prevent the collapse of any very large or very interconnected U.S. bank. Indeed, it was this implicit guarantee, more than any explicit government action, that played the greatest role in calming markets and halting the financial panic.

Even as Treasury took drastic steps to rescue a handful of very large banks, smaller banks continued to collapse across the country. A total of 334 small and medium-sized banks have failed since the TARP’s creation. Partly due to Treasury’s decision to rescue very large banks while allowing smaller banks to collapse, America’s largest banks today manage an even greater fraction of the nation’s wealth than before the crisis. Banks that were “too big to fail” in 2008 are even bigger today.

In light of these events, it is not surprising that markets have incorporated the notion that “too big to fail” banks are safer than their “small enough to fail” counterparts. Credit rating agencies continue to adjust the credit ratings of very large banks to reflect their implicit government guarantee. Smaller banks receive no such adjustment, and as a result, they face higher costs of funds relative to very large banks.

By protecting very large banks from insolvency and collapse, the TARP also created classic moral hazard: that is, very large financial institutions may now rationally decide to take inflated risks because they expect that, if their gamble fails, taxpayers will bear the loss. Ironically, these inflated risks may create even greater systemic risk and increase the likelihood of future crises and bailouts. It is difficult to determine the degree to which moral hazard continues to infect the financial system. Treasury believes that the recent Dodd-Frank Act reined in the problem by establishing a plausible resolution authority for very large banks, but that authority has yet to be tested.

It is important to note that much of the moral hazard created by the TARP was inherent in any large-scale government intervention in the financial sector. That is, once Congress and the administration decided to rescue too-big-to-fail firms from the natural consequences of their own errors, a hefty dose of moral hazard was guaranteed. Yet Treasury likely exacerbated moral hazard in late 2008 and early 2009 by choosing not to impose tough consequences on TARP-recipient banks. For example, if banks had been forced as a condition of TARP assistance to use TARP funds to increase lending, fire their top management, or endure other severe penalties, they would be less willing to repeat the experience, reducing moral hazard.

Treasury’s interventions in the automotive industry, in particular, raise moral hazard concerns. In some ways, Treasury actually mitigated moral hazard through its very strict approach to

these companies: it forced GM and Chrysler to enter bankruptcy, a step not required of other major TARP-recipient institutions. However, the mere fact that Treasury intervened in the automotive industry, rescuing companies that were not banks and were not particularly interconnected within the financial system, extended the “too big to fail” guarantee and its associated moral hazard to non-financial firms. The implication may seem to be that any company in America can receive a government backstop, so long as its collapse would cost enough jobs or deal enough economic damage.

B. Stigma

As the TARP evolved, Treasury found its policy choices increasingly constrained by public anger about the program. The TARP is now widely perceived as having restored stability to the financial sector by bailing out Wall Street banks and domestic automotive manufacturers while doing little for the 13.9 million workers who are unemployed, the 2.4 million homeowners who are at immediate risk of foreclosure, or the countless families otherwise struggling to make ends meet. Treasury acknowledges that, as a result of this perception, the TARP and its programs are now burdened by a public “stigma.”

Because the TARP was designed for an inherently unpopular purpose—rescuing Wall Street banks from the consequences of their own actions—stigmatization was likely inevitable. Treasury’s implementation of the program has, however, made this stigma worse. For example, Treasury initially insisted that only healthy banks would be eligible for capital infusions under the CPP. When it later became clear that some TARP-recipient banks were in fact on the brink of failure, all participating banks, even those in comparatively strong condition, became tainted in the public eye. Further, many senior managers of TARP-recipient institutions maintained their jobs and their substantial salaries, and although shareholders often suffered meaningful dilution, they were not wiped out. To the public, this may appear to be evidence that Wall Street banks and bankers can retain their profits in boom years and shift their losses to taxpayers during a bust—an arrangement that is anathema to market discipline in a free economy.

Another factor contributing to stigmatization was the haphazard, constantly shifting, and in some ways misleading manner in which the TARP was sold to the public. Treasury initially proposed the TARP in a three-page bill that would have provided the Secretary of the Treasury with nearly unlimited, unilateral authority to buy troubled mortgage-backed assets off of bank balance sheets, absent any oversight or review. Although the legislation authorizing the TARP later grew in length and complexity (and added several layers of oversight, including the Panel), Treasury continued to assert that the TARP would function mainly by purchasing troubled assets. Mere days after the legislation authorizing the program was signed into law, however, Treasury changed course and decided to implement the TARP mainly as a bank capitalization program. The shift may have been made for sound policy reasons, but it helped to create a public distrust of the TARP: a sense that the government was treating honest and forthright communication to the public as secondary to Wall Street’s needs. Further, the program’s

architects in many ways oversold its potential. Congress authorized the TARP to be used in a manner that “protects home values, college funds, retirement accounts, and life savings” and “preserves homeownership and promotes jobs and economic growth.” Notwithstanding these stated goals, the TARP was always intended by Congress and Treasury primarily to recapitalize banks. By citing the other goals as part of the rationale for the TARP, Congress and the administration may have laid the groundwork for some of the public disillusionment and anger that followed.

Yet another source of stigma is that the TARP and other government rescue efforts were generally coordinated by the very regulators, bankers, and public officials who failed to anticipate or prevent the crisis, and that the boundaries between public and private actors were not always clear. To give a concrete example, in the rescue of AIG, people from the same small group of law firms, investment banks, and regulators appeared in many roles, sometimes representing conflicting interests. More broadly, the individuals who orchestrated the TARP and other rescue efforts almost all had the perspectives of either a banker or a banking regulator. This problem may be insurmountable—after all, who other than financial experts would coordinate a financial rescue? Nonetheless, the fact that the same people who contributed to the crisis were charged with ending it contributed to a perception that the government was quietly helping banking insiders at the expense of accountability and transparency.

Whatever the reasons for the TARP’s stigmatization, the program eventually became so detested that some smaller banks refused to participate in the CPP, while the legislation proposing the SBLF, a TARP-like bank capitalization program, attempted to escape the program’s unpopularity by providing explicit assurances that the fund was not affiliated with the TARP.

Stigma is difficult to quantify, but opinion polling is suggestive. A Bloomberg poll conducted in October 2010 found that 60 percent of respondents believe that most of the TARP funds provided to the banks would be lost; only 33 percent believed that most of the funds would be recovered. This overwhelming public belief stands at odds with projections released by the administration and CBO, which indicate that these programs may in fact turn a profit. In other words, the public’s broad fury about the TARP may leave many Americans ready to believe only the worst about the program—a sentiment that creates real obstacles to any future government effort to intervene in a financial crisis.

C. Transparency, Data Collection, and Accountability

Transparency. Beginning with its very first report, the Panel has repeatedly expressed concerns about the lack of transparency in the TARP. In too many cases, especially in late 2008 and early 2009, Treasury either declined to release information that it possessed about the program or declined to require TARP-recipient institutions to reveal information about their use of taxpayer funds. In perhaps the most profound violation of the principle of transparency, Treasury decided in the TARP’s earliest days to push tens of billions of dollars out the door to very large financial institutions without requiring banks to use the funds in any particular way or

even reveal how the money was used. As a result, the public will never know to what purpose its money was put. Other transparency problems include Treasury's refusal to explain how it valued the stock warrants it received in exchange for its TARP investments and the joint failure of Treasury and the Federal Reserve to disclose enough details of the 2009 stress tests to permit the results to be duplicated or challenged by outside parties.

To Treasury's credit, its transparency and disclosure practices have improved over the lifetime of the TARP. For example, Treasury has recently begun to release loan-level information on its foreclosure mitigation programs—a far greater level of detail than was available in the program's early days. Further, Treasury has made an admirable commitment to posting TARP contracts online, and it has even disclosed the identity of TARP subcontractors—an unusual degree of transparency within the government contracting arena.

Data Collection and Analysis. In some cases, public understanding of the TARP has suffered not because Treasury refused to reveal useful data but because these data were never collected in the first place. For example, despite repeated urgings from the Panel, Treasury still does not collect sufficient information about why loans are moving to foreclosure, nor does it monitor closely enough any loan modifications performed outside of HAMP. Additionally, Treasury stopped collecting lending data from CPP-recipient banks after larger banks repaid TARP funds, rendering it difficult for observers to measure that program's continuing impact.

Without adequate data collection, Treasury has flown blind; it has lacked the information needed to spot trends, determine which programs are succeeding and which programs are failing, and make changes necessary for better implementation. The collection and analysis of data were especially important because so many of the TARP's programs were unprecedented, creating the possibility that data could reveal surprising and unexpected results. For example, Treasury took for granted that recapitalizing banks through the CPP would spur lending, yet when the Panel analyzed bank-level lending data, it was unable to find any correlation between the receipt of CPP funds and new lending. Similarly, it may seem intuitively obvious that homeowners who are burdened by significant car loan and credit card payments would be more likely to default on their mortgages than similar homeowners unburdened by such payments—yet surprisingly, HAMP data revealed that this was not the case. To the extent that comprehensive, usable data were not collected for all TARP programs, or to the extent that data were collected but not analyzed or released for public review, other surprising and important correlations were likely never uncovered.

Goals and Accountability. A related concern is Treasury's failure to articulate clear, meaningful goals for many of its TARP programs or to update its goals as programs have evolved. For example, when the President announced HAMP in early 2009, he asserted that the program would prevent three to four million foreclosures. The program has fallen far short of that goal and now appears on track to help only 700,000 to 800,000 homeowners—yet

Treasury has never formally announced a new target for the program.

Even in cases in which Treasury's decisions have been clearly disclosed, the justifications have often remained obscure. For example, Treasury has often stated numerous goals for a single TARP program, such as to maintain systemic stability, to protect the stability of a particular institution, and to ensure the best possible return on taxpayer money. These goals have, unfortunately, frequently come into conflict, and Treasury has never adequately explained how it balanced conflicting obligations or prioritized conflicting aims. Because virtually any course of action could be justified as meeting one or another of Treasury's goals, the public has had no meaningful way to hold Treasury accountable—and Treasury has had no clear target to strive toward in its own internal deliberations.

D. Other Obstacles Encountered by the TARP

In addition to the broad problems laid out above, Treasury has encountered other recurring difficulties in its administration of the TARP.

- **Treasury often found greater success in TARP programs that had only a few participants than in programs that required coordinating hundreds or thousands of participants.** In the case of the CPP, Treasury achieved the vast majority of the program's effect by quickly pumping tens of billions of dollars into a handful of very large banks. Treasury needed a much longer timeframe to recapitalize hundreds of local and regional banks, and Treasury's investments in these banks were simply too small and too late to have a meaningful effect on financial stability. Along similar lines, the TARP program that directly reached the most participants—HAMP—was also one of the least effective, in part because Treasury found the task of coordinating hundreds of banks and loan servicers and millions of homeowners to be nearly overwhelming.

Although Treasury found it easier and often more effective to stabilize the financial system by supporting "too big to fail" institutions rather than smaller banks or individual homeowners, it is critically important that the government consider the effects of its actions on the overall financial system. Rescuing large banks may have averted the immediate crisis, but it also provided these banks a competitive advantage, exacerbating concentration and potentially destabilizing the financial system. Further, the fact that large banks received such quick and dramatic support even as foreclosures continued unabated has contributed to the TARP's stigmatization, which has undermined the program's effectiveness.

- **Treasury often encountered difficulty in attracting active, widespread participation in voluntary programs.** The TARP's most effective programs were those in which participants had little choice but to follow Treasury's guidance. In particular, the investments that most dramatically stabilized the financial system were the CPP's investments in very large banks (which, at the peak of the financial crisis, received intense political and market pressure to participate in the TARP) and AIG, GM, and Chrysler (which would have suffered catastrophic, uncontrolled bankruptcies

had they refused government support). In cases in which Treasury relied on voluntary participation, as in the involvement of small banks in the CPP or of investors and loan servicers in HAMP, many would-be participants refused to join, and Treasury found that it had little leverage to enforce program terms on the participants that did enroll. These problems persisted even though the terms of HAMP and the CPP were quite generous.

Of course, mandatory programs present their own problems, including the specter of unrestrained government intervention into private institutions. The fact that voluntary TARP programs worked relatively poorly does not necessarily mean that future programs should be made mandatory; rather, it means that future administrations should carefully weigh the trade-offs of a program that relies purely on voluntary participation.

- **Treasury often found that hastily designed programs could backfire.** For example, in the foreclosure arena, Treasury found that HAMP's initial design attracted only limited interest from loan servicers, prompting it to launch half a dozen increasingly generous foreclosure-related efforts in 2009 and early 2010. Unfortunately, the pattern of providing ever more generous incentives may have backfired, as lenders and servicers may have opted to delay modifications in hopes of eventually receiving a better deal. In addition, loan servicers expressed confusion about the constant flux of new programs, new standards, and new requirements that made implementation more complex. A similar problem arose in the CPP, in which Treasury and Congress imposed additional restrictions on CPP-recipient banks—particularly as related to executive compensation—long after those banks had accepted taxpayer money. Once financial institutions recognized that their CPP participation entailed a risk of being forced to accept additional, unilaterally imposed restrictions at a later date, they became less willing to participate in future TARP programs.

In a crisis, government agencies may feel forced to launch a response—any response—as quickly as possible with the expectation that, if their first effort should fail, they can always revise and improve the program later. The experience of the TARP, however, suggests that poorly designed first efforts may create enduring problems. Government actors should weigh this risk carefully when choosing whether to launch an immediate, haphazard response or to take more time to design an effective program.

- **Treasury's programs often focused on addressing the immediate crisis, potentially giving short shrift to longer-term risks.** For example, the Panel highlighted potential threats to the financial system in its oversight reports on the CRE market and on the potential hazards posed by mortgage irregularities. Treasury had not established specific programs to deal with these potential systemic threats, and its existing programs in some cases relied upon these threats not materializing (for example, HAMP's contracts with loan servicers take for granted that those servicers have a legal right to conduct loan modifications, notwithstanding widespread concern about mortgage documentation irregularities).

It is understandable that, while dealing with threats that could impair the financial system tomorrow, Treasury may pay less attention to threats that could damage the system months or years

in the future. Even so, failure to pay attention to threats at their earliest stages could allow risks to magnify and may force more costly interventions down the road.

E. On the Role of Oversight

In establishing the TARP, Congress assigned oversight roles to no fewer than three government bodies: the Congressional Oversight Panel, the Special Inspector General for TARP (SIGTARP), and the Government Accountability Office (GAO). Although this document is the Panel's final report, SIGTARP and GAO will continue to monitor the TARP and issue public reports on their findings, and further oversight work will be performed by committees of the U.S. House of Representatives and the U.S. Senate. Academics, journalists, and watchdog groups also have played and will continue to play an important role in evaluating the TARP.

Because so many organizations have examined Treasury's efforts, the TARP has become one of the most thoroughly scrutinized government programs in U.S. history. Such close scrutiny inevitably begets criticism, and in the case of the TARP—a program born out of ugly necessity—the criticism was always likely to be harsh. After all, in the midst of a crisis, perfect solutions do not exist; every possible action carries regrettable consequences, and even the best possible decisions will be subject to critiques and second-guessing. For these reasons the TARP was likely doomed to be unpopular, and because close scrutiny from oversight bodies drew attention to the program's faults—both the faults resulting from Treasury's decisions and the faults beyond anyone's control—the oversight process itself may have magnified the TARP's unpopularity.

This fact creates an unfortunate tension. In a democracy in which a government's legitimacy depends upon public approval for its actions, political logic may argue for conducting only loose oversight of unpopular programs in hopes of shielding such programs from public criticism. It is to the credit of Congress, Treasury, and the administration that the TARP has not been hidden: that despite the much-discussed gaps in the program's transparency, it has been thoroughly and systematically scrutinized and debated. There can be no question that this oversight has improved the TARP and increased taxpayer returns. For example, in July 2009, the Panel reported that Treasury's method for selling stock options gained through the CPP appeared to be recovering only 66 percent of the warrants' estimated worth. Due in part to pressure generated by the Panel's work, Treasury changed its approach, and subsequent sales recovered 103 cents on the dollar, contributing to \$8.6 billion in returns to taxpayers. Other substantial improvements in the TARP—such as Treasury's heightened focus on the threat to HAMP posed by second liens and its greater disclosure of TARP-related data—are all partly the result of pressure exerted by the Panel and other oversight bodies.

Thus, an enduring lesson of the TARP is that extraordinary government programs can benefit from, and indeed may require, extraordinary oversight. This lesson remains relevant in the context of the government's extraordinary actions in the 2008 financial crisis: the public will continue to benefit from intensive, coordinated efforts by public and private organizations to oversee Treasury, the

FDIC, the Federal Reserve, and other government actors. Careful, skeptical review of the government's actions and their consequences—even when this review is uncomfortable—is an indispensable step toward preserving the public trust and ensuring the effective use of taxpayer money.

ANNEX I: FEDERAL FINANCIAL STABILITY EFFORTS

Beginning in its April 2009 report, the Panel broadly classified the resources that the federal government has devoted to stabilizing the economy in the aftermath of the financial crisis through myriad programs and initiatives such as outlays, loans, or guarantees. The Panel calculates the total current value of these Treasury, FDIC, and Federal Reserve resources to be approximately \$1.9 trillion. However, this would translate into the ultimate “cost” of the stabilization effort only if: (1) assets do not appreciate; (2) no dividends are received, no warrants are exercised, and no TARP funds are repaid; (3) all loans default and are written off; and (4) all guarantees are exercised and subsequently written off. The \$1.9 trillion total current value does not include Treasury’s exposure to Fannie Mae and Freddie Mac, which the Panel consistently has treated as a separate issue. It also excludes efforts by the Federal Reserve that are primarily monetary policy initiatives, rather than financial stability efforts. These efforts are discussed separately below.

With respect to the FDIC and Federal Reserve programs, the risk of loss varies significantly across the programs considered here, as do the mechanisms providing protection for the taxpayer against such risk. As discussed in the Panel’s November 2009 report, the FDIC assesses a premium of up to 100 basis points, or 1 percentage point, on TLGP debt guarantees.⁵⁸⁴ In contrast, the Federal Reserve’s liquidity programs, classified here as loans under “Other Federal Reserve Credit Expansion,” are generally available only to borrowers with good credit, and the loans are over-collateralized and with recourse to other assets of the borrower. If the assets securing a Federal Reserve loan realize a decline in value greater than the “haircut,” the Federal Reserve is able to demand more collateral from the borrower. Similarly, should a borrower default on a recourse loan, the Federal Reserve can turn to the borrower’s other assets to make the Federal Reserve whole. In this way, the risk to the taxpayer on recourse loans only materializes if the borrower enters bankruptcy.

FIGURE 34: FEDERAL GOVERNMENT FINANCIAL STABILITY EFFORTS (AS OF MARCH 8, 2011)
[Dollars in billions]

Program	Treasury (TARP)	Federal Reserve	FDIC	Total
Total	\$213.2	\$1,156.9	558.3	1,928.3
Outlays ^{xlviii}	186.4	1,092.2	64.1	1,342.7
Loans ^{xliv}	22.4	64.7	0	87.1
Guarantees ⁱ	4.3	0	494.2	498.5
AIG ^{li}	60.0	24.8	0	85.7
Outlays	^{lii} 60.9	^{liii} 0	0	60.9
Loans	0	^{liiv} 24.8	0	24.8
Guarantees	0	0	0	0
Citigroup	0	0	0	0
Outlays	^{lv} 0	0	0	0
Loans	0	0	0	0
Guarantees	0	0	0	0
Bank of America	0	0	0	0
Outlays	^{lvi} 0	0	0	0

⁵⁸⁴ 2009 November Oversight Report, *supra* note 60, at 36.

FIGURE 34: FEDERAL GOVERNMENT FINANCIAL STABILITY EFFORTS (AS OF MARCH 8, 2011)—
Continued
[Dollars in billions]

Program	Treasury (TARP)	Federal Reserve	FDIC	Total
Loans	0	0	0	0
Guarantees	0	0	0	0
Capital Purchase Program (Other)	30.8	0	0	30.8
Outlays	^{lvii} 30.8	0	0	30.8
Loans	0	0	0	0
Guarantees	0	0	0	0
Capital Assistance Program	N/A	0	0	^{lviii} N/A
TALF	4.3	15.9	0	20.2
Outlays	0	0	0	0
Loans	0	^{lx} 15.9	0	15.9
Guarantees	^{lix} 4.3	0	0	4.3
PPIP (Loans) ^{lxi}	0	0	0	0
Outlays	0	0	0	0
Loans	0	0	0	0
Guarantees	0	0	0	0
PPIP (Securities)	^{lxii} 21.7	0	0	21.7
Outlays	7.4	0	0	7.4
Loans	14.3	0	0	14.3
Guarantees	0	0	0	0
Making Home Affordable Program/Foreclosure Mitigation	45.6	0	0	0
Outlays	^{lxiii} 45.6	0	0	45.6
Loans	0	0	0	0
Guarantees	0	0	0	0
Automotive Industry Financing Program	^{lxiv} 48.9	0	0	48.9
Outlays	40.8	0	0	40.8
Loans	8.1	0	0	8.1
Guarantees	0	0	0	0
Automotive Supplier Support Program	0	0	0	0
Outlays	0	0	0	0
Loans	^{lxv} 0	0	0	0
Guarantees	0	0	0	0
SBA 7(a) Securities Purchase	^{lxvi} 0.37	0	0	0.37
Outlays	0.37	0	0	0.37
Loans	0	0	0	0
Guarantees	0	0	0	0
Community Development Capital Initiative	^{lxvii} 0.57	0	0	0.57
Outlays	0	0	0	0
Loans	0.57	0	0	0.57
Guarantees	0	0	0	0
Temporary Liquidity Guarantee Program	0	0	494.2	494.2
Outlays	0	0	0	0
Loans	0	0	0	0
Guarantees	0	0	^{lxviii} 494.2	494.2
Deposit Insurance Fund	0	0	64.1	64.1
Outlays	0	0	^{lxix} 64.1	64.1
Loans	0	0	0	0
Guarantees	0	0	0	0
Other Federal Reserve Credit Expansion	0	1,116.2	0	1,116.2
Outlays	0	^{lxx} 1,092.2	0	1,092.2
Loans	0	^{lxxi} 24.0	0	24.0
Guarantees	0	0	0	0

See endnote references in Annex III: Endnotes

Treasury's Exposure to Fannie Mae and Freddie Mac

In July 2008, the Federal Reserve and Treasury began to provide increased credit support to Fannie Mae and Freddie Mac. On September 7, 2008, the FHFA, using authority it had been provided through the Housing and Economic Recovery Act of 2008, placed

Fannie Mae and Freddie Mac in conservatorship, thereby explicitly guaranteeing the \$5.2 trillion in debt and MBS guaranteed by the GSEs in 2008.⁵⁸⁵ As part of this action, Treasury initiated agreements to recapitalize the GSEs, and additionally established two programs to aid them: the Government Sponsored Enterprises' Mortgage Backed Securities Purchase Program (GSE MBS Purchase Program) and the GSE Credit Facility.

Under the GSE MBS Purchase Program, Treasury purchased approximately \$225 billion in GSE MBS by the time its authority expired.⁵⁸⁶ As of February 2011, there was approximately \$136.3 billion in MBS still outstanding under this program.⁵⁸⁷ No loans were needed or issued under the GSE Credit Facility.

On May 6, 2009, Treasury doubled its recapitalization (stock purchase) commitment to each enterprise. In December 2009, Treasury announced amendments to the Senior Preferred stock purchase agreements that removed any limits on such stock purchases of each GSE through the end of 2012. As of the end of fiscal year 2010, Treasury held \$52.6 billion in preferred stock, a number that was predicted to fall to \$47.5 billion in fiscal year 2011.⁵⁸⁸

Other Federal Reserve Actions

On November 3, 2010, the FOMC announced that it had directed FRBNY to begin purchasing \$600 billion in longer-term Treasury securities. In addition, FRBNY will reinvest \$250 billion to \$300 billion in principal payments from agency debt and agency MBS in Treasury securities.⁵⁸⁹ The additional purchases and reinvestments will be conducted through the end of the second quarter of 2011, meaning the pace of purchases will be approximately \$110 billion per month. In order to facilitate these purchases, FRBNY will temporarily lift its System Open Market Account per-issue limit, which prohibits the Federal Reserve's holdings of an individual security from surpassing 35 percent of the outstanding amount.⁵⁹⁰ As of March 9, 2011, the Federal Reserve held \$1.27 trillion in Treasury securities.⁵⁹¹

⁵⁸⁵ Fannie Mae had \$3.0 trillion of guaranteed debt on its books in 2008, and had \$3.1 trillion in 2010. Freddie Mac had \$2.2 trillion of MBS on its books in 2008 and had \$2.2 trillion in 2010. Federal National Mortgage Association, *Form 10-K for the Fiscal Year Ended December 31, 2010*, at 74 (Feb. 24, 2011) (online at www.sec.gov/Archives/edgar/data/310522/000095012311017972/w81665e10vk.htm); Federal Home Loan Mortgage Corporation, *Form 10-K for the Fiscal Year Ended December 31, 2010*, at 81 (Feb. 24, 2011) (online at www.sec.gov/Archives/edgar/data/1026214/000102621411000005/f71542e10vk.htm).

⁵⁸⁶ U.S. Department of the Treasury, *FY2011 Budget in Brief*, at 138 (Feb. 2010) (online at [www.treasury.gov/about/budget-performance/budget-in-brief/Documents/FY%202011%20BIB%20\(2\).pdf](http://www.treasury.gov/about/budget-performance/budget-in-brief/Documents/FY%202011%20BIB%20(2).pdf)).

⁵⁸⁷ U.S. Department of the Treasury, *MBS Purchase Program: Portfolio by Month* (online at www.treasury.gov/resource-center/data-chart-center/Pages/mbs-purchase-program.aspx) (accessed Mar. 11, 2011). Treasury has received \$80.7 billion in principal repayments and \$16.2 billion in interest payments from these securities. See U.S. Department of the Treasury, *MBS Purchase Program Principal and Interest Received* (online at www.treasury.gov/resource-center/data-chart-center/Pages/mbs-purchase-program.aspx) (accessed Mar. 11, 2011).

⁵⁸⁸ U.S. Department of the Treasury, *Housing Government Sponsored Enterprise Programs: Program Summary by Budget Activity* (Feb. 14, 2011) (online at www.treasury.gov/about/budget-performance/budget-in-brief/Documents/FY2012_GSE_508.pdf).

⁵⁸⁹ On August 10, 2010, the Federal Reserve began reinvesting principal payments on agency debt and agency MBS holdings in longer-term Treasury securities in order to keep the amount of their securities holdings in their System Open Market Account portfolio at their then-current level. Board of Governors of the Federal Reserve System, *FOMC Statement* (Aug. 10, 2010) (online at www.federalreserve.gov/newsevents/press/monetary/20100810a.htm).

⁵⁹⁰ Federal Reserve Bank of New York, *FAQs: Purchases of Longer-term Treasury Securities* (Nov. 3, 2010) (online at www.newyorkfed.org/markets/lttreas_faqs.html).

⁵⁹¹ March 2011 Fed Statistical Release H.4.1, *supra* note 458.

ANNEX II: ADDITIONAL CPP DATA

The CPP is discussed at length in Section II.A above. This annex provides additional data about the current state of the CPP. Figure 35 shows the number of CPP recipients that have missed dividend payments to Treasury by bank size, type of dividend owed, and number of payments missed.

FIGURE 35: CPP MISSED DIVIDEND PAYMENTS (AS OF FEBRUARY 28, 2011)⁵⁹²

Number of Missed Payments	1	2	3	4	5	6	7	8	9	Total
Cumulative Dividends:										
Number of Banks, by asset size	26	18	26	20	17	13	8	3	0	131
Under \$1B	16	11	19	17	13	8	5	1	0	90
\$1B-\$10B	9	7	6	3	4	5	3	2	0	39
Over \$10B	1	0	1	0	0	0	0	0	0	2
Non-Cumulative Dividends:										
Number of Banks, by asset size	3	5	2	6	6	1	3	3	1	30
Under \$1B	2	5	2	6	5	1	3	3	1	28
\$1B-\$10B	1	0	0	0	1	0	0	0	0	2
Over \$10B	0	0	0	0	0	0	0	0	0	0
Total Banks Missing Payments .....	...	...	...	...	...	...	...	...	...	161
Total Missed Payments .....	...	...	...	...	...	...	...	...	...	596

⁵⁹² Additionally, two banks in the CDCI program have missed one payment and one has missed two payments, as of February 28, 2011. All three banks have less than \$1 billion in assets. Treasury's Dividends & Interest Report, *supra* note 156. Data on total bank assets compiled using SNL Financial data service (accessed Mar. 11, 2011).

Figure 36 identifies CPP recipients to whose board meetings Treasury currently sends an observer, as a result of multiple missed dividend payments.

FIGURE 36: INSTITUTIONS WHERE TREASURY OBSERVERS NOW ATTEND BOARD MEETINGS⁵⁹³

Institution	CPP Investment Amount	Non-Current Dividends/Interest	No. of Missed Payments
Anchor BanCorp Wisconsin, Inc.	\$110,000,000	\$11,229,167	8
Blue Valley Ban Corp	21,750,000	2,175,000	8
Cascade Financial Corporation	38,970,000	2,922,750	6
Central Pacific Financial Corp. ⁵⁹⁴	135,000,000	N/A	0
Centrue Financial Corporation	32,668,000	2,858,450	7
Citizens Bancorp	10,400,000	991,900	7
Citizens Commerce Bancshares, Inc.	6,300,000	515,025	6
Dickinson Financial Corporation II	146,053,000	13,929,860	7
FC Holdings, Inc.	21,042,000	1,720,170	6
First BanCorp (PR) ⁵⁹⁵	400,000,000	12,077,176	3
First Banks, Inc.	295,400,000	28,173,775	7
Grand Mountain Bancshares, Inc.	3,076,000	286,885	7
Heritage Commerce Corp	40,000,000	3,000,000	6
Idaho Bancorp	6,900,000	658,088	7
Integra Bank Corporation	83,586,000	6,268,950	6
Northern States Financial Corporation	17,211,000	1,290,825	6
Pacific Capital Bancorp ⁵⁹⁶	180,634,000	0	0
Pacific City Financial Corporation	16,200,000	1,545,075	7
Pathway Bancorp	3,727,000	304,635	6
Premierwest Bancorp	41,400,000	3,105,000	6
Ridgestone Financial Services, Inc.	10,900,000	891,075	6
Rogers Bancshares, Inc.	25,000,000	2,043,750	6
Royal Bancshares of Pennsylvania, Inc.	30,407,000	2,660,613	7
Seacoast Banking Corporation of Florida	50,000,000	5,000,000	8
Syringa Bancorp	8,000,000	654,000	6
Georgia Primary Bank	4,500,000	438,725	7
Lone Star Bank	3,072,000	339,107	8

FIGURE 36: INSTITUTIONS WHERE TREASURY OBSERVERS NOW ATTEND BOARD MEETINGS⁵⁹³—
Continued

Institution	CPP Investment Amount	Non-Current Dividends/ Interest	No. of Missed Payments
One Georgia Bank	5,500,000	530,391	7
OneUnited Bank	12,063,000	1,206,300	8
Premier Service Bank	4,000,000	378,472	7
United American Bank	8,700,000	941,715	8
Total	\$1,772,459,000	\$108,136,877	194

⁵⁹³ Treasury's Dividends & Interest Report, *supra* note 156.

⁵⁹⁴ On February 18, 2011, Treasury completed the exchange of its \$135,000,000 of Preferred Stock (including accrued and unpaid dividends thereon) in Central Pacific Financial Corp. for 5,620,117 shares of common stock, pursuant to an exchange agreement dated February 17, 2011. Treasury's Dividends & Interest Report, *supra* note 156.

⁵⁹⁵ On July 20, 2010, Treasury completed the exchange of its \$400,000,000 of Preferred Stock in First BanCorp for \$424,174,000 of Mandatorily Convertible Preferred Stock (MCP), which is equivalent to the initial investment amount of \$400,000,000, plus \$24,174,000 of capitalized previously accrued and unpaid dividends. Subject to the fulfillment by First BanCorp of certain conditions, including those related to its capital plan, the MCP may be converted to common stock. Since that point, two additional dividend payments have been missed. Treasury's Dividends & Interest Report, *supra* note 156.

⁵⁹⁶ On August 31, 2010, following the completion of the conditions related to Pacific Capital Bancorp's capital plan, Treasury exchanged its \$180,634,000 of Preferred Stock in Pacific Capital for \$195,045,000 of Mandatorily Convertible Preferred Stock, which is equivalent to the initial investment amount of \$180,634,000, plus \$14,411,000 of capitalized previously accrued and unpaid dividends. On September 27, 2010, following the completion of the conversion conditions set forth in the Certificate of Designations for the MCP, all of Treasury's MCP was converted into 360,833,250 shares of common stock of Pacific Capital. No dividends have been missed since this point. Treasury's Dividends & Interest Report, *supra* note 156.

Figure 37 details the losses to Treasury to date, both settled and unsettled, from the CPP.

FIGURE 37: CPP SETTLED AND UNSETTLED LOSSES⁵⁹⁷

Institution	Investment Amount	Investment Disposition Amount	Warrant Disposition Amount	Dividends & Interest	Possible Losses/Reduced Exposure	Action
Cadence Financial Corporation*	\$44,000,000	\$38,000,000		\$2,970,000	\$(6,000,000)	3/4/2011: Treasury completed the sale of the preferred stock and warrants issued by Cadence Financial to Community Bancorp LLC for \$38 million plus accrued and unpaid dividends.
CIT Group Inc.*	2,330,000,000			43,687,500	(2,330,000,000)	12/10/2009: Bankruptcy reorganization plan for CIT Group Inc. became effective. CPP preferred shares and warrants were extinguished and replaced with contingent value rights. On Feb. 8, 2010, the contingent value rights expired without value.
Midwest Banc Holdings, Inc.	89,388,000			824,289	(89,388,000)	5/14/2010: Midwest Banc Holdings, Inc. subsidiary, Midwest Bank and Trust, Co., placed into receivership. Midwest Banc Holdings is currently in bankruptcy proceedings.
Pacific Coast National Bancorp*	4,120,000			18,088	(4,120,000)	2/11/2010: Pacific Coast National Bancorp dismissed its bankruptcy proceedings without recovery to creditors or investors. Investments, including Treasury's CPP investments, were extinguished.
Pierce County Bancorp	6,800,000			207,948	(6,800,000)	11/5/2010: Pierce County Bancorp subsidiary, Pierce Commercial Bank, placed into receivership.
Sonoma Valley Bancorp	8,653,000			347,164	(8,653,000)	8/20/2010: Sonoma Valley Bancorp subsidiary, Sonoma Valley Bank, placed into receivership.
South Financial Group*	347,000,000	130,179,219	\$400,000	16,386,111	(216,820,781)	9/30/2010: Preferred stock and warrants sold to Toronto-Dominion Bank.
The Bank of Currituck*	4,021,000	1,742,850		169,834	(2,278,150)	12/3/2010: The Bank of Currituck completed its repurchase of all preferred stock (including preferred stock received upon exercise of warrants) issued to Treasury.
TIB Financial Corp.*	37,000,000	12,119,637	40,000	1,284,722	(24,880,363)	9/30/2010: Preferred stock and warrants sold to North American Financial Holdings.
Tifton Banking Company	3,800,000			223,208	(3,800,000)	11/12/2010: Tifton Banking Company placed into receivership.
Treaty Oak Bancorp*	3,268,000	500,000		192,415	(2,768,000)	1/26/2011: Treaty Oak shareholders approve Carllie Bankshares' purchase plan.

FIGURE 37: CPP SETTLED AND UNSETTLED LOSSES⁵⁹⁷—Continued

Institution	Investment Amount	Investment Disposition Amount	Warrant Disposition Amount	Dividends & Interest	Possible Losses/Reduced Exposure	Action
UCBH Holdings, Inc	298,737,000			7,509,920	(298,737,000)	11/6/2009: United Commercial Bank, a wholly owned subsidiary of UCBH Holdings, Inc., was placed into receivership. UCBH Holdings is currently in bankruptcy proceedings.
Total	\$3,176,787,000	\$182,541,706	440,000	73,821,199	\$(2,994,245,294)	

⁵⁹⁷ Treasury Transactions Report, *supra* note 36, at 14. The asterisk (“*”) denotes recognized losses on Treasury’s Transactions Report.

FIGURE 38: WARRANT REPURCHASES/AUCTIONS FOR FINANCIAL INSTITUTIONS THAT HAVE FULLY REPAID CPP FUNDS (AS OF MARCH 9, 2011)

Institution	Investment Date	Warrant Repurchase Date	Warrant Repurchase/Sale Amount	Panel's Best Valuation Estimate at Disposition Date	Price/Estimate Ratio	IRR (Percent)
Old National Bancorp	12/12/2008	5/8/2009	\$1,200,000	\$2,150,000	0.558	9.3
Iberiabank Corporation	12/5/2008	5/20/2009	1,200,000	2,010,000	0.597	9.4
Firstmerit Corporation	1/9/2009	5/27/2009	5,025,000	4,260,000	1.180	20.3
Sun Bancorp, Inc.	1/9/2009	5/27/2009	2,100,000	5,580,000	0.376	15.3
Independent Bank Corp.	1/9/2009	5/27/2009	2,200,000	3,870,000	0.568	15.6
Alliance Financial Corporation ...	12/19/2008	6/17/2009	900,000	1,580,000	0.570	13.8
First Niagara Financial Group	11/21/2008	6/24/2009	2,700,000	3,050,000	0.885	8.0
Berkshire Hills Bancorp, Inc.	12/19/2008	6/24/2009	1,040,000	1,620,000	0.642	11.3
Somerset Hills Bancorp	1/16/2009	6/24/2009	275,000	580,000	0.474	16.6
SCBT Financial Corporation	1/16/2009	6/24/2009	1,400,000	2,290,000	0.611	11.7
HF Financial Corp.	11/21/2008	6/30/2009	650,000	1,240,000	0.524	10.1
State Street	10/28/2008	7/8/2009	60,000,000	54,200,000	1.107	9.9
U.S. Bancorp	11/14/2008	7/15/2009	139,000,000	135,100,000	1.029	8.7
The Goldman Sachs Group, Inc.	10/28/2008	7/22/2009	1,100,000,000	1,128,400,000	0.975	22.8
BB&T Corp.	11/14/2008	7/22/2009	67,010,402	68,200,000	0.983	8.7
American Express Company	1/9/2009	7/29/2009	340,000,000	391,200,000	0.869	29.5
Bank of New York Mellon Corp ...	10/28/2008	8/5/2009	136,000,000	155,700,000	0.873	12.3
Morgan Stanley	10/28/2008	8/12/2009	950,000,000	1,039,800,000	0.914	20.2
Northern Trust Corporation	11/14/2008	8/26/2009	87,000,000	89,800,000	0.969	14.5
Old Line Bancshares Inc.	12/5/2008	9/2/2009	225,000	500,000	0.450	10.4
Bancorp Rhode Island, Inc.	12/19/2008	9/30/2009	1,400,000	1,400,000	1.000	12.6
Centerstate Banks of Florida Inc.	11/21/2008	10/28/2009	212,000	220,000	0.964	5.9
Manhattan Bancorp	12/5/2008	10/14/2009	63,364	140,000	0.453	9.8
CVB Financial Corp	12/5/2008	10/28/2009	1,307,000	3,522,198	0.371	6.4
Bank of the Ozarks	12/12/2008	11/24/2009	2,650,000	3,500,000	0.757	9.0
Capital One Financial	11/14/2008	12/3/2009	148,731,030	232,000,000	0.641	12.0
JPMorgan Chase & Co.	10/28/2008	12/10/2009	950,318,243	1,006,587,697	0.944	10.9
CIT Group Inc.	12/31/2008	.....	.....	562,541	.....	(97.2)
TCF Financial Corp	1/16/2009	12/16/2009	9,599,964	11,825,830	0.812	11.0
LSB Corporation	12/12/2008	12/16/2009	560,000	535,202	1.046	9.0
Wainwright Bank & Trust Com- pany	12/19/2008	12/16/2009	568,700	1,071,494	0.531	7.8
Wesbanco Bank, Inc.	12/5/2008	12/23/2009	950,000	2,387,617	0.398	6.7
Union First Market Bankshares Corporation (Union Bankshares Corporation)	12/19/2008	12/23/2009	450,000	1,130,418	0.398	5.8
Trustmark Corporation	11/21/2008	12/30/2009	10,000,000	11,573,699	0.864	9.4
Flushing Financial Corporation ...	12/19/2008	12/30/2009	900,000	2,861,919	0.314	6.5
OceanFirst Financial Corporation	1/16/2009	2/3/2010	430,797	279,359	1.542	6.2
Monarch Financial Holdings, Inc.	12/19/2008	2/10/2010	260,000	623,434	0.417	6.7
Bank of America ⁵⁹⁹	10/28/2008	3/3/2010	1,566,210,714	1,006,416,684	1.533	6.5
	⁶⁰⁰ 1/9/2009					
	⁶⁰¹ 1/14/2009					
Washington Federal Inc./Washington Federal Sav- ings & Loan Association	11/14/2008	3/9/2010	15,623,222	10,166,404	1.537	18.6
Signature Bank	12/12/2008	3/10/2010	11,320,751	11,458,577	0.988	32.4
Texas Capital Bancshares, Inc. ...	1/16/2009	3/11/2010	6,709,061	8,316,604	0.807	30.1
Umpqua Holdings Corp.	11/14/2008	3/31/2010	4,500,000	5,162,400	0.872	6.6
City National Corporation	11/21/2008	4/7/2010	18,500,000	24,376,448	0.759	8.5
First Litchfield Financial Cor- poration	12/12/2008	4/7/2010	1,488,046	1,863,158	0.799	15.9
PNC Financial Services Group Inc.	12/31/2008	4/29/2010	324,195,686	346,800,388	0.935	8.7
Comerica Inc.	11/14/2008	5/4/2010	183,673,472	276,426,071	0.664	10.8
Valley National Bancorp	11/14/2008	5/18/2010	5,571,592	5,955,884	0.935	8.3
Wells Fargo Bank	10/28/2008	5/20/2010	849,014,998	1,064,247,725	0.798	7.8
First Financial Bancorp	12/23/2008	6/2/2010	3,116,284	3,051,431	1.021	8.2
Sterling Bancshares, Inc./Sterling Bank	12/12/2008	6/9/2010	3,007,891	5,287,665	0.569	10.8

FIGURE 38: WARRANT REPURCHASES/AUCTIONS FOR FINANCIAL INSTITUTIONS THAT HAVE FULLY REPAID CPP FUNDS (AS OF MARCH 9, 2011)—Continued

Institution	Investment Date	Warrant Repurchase Date	Warrant Repurchase/Sale Amount	Panel's Best Valuation Estimate at Disposition Date	Price/Estimate Ratio	IRR (Percent)
SVB Financial Group	12/12/2008	6/16/2010	6,820,000	7,884,633	0.865	7.7
Discover Financial Services	3/13/2009	7/7/2010	172,000,000	166,182,652	1.035	17.1
Bar Harbor Bancshares	1/16/2009	7/28/2010	250,000	518,511	0.482	6.2
Citizens & Northern Corporation	1/16/2009	9/1/2010	400,000	468,164	0.854	5.9
Columbia Banking System, Inc.	11/21/2008	9/1/2010	3,301,647	3,291,329	1.003	7.3
Hartford Financial Services Group, Inc.	6/26/2009	9/21/2010	713,687,430	472,221,996	1.511	30.3
Lincoln National Corporation	7/10/2009	9/16/2010	216,620,887	181,431,183	1.194	27.1
Fulton Financial Corporation	12/23/2008	9/8/2010	10,800,000	15,616,013	0.692	6.7
The Bancorp, Inc./The Bancorp Bank	12/12/2008	9/8/2010	4,753,985	9,947,683	0.478	12.8
South Financial Group, Inc./Carolina First Bank	12/5/2008	9/30/2010	400,000	1,164,486	0.343	(34.2)
TIB Financial Corp/TIB Bank	12/5/2008	9/30/2010	40,000	235,757	0.170	(38.0)
Central Jersey Bancorp	12/23/2008	12/1/2010	319,659	1,554,457	0.206	6.3
Huntington Bancshares	11/14/2008	1/19/2011	49,100,000	45,180,929	1.087	6.4
First PacTrust Bancorp, Inc.	11/21/2008	1/5/2011	1,033,227	1,750,518	0.590	7.3
East West Bancorp	12/5/2008	1/26/2011	14,500,000	32,726,663	0.443	7.0
Susquehanna Bancshares, Inc. ...	12/12/2008	1/19/2011	5,269,179	14,708,811	0.358	6.2
Citigroup ⁶⁰²	⁶⁰³ 10/25/2008 ⁶⁰⁴ 12/31/2008	1/25/2011	245,008,277	136,161,499	1.799	13.4
Boston Private Financial Holdings, Inc.	11/21/2008	2/1/2011	6,352,500	10,150,607	0.626	7.4
Sandy Spring Bancorp, Inc.	12/5/2008	2/23/2011	4,450,000	4,452,306	0.999	7.3
Wintrust Financial Corporation ...	12/19/2008	2/8/2011	25,694,061	30,185,219	0.860	9.6
Washington Banking Company ...	1/16/2009	3/2/2011	1,625,000	3,792,179	0.429	7.8
Cadence Financial Corporation ...	1/9/2009	3/4/2011	.....	881,230	.....	(2.2)
First Horizon National Corporation	11/14/2008	3/9/2011	79,700,000	43,387,200	1.837	8.9
1st Source Corporation	1/13/2009	3/9/2011	3,750,000	4,494,175	0.834	6.5
Total			\$8,585,404,069	\$8,329,269,048	1.031	10.0

⁵⁹⁸ Calculation of the IRR for Bank of America does not include fees received by Treasury as part of an agreement to terminate that bank's participation under the AGP. TARP Monthly 105(a) Report—December 2010, *supra* note 241, at A-3.

⁵⁹⁹ Investment date for Bank of America in the CPP.

⁶⁰⁰ Investment date for Merrill Lynch in the CPP.

⁶⁰¹ Investment date for Bank of America in the TIP.

⁶⁰² Calculations for the IRR of Citigroup do not include dividends or warrant proceeds earned from the Asset Guarantee Program (AGP). This IRR also does not incorporate proceeds received from Treasury's sale of Citigroup's trust preferred securities, given as a premium for Treasury's guarantee under the AGP. It is important to note that subject to the AGP termination agreement with Citigroup, Treasury could receive \$800 million in trust preferred securities held by the FDIC upon the company's exit from the FDIC's TLGP. As of March 11, 2011, the company and its subsidiaries had \$58.2 billion in long-term debt outstanding, which is guaranteed under the TLGP. Treasury Transactions Report, *supra* note 36, at 20. Data on Citigroup debt guaranteed by the TLGP accessed through SNL Financial (Mar. 11, 2011).

⁶⁰³ Investment date for Citigroup in the CPP.

⁶⁰⁴ Investment date for Citigroup in the TIP.

Figure 39 shows the Panel's estimates of the value of Treasury's current holdings of warrants in CPP recipients as well as in AIG.

FIGURE 39: VALUATION OF CURRENT HOLDINGS OF WARRANTS (AS OF MARCH 3, 2011)

Financial Institutions with Warrants Outstanding	Warrant Valuation (<i>millions of dollars</i>)		
	Low Estimate	High Estimate	Best Estimate
SunTrust Banks, Inc.	\$44.75	\$305.37	\$128.99
Regions Financial Corporation	13.62	203.30	111.40
Fifth Third Bancorp	134.47	427.64	189.77
KeyCorp	34.51	179.69	87.17
AIG	247.75	1,708.06	787.49
All Other Banks	554.97	1,371.69	964.56
Total	\$1,030.07	\$4,195.74	\$2,269.38

ANNEX III: ENDNOTES

ⁱU.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for Period Ending March 8, 2011* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

ⁱⁱFigures represent TLGP debt outstanding at the end of the month for which the amount of debt outstanding reached its peak. BB&T Financial, Capital One Financial, and Fifth Third Bancorp did not issue debt guaranteed under the TLGP. Data provided by FDIC staff (Feb. 25, 2011).

ⁱⁱⁱFor further discussion on the FDIC's loss exposure to Bank of America and Citigroup under the AGP, see Section II.B.1.

^{iv}Figures represent the outstanding loan amount at the end of the month for which the amount loaned to each company reached its peak, and include loans to companies that were acquired by a SCAP bank. Data provided by Federal Reserve staff (Mar. 4, 2011). For more information on the credit and liquidity programs, see Board of Governors of the Federal Reserve System, *Regulatory Reform—Usage of Federal Reserve Credit and Liquidity Facilities* (online at www.federalreserve.gov/newsevents/reform_transaction.htm) (accessed Mar. 14, 2011).

Does not include the Asset-Backed Commercial Paper Money Market Mutual Fund Liquidity Facility (AMLF). Under the AMLF, the Federal Reserve provided loans to banks, which served as conduits to purchase asset-backed commercial paper from money market mutual funds. At its height, the facility had \$146 billion in outstanding loans to participating banks. Although the data released by the Federal Reserve in December 2010 indicate that some of the SCAP banks acted as sponsors for money market mutual funds, it is difficult to determine the extent to which these banks were the ultimate beneficiaries of this facility. As a result, loans extended under the AMLF are not included in this table.

^vFor discussion on the Federal Reserve's loss exposure to Bank of America and Citigroup under the AGP, see Section II.B.1.

^{vi}Under the TSLF, the Federal Reserve loaned Treasury securities in exchange for eligible collateral rather than extending credit. Figures represent the par value of Treasury securities loaned to participating institutions. See Board of Governors of the Federal Reserve System, *Regulatory Reform—Term Securities Lending Facility (TSLF) and TSLF Options Program (TOP)* (online at www.federalreserve.gov/newsevents/reform_tslf.htm) (accessed Mar. 11, 2011).

^{vii}JPMorgan Chase did not have any outstanding loans from the Primary Dealer Credit Facility at month end. However, the company's maximum amount drawn from the facility was \$3 billion in September 2008. Data provided by Federal Reserve staff (Mar. 4, 2011).

^{viii}MetLife was not a TARP recipient.

^{ix}Figures affected by rounding. Unless otherwise noted, data in this table are from the following sources: U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for Period Ending March 8, 2011* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf); U.S. Department of the Treasury, *Daily TARP Update* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-daily-summary-report/TARP%20Cash%20Summary/Daily%20TARP%20Update%20-%202003.10.2011.pdf).

^xUnless otherwise noted, figures reference the adjusted TARP commitments following the enactment of the Dodd-Frank Act. The automotive sector programs (AIFP and ASSP) as well as the housing programs (HAMP, HHF, FHA Short Refi) have been broken out in the above table in order to provide more detail. U.S. Department of the Treasury, *Troubled Assets Relief Program (TARP) Monthly 105(a) Report—July 2010*, at 5 (July 2010) (online at [www.treasury.gov/initiatives/financial-stability/briefing-room/reports/105/Documents105/July%202010%20105\(a\)%20Report_Final.pdf](http://www.treasury.gov/initiatives/financial-stability/briefing-room/reports/105/Documents105/July%202010%20105(a)%20Report_Final.pdf)).

^{xi}Treasury will not make additional purchases pursuant to the expiration of its purchasing authority under EESA. Any funds still accounted for as available were committed to programs prior to the expiration of Treasury's purchasing authority. U.S. Department of the Treasury, *Troubled Asset Relief Program: Two-Year Retrospective*, at 43 (Oct. 2010) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/agency_reports/Documents/TARP%20Two%20Year%20Retrospective_10%2005%2010_transmittal%20letter.pdf).

^{xii}The total CPP repayment figure includes the principal repayment from the sale of Citigroup common stock as well as amounts repaid by institutions that exchanged their CPP investments for investments under the CDCI. See U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for Period Ending March 8, 2011*, at 2, 7, 13–15 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf); U.S. Department of the Treasury, *Troubled Asset Relief Program: Two-Year Retrospective*, at 25 (Oct. 2010) (online at www.treasury.gov/press-center/news/Documents/TARP%20Two%20Year%20Retrospective_10%2005%2010_transmittal%20letter.pdf); U.S. Department of the Treasury, *Treasury Commences Plan to Sell Citigroup Common Stock* (Apr. 26, 2010) (online at www.treasury.gov/press-center/press-releases/Pages/tg660.aspx).

^{xiii}In the TARP Transactions Report, Treasury has classified the entirety of investments it made in two institutions, CIT Group (\$2.3 billion) and Pacific Coast National Bancorp (\$4.1 million), as losses. In addition, Treasury sold its preferred ownership interests, along with warrants, in South Financial Group, Inc., TIB Financial Corp., the Bank of Currituck, Treaty Oak Bancorp, and Cadence Financial Corp. to non-TARP participating institutions. These shares were sold at prices below the value of the initial CPP investment, and represent losses of \$252.7 million. Therefore, Treasury's net current CPP investment is \$30.8 billion due to the \$2.6 billion in losses thus far. See U.S. Department of the Treasury, *Troubled Asset Relief Program Trans-*

actions Report for the Period Ending March 8, 2011, at 1–14 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

^{xiv} The \$5.0 billion AGP guarantee for Citigroup was unused since Treasury was not required to make any guarantee payments during the life of the program. U.S. Department of the Treasury, *Troubled Asset Relief Program: Two-Year Retrospective*, at 31 (Oct. 2010) (online at [www.treasury.gov/initiatives/financial-stability/briefing-room/reports/agency reports/Documents/TARP%20Two%20Year%20Retrospective 10%2005%2010 transmittal%20letter.pdf](http://www.treasury.gov/initiatives/financial-stability/briefing-room/reports/agency%20reports/Documents/TARP%20Two%20Year%20Retrospective%2010%2005%2010%20transmittal%20letter.pdf)).

^{xv} Although this \$5.0 billion is no longer exposed as part of the AGP, Treasury did not receive a repayment in the same sense as with other investments. Treasury did receive other income as consideration for the guarantee, which is not a repayment and is accounted for in Figure 32. See U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 20 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

^{xvi} AIG completely utilized the \$40 billion that was made available on November 25, 2008, in exchange for the company's preferred stock. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf). It has also drawn down the entirety of the \$30 billion made available on April 17, 2009. Of this \$30 billion investment, \$165 million was a reduction of available funds used for retention payments and the remainder was exchanged or used in the execution of AIG's recapitalization plan. In total \$29.8 billion was drawn by AIG. The \$7.5 billion that was outstanding under the facility at the time AIG executed its recapitalization plan was converted to 167.6 million shares of AIG common stock. Upon the closing of the recapitalization plan, \$16.9 billion of the funds drawn-down by AIG from the Series F TARP investment was exchanged for a corresponding liquidation preference of preferred stock in the AIA Aurora LLC, \$3.4 billion was exchanged for junior preferred stock interest in the ALICO Holdings LLC, and \$2 billion was designated as Series G preferred stock, which provides AIG with an equity capital facility they can draw on for general corporate purposes. This figure does not include \$1.6 billion in accumulated but unpaid dividends owed by AIG to Treasury due to the restructuring of Treasury's investment from cumulative preferred shares to non-cumulative shares. *Id.* at 21. For a full discussion of AIG's recapitalization plan, see American International Group, Inc., *Form 8-K for the Period Ending January 14, 2011* (Jan. 14, 2011) (online at www.sec.gov/Archives/edgar/data/5272/000095012311003061/y88987e8vk.htm).

^{xvii} As of March 8, 2011, Treasury received \$9.1 billion in proceeds from its preferred interests in AIG-related SPVs. The funds used by AIG to redeem these preferred shares came from AIG asset sales. On February 14, 2011, AIG paid Treasury \$2.2 billion using funds from the sale of AIG Star Life Insurance Co., Ltd. and AIG Edison Life Insurance Company. On March 8, 2011, Treasury received a further \$6.9 billion pursuant to AIG's sales of the MetLife equity units it acquired when it sold its subsidiary, ALICO, to MetLife. This fully closes Treasury's stake in the ALICO SPV. Treasury's remaining investment is comprised of \$11.2 billion in AIA Preferred Units, 92 percent of AIG's common stock, and \$2.0 billion preferred stock credit facility for AIG's benefit (available but undrawn). AIG is also still required to pay the remaining \$110 million it owes stemming from the \$165 million reduction to the Series F TARP investment. These funds were used to pay AIGFP retention bonuses and, as of March 8, 2011, \$55 million had been repaid. American International Group, Inc., *Form 8-K for the Period Ending February 8, 2011* (Feb. 9, 2011) (online at www.sec.gov/Archives/edgar/data/5272/000095012311010653/y89586e8vk.htm); U.S. Department of the Treasury, *Treasury: With \$6.9 Billion Repayment Today from AIG, 70 Percent of TARP Disbursements Now Recovered* (Mar. 8, 2011) (online at www.treasury.gov/press-center/press-releases/Pages/tg1096.aspx); U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf); Treasury conversations with Panel staff (Mar. 11, 2011).

^{xviii} Treasury closed the program on September 30, 2010, after investing \$570 million in 84 community development financial institutions. Including additional investments, \$464 million of the CDCI program funds were provided to banks that previously received assistance under the TARP's Capital Purchase Program. U.S. Department of the Treasury, *Treasury Announces Special Financial Stabilization Initiative Investments of \$570 Million in 84 Community Development Financial Institutions in Underserved Areas* (Sept. 30, 2010) (online at www.treasury.gov/press-center/press-releases/Pages/tg885.aspx); U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 18–19 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

^{xix} This figure includes \$2,540,000,000 of repayment Treasury received from the sale of GMAC's Financial's TruPs. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 18–19 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

^{xx} On May 14, 2010, Treasury accepted a \$1.9 billion settlement payment for its \$3.5 billion loan to Chrysler Holding. The payment represented a \$1.6 billion loss from the termination of the debt obligation. See U.S. Department of the Treasury, *Chrysler Financial Parent Company Repays \$1.9 Billion in Settlement of Original Chrysler Loan* (May 17, 2010) (online at www.treasury.gov/press-center/press-releases/Pages/tg700.aspx); U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*,

at 18–19 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

Also, following the bankruptcy proceedings for Old Chrysler, which extinguished the \$1.9 billion DIP loan provided to Old Chrysler, Treasury retained the right to recover the proceeds from the liquidation of specified collateral. Although Treasury does not expect a significant recovery from the liquidation proceeds, Treasury is not yet reporting this loan as a loss in the TARP Transactions Report. To date, Treasury has collected \$48.1 million in proceeds from the sale of collateral. Treasury includes these proceeds as part of the \$26.4 billion repaid under the AIFP. U.S. Department of the Treasury, *Troubled Assets Relief Program Monthly 105(a) Report—September 2010* (Oct. 12, 2010) (online at [www.treasury.gov/initiatives/financial-stability/briefing-room/reports/105/Documents105/September%20105\(a\)%20report.FINAL.pdf](http://www.treasury.gov/initiatives/financial-stability/briefing-room/reports/105/Documents105/September%20105(a)%20report.FINAL.pdf)); Treasury conversations with Panel staff (Aug. 19, 2010 and Nov. 29, 2010); U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 18 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

^{xxi} On April 5, 2010, Treasury terminated its commitment to lend to the GM special purpose vehicle (SPV) under the ASSP. On April 7, 2010, it terminated its commitment to lend to the Chrysler SPV. In total, Treasury received \$413 million in repayments from loans provided by this program (\$290 million from the GM SPV and \$123 million from the Chrysler SPV). Further, Treasury received \$101 million in proceeds from additional notes associated with this program. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 19 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

^{xxii} For the TALF, \$1 of TARP funds was committed for every \$10 of funds obligated by the Federal Reserve. The program was intended to be a \$200 billion initiative, and the TARP was responsible for the first \$20 billion in loan-losses, if any were incurred. The loan was incrementally funded. When the program closed in June 2010, a total of \$43 billion in loans was outstanding under the TALF, and the TARP's commitments constituted \$4.3 billion. The Federal Reserve Board of Governors agreed that it was appropriate for Treasury to reduce TALF credit protection from the TARP to \$4.3 billion. Board of Governors of the Federal Reserve System, *Federal Reserve Announces Agreement with the Treasury Department Regarding a Reduction of Credit Protection Provided for the Term Asset-Backed Securities Loan Facility (TALF)* (July 20, 2010) (online at www.federalreserve.gov/newsevents/press/monetary/20100720a.htm).

^{xxiii} As of March 9, 2011, Treasury had provided \$107 million to TALF LLC. This total is net of accrued interest payable to Treasury. Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1)* (Mar. 10, 2010) (online at www.federalreserve.gov/releases/h41/20110310/).

^{xxiv} As of December 31, 2010, the total value of securities held by the PPIP fund managers was \$21.5 billion. Non-agency residential mortgage-backed securities represented 81 percent of the total; commercial mortgage-backed securities represented the balance. U.S. Department of the Treasury, *Legacy Securities Public-Private Investment Program, Program Update—Quarter Ended December 31, 2010*, at 5 (Jan. 24, 2011) (online at www.treasury.gov/initiatives/financial-stability/investment-programs/ppip/s-ppip/Documents/ppip-12-10vFinal.pdf).

^{xxv} This number is calculated as the sum of the disbursed equity and disbursed debt on the Daily Tarp Update. U.S. Department of the Treasury, *Daily TARP Update* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-daily-summary-report/TARP%20Cash%20Summary/Daily%20TARP%20Update%20-%2003.10.2011.pdf).

^{xxvi} As of March 2, 2011, Treasury has received \$713 million in capital repayments from two PPIP fund managers. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 24 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

^{xxvii} As of March 2, 2011, Treasury's purchases under the SBA 7(a) Securities Purchase Program totaled \$368.1 million. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 23 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

^{xxviii} Treasury has received to date \$12.2 million in principal repayments through this program. U.S. Department of the Treasury, *Cumulative Dividends, Interest, and Distributions Report as of February 28, 2011* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/dividends-interest/DocumentsDividendsInterest/February%202011%20Dividends%20Interest%20Report.pdf).

^{xxix} As of March 10, 2011, \$1.04 billion was disbursed under this program. U.S. Department of the Treasury, *Daily TARP Update* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-daily-summary-report/TARP%20Cash%20Summary/Daily%20TARP%20Update%20-%2003.10.2011.pdf).

^{xxx} On June 23, 2010, \$1.5 billion was allocated to mortgage assistance through the Hardest Hit Fund (HHF). Another \$600 million was approved on August 3, 2010. U.S. Department of the Treasury, *Obama Administration Approves State Plans for \$600 Million of 'Hardest Hit Fund' Foreclosure Prevention Assistance* (Aug. 4, 2010) (online at www.treasury.gov/press-center/press-releases/Pages/tg813.aspx). As part of its revisions to TARP allocations upon enactment of the Dodd-Frank Act, Treasury allocated an additional \$2 billion in TARP funds to mortgage assistance for unemployed borrowers through the HHF. U.S. Department of the Treasury, *Obama Administration Announces Additional Support for Targeted Foreclosure-Prevention Programs to Help Homeowners Struggling with Unemployment* (Aug. 11, 2010) (online at

www.treasury.gov/press-center/press-releases/Pages/tg1042.aspx). In October 2010, another \$3.5 billion was allocated among the 18 states and the District of Columbia currently participating in HHF. The amount each state received during this round of funding is proportional to its population. U.S. Department of the Treasury, *Troubled Asset Relief Program: Two Year Retrospective*, at 72 (Oct. 2010) (online at www.treasury.gov/press-center/news/Documents/TARP%20Two%20Year%20Retrospective%2010%2005%2010%20transmittal%20letter.pdf).

^{xxxvi} As of February 28, 2011, \$125.1 million has been disbursed to fourteen states and the District of Columbia: Alabama (\$8.0 million), Arizona (\$6.3 million), California (\$17.5 million), Florida (\$10.5 million), Georgia (\$8.5 million), Kentucky (\$4.0 million), Michigan (\$7.7 million), Nevada (\$2.6 million), North Carolina (\$15.0 million), Ohio (\$11.6 million), Oregon (\$15.5 million), Rhode Island (\$3.0 million), South Carolina (\$7.5 million), Tennessee (\$6.3 million), and the District of Columbia (\$1.1 million). Data provided by Treasury (Feb. 28, 2011).

^{xxxvii} This figure represents the amount Treasury disbursed to fund the advance purchase account of the Letter of Credit issued under the FHA Short Refinance Program. The \$53.8 million in the FHA Short Refinance Program is broken down as follows: \$50 million for a deposit into an advance purchase account as collateral to the initial \$50 million Letter of Credit, \$2.9 million for the closing and funding of the Letter of Credit, \$115,000 in trustee fees, \$175,000 in claims processor fees, \$11,500 for a letter of credit fee, and \$663,472 for an unused commitment fee for the Letter of Credit. Data provided by Treasury (Feb. 28, 2011).

^{xxxviii} HAMP is not listed in this table because HAMP is a 100 percent subsidy program, and no profit is expected.

^{xxxix} U.S. Department of the Treasury, *Cumulative Dividends, Interest and Distributions Report as of February 28, 2011* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/dividends-interest/DocumentsDividendsInterestFebruary%202011%20Dividends%20Interest%20Report.pdf).

^{xl} U.S. Department of the Treasury, *Cumulative Dividends, Interest and Distributions Report as of February 28, 2011* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/dividends-interest/DocumentsDividendsInterestFebruary%202011%20Dividends%20Interest%20Report.pdf).

^{xli} U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

^{xlii} In the TARP Transactions Report, Treasury classified the investments it made in two institutions, CIT Group (\$2.3 billion) and Pacific Coast National Bancorp (\$4.1 million), as losses. Treasury has also sold its preferred ownership interests and warrants from South Financial Group, Inc., TIB Financial Corp the Bank of Currituck, Treaty Oak Bancorp, and Cadence Financial Corp. This represents a \$252.7 million loss on its CPP investments in these five banks. See Figure 37, CPP Settled and Unsettled Losses, for details on other banks likely to result in losses. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

^{xliii} This figure represents net proceeds to Treasury from the sale of Citigroup common stock to date. In June 2009, Treasury exchanged \$25 billion in Citigroup preferred stock for 7.7 billion shares of the company's common stock at \$3.25 per share. Treasury completed the sale of its Citigroup common shares on December 6, 2010. The gross proceeds of the common stock sale were \$31.85 billion and the amount repaid under CPP was \$25 billion. The difference between these two numbers represents the \$6.85 billion in net profit Treasury has received from the sale of Citigroup common stock. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 15 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

^{xliiii} On March 8, 2011, Treasury received full payment for its share of the ALICO Junior Preferred Interests, which resulted in an associated payment of \$18.5 million of accrued preferred returns since the recapitalization date (Jan. 14, 2011) on this segment of the AIG investment. This payment reflects a profit on a particular portion of Treasury's remaining investment, and does not account for the remaining ownership positions in the company or related SPVs.

^{xliiii} This represents the cash received for the warrants related to the GMAC/Ally sale of trust preferred securities that closed on March 7, 2011. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 19 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

^{xliiii} This represents a distribution fee of \$28.2 million received in connection with the sale of GMAC/Ally trust preferred securities, as well as the additional note of \$15.0 million received upon repayment of the Chrysler Financial investment. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 19 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

^{xliiii} Losses on the AIFP do not include projected losses on the GM stock sale as reported on the Daily TARP Update. U.S. Department of the Treasury, *Daily TARP Update* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-daily-summary-report/TARP%20Cash%20Summary/Daily%20TARP%20Update%20-%202011.pdf).

^{xliiii} This represents the total proceeds from additional notes connected with Treasury's investments in GM Supplier Receivables LLC and Chrysler Receivables SPV LLC. U.S. Department

of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 19 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

^{xiv} As a fee for taking a second-loss position of up to \$5 billion on a \$301 billion pool of ring-fenced Citigroup assets as part of the AGP, Treasury received \$4.03 billion in Citigroup preferred stock and warrants. Treasury exchanged these preferred stocks for trust preferred securities in June 2009. Following the early termination of the guarantee in December 2009, Treasury cancelled \$1.8 billion of the trust preferred securities, leaving Treasury with \$2.23 billion in Citigroup trust preferred securities. On September 30, 2010, Treasury sold these securities for \$2.25 billion in total proceeds. At the end of Citigroup's participation in the FDIC's Temporary Liquidity Guarantee Program (TLGP), the FDIC may transfer \$800 million of \$3.02 billion in Citigroup Trust Preferred Securities it received in consideration for its role in the AGP to Treasury. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 20 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf); U.S. Department of the Treasury, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and Citigroup Inc., *Termination Agreement*, at 1 (Dec. 23, 2009) (online at www.treasury.gov/initiatives/financial-stability/investment-programs/agg/Documents/Citi%20AGP%20Termination%20Agreement%20-%20Fully%20Executed%20Version.pdf); U.S. Department of the Treasury, *Treasury Announces Further Sales of Citigroup Securities and Cumulative Return to Taxpayers of \$41.6 Billion* (Sept. 30, 2010) (online at www.treasury.gov/press-center/press-releases/Pages/tg887.aspx); Federal Deposit Insurance Corporation, *2009 Annual Report*, at 87 (June 30, 2010) (online at www.fdic.gov/about/strategic/report/2009annualreport/AR09final.pdf).

^{xiv} As of January 31, 2011, Treasury has earned \$456.1 million in membership interest distributions from the PPIP. Additionally, Treasury has earned \$20.6 million in total proceeds following the termination of the TCW fund. See U.S. Department of the Treasury, *Cumulative Dividends, Interest and Distributions Report as of February 28, 2011*, at 14 (Mar. 10, 2010) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/dividends-interest/DocumentsDividendsInterest/February%202011%20Dividends%20Interest%20Report.pdf); U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 24 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

^{xv} Treasury has received approximately \$183,555 in proceeds from senior indebtedness instruments associated with its investments in SBA 7(a) securities. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

^{xvii} Although Treasury, the Federal Reserve, and the FDIC negotiated with Bank of America regarding a similar guarantee, the parties never reached an agreement. In September 2009, Bank of America agreed to pay each of the prospective guarantors a fee as though the guarantee had been in place during the negotiations period. This agreement resulted in payments of \$276 million to Treasury, \$57 million to the Federal Reserve, and \$92 million to the FDIC. U.S. Department of the Treasury, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and Bank of America Corporation, *Termination Agreement*, at 1–2 (Sept. 21, 2009) (online at www.treasury.gov/initiatives/financial-stability/investment-programs/agg/Documents/BofA%20-%20Termination%20Agreement%20-%20executed.pdf).

^{xviii} The term “outlays” is used here to describe the use of Treasury funds under the TARP, which are broadly classifiable as purchases of debt or equity securities (e.g., debentures, preferred stock, exercised warrants, etc.). These values were calculated using (1) Treasury's actual reported expenditures, and (2) Treasury's anticipated funding levels as estimated by a variety of sources, including Treasury statements and GAO estimates. Anticipated funding levels are set at Treasury's discretion, have changed from initial announcements, and are subject to further change. Outlays used here represent investments and asset purchases—as well as commitments to make investments and asset purchases—and are not the same as budget outlays, which under section 123 of EESA are recorded on a “credit reform” basis.

^{xlix} Figures affected by rounding. All figures are as of March 8, 2010 unless otherwise noted.

ⁱ Although many of the guarantees may never be exercised or will be exercised only partially, the guarantee figures included here represent the federal government's greatest possible financial exposure.

ⁱⁱ See U.S. Department of the Treasury, *Treasury Update on AIG Investment Valuation* (Nov. 1, 2010) (online at www.treasury.gov/press-center/press-releases/Pages/pr_11012010.aspx). AIG values exclude accrued dividends on preferred interests in the AIA and ALICO SPVs and accrued interest payable to FRBNY on the Maiden Lane LLCs.

ⁱⁱⁱ This number is comprised of the investments under the AIGIP/SSFI Program. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 21 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

ⁱⁱⁱⁱ As part of the restructuring of the U.S. government's investment in AIG announced on March 2, 2009, the amount available to AIG through the Revolving Credit Facility was reduced by \$25 billion in exchange for preferred equity interests in two SPVs, AIA Aurora LLC and ALICO Holdings LLC. These SPVs were established to hold the common stock of two AIG subsidiaries: AIA and ALICO. This interest was exchanged as part of the AIG recapitalization plan

and is now consolidated under the Treasury holdings. Board of Governors of the Federal Reserve System, *Federal Reserve System Monthly Report on Credit and Liquidity Programs and the Balance Sheet*, at 18 (Dec. 2010) (online at www.federalreserve.gov/monetarypolicy/files/monthlyclbsreport201012.pdf).

Upon the completion of AIG's recapitalization plan, FRBNY no longer held an interest in the AIA and ALICO SPVs. The remaining holdings in these vehicles were consolidated under Treasury. After the March 2, 2011 sale of these MetLife equity units, Treasury, through the TARP, currently holds \$11.3 billion in liquidation preference of preferred stock in the AIA Aurora LLC and no longer holds an interest in the ALICO SPV. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 21 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

^{lv}This number represents the outstanding principal of the loans extended to the Maiden Lane II and III SPVs to buy AIG assets (as of March 10, 2011, \$12.4 billion for each of the SPVs). Federal Reserve Bank of New York, *Factors Affecting Reserve Balances (H.4.1)* (Mar. 10, 2011) (online at www.federalreserve.gov/releases/h41/20110310/); Board of Governors of the Federal Reserve System, *Federal Reserve System Monthly Report on Credit and Liquidity Programs and the Balance Sheet* (Nov. 2010) (online at www.federalreserve.gov/monetarypolicy/files/monthlyclbsreport201011.pdf). The amounts outstanding under the Maiden Lane II and III facilities do not reflect the accrued interest payable to FRBNY. Income from the purchased assets is used to pay down the loans to the SPVs, reducing the taxpayer's exposure to losses over time. Board of Governors of the Federal Reserve System, *Federal Reserve System Monthly Report on Credit and Liquidity Programs and the Balance Sheet*, at 15 (Nov. 2010) (online at www.federalreserve.gov/monetarypolicy/files/monthlyclbsreport201011.pdf).

On March 11, 2011, FRBNY announced that AIG had formally offered to purchase the assets in Maiden Lane II. There was no further news regarding the offer at the time this report was published. Federal Reserve Bank of New York, *Statement Related to Offer by AIG to Purchase Maiden Lane II LLC* (Mar. 11, 2011) (online at www.newyorkfed.org/newsevents/news/markets/2011/an110311.html).

^{lv}The final sale of Treasury's Citigroup common stock resulted in full repayment of Treasury's investment of \$25 billion. See endnote xxxviii, *supra*, for further details of the sales of Citigroup common stock. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 1, 13 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

^{lvi}Bank of America repaid the \$45 billion in assistance it had received through TARP programs on December 9, 2009. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 1 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

^{lvii}U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 13 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

^{lviii}On November 9, 2009, Treasury announced the closing of the CAP and that only one institution, GMAC/Ally Financial, was in need of further capital from Treasury. GMAC/Ally Financial, however, received further funding through the AIFP. Therefore, the Panel considers the CAP unused. U.S. Department of the Treasury, *Treasury Announcement Regarding the Capital Assistance Program* (Nov. 9, 2009) (online at www.treasury.gov/press-center/press-releases/Pages/tg359.aspx).

^{lx}This figure represents the \$4.3 billion adjusted allocation to the TALF SPV. However, as of March 3, 2011, TALF LLC had drawn only \$107 million of the available \$4.3 billion. Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1)* (Mar. 10, 2011) (online at www.federalreserve.gov/releases/h41/20110310/); U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 22 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

^{lxi}This number is derived from the unofficial 1:10 ratio of the value of Treasury loan guarantees to the value of Federal Reserve loans under the TALF. U.S. Department of the Treasury, *Fact Sheet: Financial Stability Plan*, at 4 (Feb. 10, 2009) (online at banking.senate.gov/public/files/GeithnerFINALfinancialstabilityfactsheet2.pdf) (describing the initial \$20 billion Treasury contribution tied to \$200 billion in Federal Reserve loans and announcing potential expansion to a \$100 billion Treasury contribution tied to \$1 trillion in Federal Reserve loans). Since only \$43 billion in TALF loans remained outstanding when the program closed, Treasury is currently responsible for reimbursing the Federal Reserve Board only up to \$4.3 billion in losses from these loans. Thus, since the outstanding TALF Federal Reserve loans currently total \$20.2 billion, the Federal Reserve's maximum potential exposure under the TALF is \$15.9 billion. See Board of Governors of the Federal Reserve System, *Federal Reserve Announces Agreement with Treasury Regarding Reduction of Credit Protection Provided for the Term Asset-Backed Securities Loan Facility (TALF)* (July 20, 2010) (online at www.federalreserve.gov/newsevents/press/monetary/20100720a.htm); Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1)* (Instrument Used: Term Asset-Backed Securities Loan Facility, Wednesday Level) (Mar. 3, 2011) (online at www.federalreserve.gov/releases/h41/20110303/).

^{lxii}No TARP resources were expended under the PPIP Legacy Loans Program, a TARP program that was announced in March 2009 but never launched.

^{lxii} These numbers are a staff calculation, subtracting the amount repaid from the funds obligated to find the maximum current commitment. U.S. Department of the Treasury, *Daily TARP Update* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-daily-summary-report/TARP%20Cash%20Summary/Daily%20TARP%20Update%20-%202003.10.2011.pdf). On January 24, 2010, Treasury released its fifth quarterly report on PPIP. The report indicates that as of December 31, 2010, all eight investment funds had realized an internal rate of return (on equity) since inception (net of any management fees or expenses owed to Treasury) of at least 27 percent. The highest performing fund, thus far, is AG GECC PPIF Master Fund, L.P., which has a net internal rate of return (on equity) of 59.7 percent. These figures do not include the taxpayer's additional exposure under PPIP for credit extended to these investment funds. As noted in Section VIII.C of this report, when calculated as a (blended) return on both equity and debt, the total return is only 9.7 percent. U.S. Department of the Treasury, *Legacy Securities Public-Private Investment Program*, at 8 (Jan. 24, 2010) (online at www.treasury.gov/initiatives/financial-stability/investment-programs/ppip/s-ppip/Documents/ppip-12-10_vFinal.pdf).

^{lxiii} The total amount of TARP funds committed to HAMP is \$29.9 billion. U.S. Department of the Treasury, *Troubled Assets Relief Program Monthly 105(a) Report—November 2010*, at 4 (Dec. 10, 2010) (online at [www.treasury.gov/initiatives/financial-stability/briefing-room/reports/105/Documents105/December105\(a\)%20report%20FINAL%20v4.pdf](http://www.treasury.gov/initiatives/financial-stability/briefing-room/reports/105/Documents105/December105(a)%20report%20FINAL%20v4.pdf)). However, as of March 4, 2011, only \$1.04 billion in non-GSE payments have been disbursed under HAMP. U.S. Department of the Treasury, *Daily TARP Update* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-daily-summary-report/TARP%20Cash%20Summary/Daily%20TARP%20Update%20-%202003.10.2011.pdf).

^{lxiv} A substantial portion of the total \$81.3 billion in debt instruments extended under the AIFP has since been converted to common equity and preferred shares in restructured companies. \$8.1 billion has been retained as first-lien debt (with \$1 billion committed to Old GM and \$7.1 billion to Chrysler). \$48.8 billion represents Treasury's current obligation under the AIFP after accounting for repayments, an additional note payment, and losses. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 18 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

^{lxv} At its maximum, \$400 million was outstanding under the ASSP. These funds were fully repaid and Treasury earned \$101 million in proceeds from additional notes associated with the program. U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

^{lxvi} U.S. Department of the Treasury, *Daily TARP Update* (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-daily-summary-report/TARP%20Cash%20Summary/Daily%20TARP%20Update%20-%202003.10.2011.pdf).

^{lxvii} U.S. Department of the Treasury, *Troubled Asset Relief Program Transactions Report for the Period Ending March 8, 2011*, at 17 (Mar. 10, 2011) (online at www.treasury.gov/initiatives/financial-stability/briefing-room/reports/tarp-transactions/DocumentsTARPTransactions/3-10-11%20Transactions%20Report%20as%20of%203-8-11.pdf).

^{lxviii} This figure represents the current maximum aggregate debt guarantees that could be made under the program, which is a function of the number and size of individual financial institutions participating. \$264.6 billion of debt subject to the guarantee is currently outstanding, which represents approximately 53.5 percent of the current cap. Federal Deposit Insurance Corporation, *Monthly Reports Related to the Temporary Liquidity Guarantee Program: Debt Issuance Under Guarantee Program* (Feb. 23, 2011) (online at www.fdic.gov/regulations/resources/TLGP/total%20issuance01-11.html). The FDIC has collected \$10.4 billion in fees and surcharges from this program since its inception in the fourth quarter of 2008. Federal Deposit Insurance Corporation, *Monthly Reports Related to the Temporary Liquidity Guarantee Program: Fees Under Temporary Liquidity Guarantee Debt Program* (Feb. 23, 2011) (online at www.fdic.gov/regulations/resources/TLGP/fees.html).

^{lxix} This figure represents the amount of funds on the FDIC's balance sheet at the end of the third quarter of 2010 dedicated to the resolution of bank failures. These metrics are "liabilities due to resolutions" as well as "contingent liabilities: future failures." As of Q3 2010, \$42.8 billion was earmarked as "liabilities due to resolutions" and \$21.3 billion was marked as "contingent liabilities: future failures." Federal Deposit Insurance Corporation, *Chief Financial Officer's (CFO) Report to the Board* (Instrument Used: DIF Balance Sheet, Third Quarter 2010) (online at www.fdic.gov/about/strategic/corporate/cfo_report_3rdqtr_10/balance.html) (accessed Mar. 11, 2011).

^{lxx} Outlays are comprised of the Federal Reserve Mortgage Related Facilities. On November 25, 2008, the Federal Reserve announced that it would purchase \$100 billion of debt and \$500 billion of MBS guaranteed by Fannie Mae, Freddie Mac, and Ginnie Mae. Federal Housing Finance Agency, *Mortgage Market Note 10-1* (Jan. 20, 2010) (online at www.fhfa.gov/webfiles/15362/MMN10-1%20revision%20of%20MMN%2009-1A%201192010.pdf). In March 2009, these amounts were increased to \$1.25 trillion of MBS guaranteed by Fannie Mae, Freddie Mac, and Ginnie Mae, and \$200 billion of agency debt securities from Fannie Mae, Freddie Mac, and the Federal Home Loan Banks. The intended purchase amount for agency debt securities was subsequently decreased to \$175 billion. Board of Governors of the Federal Reserve System, *Federal Reserve System Monthly Report on Credit and Liquidity Programs and the Balance Sheet*, at 5 (Dec. 2010) (online at federalreserve.gov/monetarypolicy/files/monthlyclbsreport201012.pdf). As of March 2, 2011, the Federal Reserve held \$949 billion of agency MBS and \$143 billion of agency debt. Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1)* (Mar. 10, 2011) (online at www.federalreserve.gov/releases/h41/20110310/).

^{ixxi} Federal Reserve Liquidity Facilities classified in this table as loans include primary credit, secondary credit, central bank liquidity swaps, loans outstanding to Commercial Paper Funding Facility LLC, seasonal credit, term auction credit, and loans outstanding to Bear Stearns (Maiden Lane LLC). Board of Governors of the Federal Reserve System, *Factors Affecting Reserve Balances (H.4.1)* (Mar. 10, 2011) (online at www.federalreserve.gov/releases/h41/20110310/) (accessed Mar. 4, 2011). For further information, see the data that the Federal Reserve recently disclosed on these programs pursuant to its obligations under the Dodd-Frank Act. Board of Governors of the Federal Reserve System, *Credit and Liquidity Programs and the Balance Sheet: Overview* (May 11, 2010) (online at www.federalreserve.gov/monetarypolicy/bst.htm); Board of Governors of the Federal Reserve System, *Credit and Liquidity Programs and the Balance Sheet: Reports and Disclosures* (Aug. 24, 2010) (online at www.federalreserve.gov/monetarypolicy/bst_reports.htm); Board of Governors of the Federal Reserve System, *Usage of Federal Reserve Credit and Liquidity Facilities* (Dec. 3, 2010) (online at www.federalreserve.gov/newsevents/reform_transaction.htm).

SECTION TWO: OVERSIGHT ACTIVITIES

Recent Hearings

The Panel held its final hearing on March 4, 2011 in Washington, DC. The top official in Treasury's Office of Financial Stability answered questions about the overall effectiveness of the TARP in meeting its statutory goals and also provided insight into the future strategy for the TARP as it continues to wind down in the coming years. Officials from the FDIC, the FHFA, and the Federal Reserve offered testimony about their respective agencies' credit, liquidity, and housing initiatives that worked in concert with the TARP in the government's broader efforts to stabilize the financial system. Finally, four academic economists each offered their overall assessment of the effectiveness of the TARP and the government's other financial stability efforts.

Correspondence With Treasury

The Panel's Chairman, Senator Ted Kaufman, sent a letter to the Secretary of the Treasury, Timothy F. Geithner, on March 7, 2011.⁶⁰⁵ The letter raised concerns about transparency with respect to Treasury's recent redesign of its Office of Financial Stability website.

In response to this letter, Timothy Massad, the Acting Assistant Secretary for Financial Stability, sent a letter to Senator Kaufman on March 14, 2011.⁶⁰⁶ The letter outlined the steps Treasury has taken to address the issues raised by the Panel and promised future steps to ensure TARP transparency via Treasury's website.

⁶⁰⁵ See Appendix I of this report, *infra*.

⁶⁰⁶ See Appendix II of this report, *infra*.

SECTION THREE: ABOUT THE CONGRESSIONAL OVERSIGHT PANEL

In response to the escalating financial crisis, on October 3, 2008, Congress provided Treasury with the authority to spend \$700 billion to stabilize the U.S. economy, preserve home ownership, and promote economic growth. Congress created the Office of Financial Stability within Treasury to implement the TARP. At the same time, Congress created the Congressional Oversight Panel to “review the current state of financial markets and the regulatory system.” The Panel was empowered to hold hearings, review official data, and write reports on actions taken by Treasury and financial institutions and their effect on the economy. Through regular reports, the Panel was charged with overseeing Treasury’s actions, assessing the impact of spending to stabilize the economy, evaluating market transparency, ensuring effective foreclosure mitigation efforts, and guaranteeing that Treasury acted in the best interests of the American people. In addition, Congress instructed the Panel to produce a special report on regulatory reform that analyzes “the current state of the regulatory system and its effectiveness at overseeing the participants in the financial system and protecting consumers.” The Panel issued this report in January 2009. Congress subsequently expanded the Panel’s mandate by directing it to produce a special report on the availability of credit in the agricultural sector. The report was issued on July 21, 2009.

A. Members

On November 14, 2008, Senate Majority Leader Harry Reid and the Speaker of the House Nancy Pelosi appointed Richard H. Neiman, Superintendent of Banks for the State of New York, Damon Silvers, Director of Policy and Special Counsel of the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO), and Elizabeth Warren, Leo Gottlieb, Professor of Law at Harvard Law School, to the Panel. With the appointment on November 19, 2008, of Congressman Jeb Hensarling to the Panel by House Minority Leader John Boehner, the Panel had a quorum and met for the first time on November 26, 2008, electing Professor Warren as its chair. On December 16, 2008, Senate Minority Leader Mitch McConnell named Senator John E. Sununu to the Panel. Effective August 10, 2009, Senator Sununu resigned from the Panel, and on August 20, 2009, Senator McConnell announced the appointment of Paul Atkins, former Commissioner of the U.S. Securities and Exchange Commission, to fill the vacant seat. Effective December 9, 2009, Congressman Jeb Hensarling resigned from the Panel, and House Minority Leader John Boehner announced the appointment of J. Mark McWatters to fill the vacant seat. Senate Minority Leader Mitch McConnell appointed Kenneth Troske, William B. Sturgill Professor of Economics at the University of Kentucky, to fill the vacancy created by the resignation of Paul Atkins on May 21, 2010. Effective September 17, 2010, Elizabeth Warren resigned from the Panel, and on September 30, 2010, Senate Majority Leader Harry Reid announced the appointment of Senator Ted Kaufman to fill the vacant seat. On October 4, 2010, the Panel elected Senator Kaufman as its chair.

B. Reports

12/10/2008 *Questions About the \$700 Billion Emergency Economic Stabilization Funds*

This report offered an initial impression of Treasury's use of authority under EESA. In order to set the agenda for the Panel's future work, the Panel posed ten primary questions regarding Treasury's goals and methods for the TARP. Among these questions: What is the scope of Treasury's authority? What is Treasury's strategy and is it working to stabilize markets and help reduce foreclosures? What have financial institutions done with taxpayers' money? Is the public receiving a fair deal?

1/9/2009 *Accountability for the Troubled Asset Relief Program*

The report documented the efforts to get answers to the questions posed in the Panel's first report. It detailed both the answers received from Treasury and the many questions that remained unaddressed or unanswered. It specifically highlighted four key areas of concern: The rising tide of foreclosures, insufficient bank accountability, poor transparency in the use of TARP funds, and a lack of clarity in Treasury's overall strategy.

1/29/2009 *Special Report on Regulatory Reform*

Fulfilling a mandate from Congress, this special report discussed how shortcomings in the financial regulatory regime contributed to the financial crisis by failing to effectively manage risk, require transparency, and ensure fair dealings. The report identified eight specific areas most urgently in need of reform and three key areas of risk management, concluding that financial regulation requires good risk management, transparency, and fairness.

2/6/2009 *February Oversight Report: Valuing Treasury's Acquisitions*

This report presented the results of a detailed, technical analysis of the value of Treasury's largest transactions under the TARP in an effort to determine whether taxpayers were receiving fair value. The Panel determined that, in the ten largest transactions made with TARP funds, for every \$100 spent by Treasury, it received assets worth, on average, only \$66. This disparity translated into a \$78 billion shortfall for the first \$254 billion in TARP funds spent.

3/6/2009 *Foreclosure Crisis: Working Toward a Solution*

The Panel examined the causes of the foreclosure crisis and developed a checklist providing a roadmap for foreclosure mitigation program success. Among the questions on the Panel's checklist: Will the plan result in modifications that create affordable monthly payments? Does the plan deal with negative equity? Does the plan address junior mortgages? Will the plan have widespread participation by lenders and servicers?

4/7/2009 *Assessing Treasury's Strategy: Six Months of TARP*

In this report, the Panel looked back on the first six months of Treasury's TARP efforts and offered a comparative analysis of previous efforts to combat banking crises in the past. The Panel found that the successful resolution of past financial crises involved four critical elements: Transparency of bank accounting, particularly with respect to the value of bank assets; assertiveness, including

taking early aggressive action to improve salvageable banks and shut down insolvent institutions; accountability, including willingness to replace failed management; and clarity in the government response.

5/7/2009 Reviving Lending to Small Businesses and Families and the Impact of the TALF

This report surveyed the state of lending for small businesses and families and examined the TALF. The report raised concerns about whether TALF was well-designed to help market participants meet the credit needs of households and small businesses. It also raised serious doubts about whether the program would have a significant impact on access to credit.

6/9/2009 Stress Testing and Shoring Up Bank Capital

The Panel examined how effectively Treasury and the Federal Reserve conducted stress tests of America's 19 largest banks. The Panel found that, on the whole, the stress tests were based on a solidly designed working model, but that serious concerns remained, including the possibility that economic conditions could deteriorate beyond the worst-case scenario considered in the tests. The Panel recommended that, if the economy continued to worsen, stress testing should be repeated.

7/10/2009 TARP Repayments, Including the Repurchase of Stock Warrants

The July report examined the repayment of TARP funds and the repurchase of stock warrants. At that time, 11 banks had repurchased their warrants from Treasury. The Panel's analysis indicated that the taxpayers had received only 66 percent of the Panel's best estimate of the value of the warrants. In order to ensure that taxpayers received the maximum values as banks exited the TARP, the Panel urged Treasury to make its process, reasoning, methodology, and exit strategy absolutely transparent.

7/21/2009 Special Report on Farm Loan Restructuring

This special report fulfilled a mandate under the Helping Families Save Their Homes Act of 2009 to issue a report that "analyzes the state of the commercial farm credit markets and the use of loan restructuring as an alternative to foreclosure by recipients of financial assistance under the Troubled Asset Relief Program (TARP)."

8/11/2009 The Continued Risk of Troubled Assets

The August report found that substantial troubled assets backed by residential mortgages remained on banks' balance sheets and presented a potentially serious obstacle to economic stability. The risk to the health of small and mid-sized banks was especially high. The Panel recommended that Treasury and the bank supervisors carefully monitor the condition of the troubled assets held by financial institutions and that Treasury should move forward with one or more initiatives aimed at removing troubled whole loans from bank balance sheets.

9/9/2009 The Use of TARP Funds in Support and Reorganization of the Domestic Automotive Industry

In this report, the Panel examined the use of TARP funds to assist the domestic automotive industry. The Panel recommended that Treasury provide a legal analysis justifying the use of TARP

funds in the domestic automotive industry. The Panel further recommended that, in order to limit the impact of conflicts of interest and to facilitate an effective exit strategy from ownership, Treasury should consider placing its Chrysler and GM shares in an independent trust.

10/9/2009 *An Assessment of Foreclosure Mitigation Efforts After Six Months*

The Panel's October report examined Treasury's efforts to prevent home foreclosures. The Panel expressed concern about the limited scope and scale of the Making Home Affordable program and questioned whether Treasury's strategy would lead to permanent mortgage modifications for many homeowners.

11/6/2009 *Guarantees and Contingent Payments in TARP and Related Programs*

The November oversight report found that the income of several government-backed guarantee programs will likely exceed their direct expenditures, and that guarantees played a major role in calming financial markets. At their height, these same programs, however, exposed American taxpayers to trillions of dollars in guarantees and created significant moral hazard that can distort the marketplace.

12/9/2009 *Taking Stock: What Has the Troubled Asset Relief Program Achieved?*

The Panel's December oversight report concluded that the TARP was an important part of a broader government strategy that stabilized the U.S. financial system. It was apparent after 14 months that significant underlying weaknesses remained, including a foreclosure crisis that showed no signs of abating and record unemployment, as well as market distortions caused by moral hazard.

1/14/2010 *Exiting TARP and Unwinding Its Impact on the Financial Markets*

Even after Treasury's authority to make new TARP commitments expires in October 2010, taxpayers will hold a diverse collection of assets worth many billions of dollars. The Panel's January oversight report expressed concern that the stated principles guiding Treasury's divestment strategy may frequently conflict and are broad enough to justify a wide range of actions. Furthermore, any effective exit strategy must help to unwind the implicit guarantee created by the TARP.

2/11/2010 *Commercial Real Estate Losses and the Risk to Financial Stability*

The Panel expressed concern that, over the next several years, a wave of CRE loan failures could jeopardize the stability of many banks, particularly community banks. Because community banks play a critical role in financing the small businesses that help the American economy create new jobs, their widespread failure could disrupt local communities, threaten America's weakened financial system, and extend an already painful recession.

3/11/2010 *The Unique Treatment of GMAC Under the TARP*

The Panel examined the ways the TARP was used to support GMAC with funds from the Auto Industry Financing Program. The Panel found the government's early decisions to rescue GMAC re-

sulted in missed opportunities to increase accountability and to better protect taxpayers' money.

4/14/2010 *Evaluating Progress on TARP Foreclosure Mitigation Programs*

The Panel applauded recent changes to the mortgage modification program, but found that Treasury's response lagged behind the pace of the crisis, Treasury's programs would not reach the overwhelming majority of homeowners in trouble, and even families who navigate all the way through these programs will have a precarious hold on their homes.

5/13/2010 *The Small Business Credit Crunch and the Impact of the TARP*

The May report found little evidence that the TARP had successfully spurred small business lending, and it raised questions about whether the program helped to restore stability to the smaller banks that provide substantial amounts of small business credit. The Panel also evaluated the proposed SBL and found that, even if approved by Congress, its prospects were far from certain. The program might not be fully operational for some time, may not be embraced by banks, and may not address the root causes of the small business credit crunch.

6/10/2010 *The AIG Rescue, Its Impact on Markets, and the Government's Exit Strategy*

This report found that the Federal Reserve and Treasury failed to exhaust all other options before undertaking their unprecedented, taxpayer-backed rescue of American International Group (AIG) and its creditors. This rescue resulted in extraordinary risk to taxpayers and a fundamental redefinition of the relationship between the government and the country's most sophisticated financial institutions.

7/14/2010 *Small Banks in the Capital Purchase Program*

The July report found that the CPP's "one-size-fits-all" design served Wall Street banks much better than smaller banks. Moving forward, small banks may find it difficult to repay their TARP funds because the capital they need is difficult to obtain. If so, they are at risk of being unable to raise enough money to exit the program, even as many continue to struggle to pay their TARP dividends. If this leads smaller banks to consolidate or collapse, one lasting effect of the TARP could be an even more concentrated banking sector.

8/12/2010 *The Global Context and International Effects of the TARP*

This report found that America targeted its bailouts very differently than other nations. While most nations targeted their funds to save individual banks, America simply flooded the markets with money to stabilize the system. As a result, it appeared that America's bailouts had much greater impact internationally than other nations' bailouts had on America. Additionally, the crisis revealed the need for an international plan to handle the collapse of major, globally significant financial institutions. The Panel recommended that U.S. regulators encourage regular crisis planning and "war gaming" for the international financial system.

9/16/2010 *Assessing the TARP on the Eve of Its Expiration*

The September report found that, although the TARP quelled the financial panic in the fall of 2008, it was less successful in fulfilling its broader statutory goals. After the TARP's extension, Treasury's policy choices were increasingly constrained by public anger about the TARP. The Panel concluded that this stigma proved an obstacle to future financial stability efforts. In addition, in preparing the report, the Panel consulted a variety of prominent economists, who cited significant concerns about moral hazard.

10/14/2010 *Examining Treasury's Use of Financial Crisis Contracting Authority*

This report found that Treasury's extensive use of private contractors in TARP programs created significant concerns about transparency and potential conflicts of interest. Private businesses performed many of the TARP's most critical functions, operating under 91 different contracts worth up to \$434 million. They may have had conflicts of interest, were not directly responsible to the public, and were not subject to the same disclosure requirements as government actors. Although Treasury took significant steps to ensure the appropriate use of private contractors, the Panel recommended further improvements.

11/16/2010 *Examining the Consequences of Mortgage Irregularities for Financial Stability and Foreclosure Mitigation*

The November report reviewed allegations that companies servicing \$6.4 trillion in American mortgages may in some cases have bypassed legally required steps to foreclose on a home. The implications of these irregularities were unclear, but the Panel expressed concerns about the possibility that "robo-signing" may have concealed deeper problems in the mortgage market that potentially threatened financial stability and put foreclosure prevention efforts at risk.

12/14/2010 *A Review of Treasury's Foreclosure Prevention Programs*

This report found that Treasury's main foreclosure mitigation effort, HAMP, would not make a significant dent in the foreclosure crisis. The Panel estimated that, if current trends held, HAMP would prevent only 700,000 foreclosures—far fewer than the three to four million foreclosures that Treasury initially aimed to stop. While Treasury intended to devote \$30 billion to the program, it appeared that only \$4 billion would be spent. Since the TARP had already expired, it was too late for Treasury to revamp its foreclosure prevention strategy, but Treasury could still have taken steps to wring every possible benefit from its programs.

1/13/2011 *An Update on TARP Support for the Domestic Automotive Industry*

The January report found that, although it remained too early to tell whether Treasury's intervention in the U.S. automotive industry would prove successful, the government's ambitious actions appeared to be on a promising course. Even so, the companies that received automotive bailout funds continued to face uncertain futures, taxpayers remained at financial risk, concerns remained about the transparency and accountability of Treasury's efforts,

and moral hazard lingered as a long-run threat to the automotive industry and the broader economy.

2/10/2011 *Executive Compensation Restrictions in the Troubled Asset Relief Program*

This report examined Treasury's efforts to implement restrictions on executive pay at TARP-recipient institutions and, in particular, examined the work of the Special Master for Executive Compensation. The Panel found that, amidst intense media scrutiny and in a time of deep public anger, the Special Master achieved significant changes at the institutions under his review. Overall compensation at the companies under the Special Master's jurisdiction fell by an average of 55 percent, and cash salaries were generally limited to \$500,000. Unfortunately, the Special Master fell short in his far broader goal of permanently changing Wall Street's pay practices.

3/16/2011 *The Final Report of the Congressional Oversight Panel*

For its final report the Panel summarized and revisited its comprehensive body of monthly oversight work. To provide a context for understanding and evaluating the TARP, the report described the major events of the financial crisis in the fall of 2008 and the economic conditions prevailing during the crisis and response, as well as the broad array of federal initiatives undertaken to promote financial stability and liquidity as a result of the crisis. For each area in which it has done oversight work, the Panel provided a summary of its key findings and recommendations, along with an update since the Panel's prior work and the current status of the Panel's recommendations. The report concluded with a summation of the key lessons learned in order to guide policymakers should they find it necessary to respond to financial crises in the future.

C. Hearings

Date	Hearing
12/16/2008	<i>Clark County, NV: Ground Zero of the Housing and Financial Crises</i>
1/14/2009	<i>Modernizing America's Financial Regulatory Structure</i>
2/27/2009	<i>COP Field Hearing: Coping with the Foreclosure Crisis: State and Local Efforts to Combat Foreclosures in Prince George's County, Maryland</i>
3/19/2009	<i>Learning from the Past: Lessons from the Banking Crises of the 20th Century</i>
4/21/2009	<i>COP Hearing with Treasury Secretary Timothy F. Geithner</i>
5/28/2009	<i>COP Field Hearing in New York City: The Impact of Economic Recovery Efforts on Corporate and Commercial Real Estate Lending</i>
6/24/2009	<i>COP Hearing with Herb Allison, Assistant Secretary of the Treasury for Financial Stability</i>
7/7/2009	<i>COP Field Hearing in Greeley, CO on Farm Credit</i>
7/27/2009	<i>Oversight of TARP Assistance to the Automobile Industry</i>
9/10/2009	<i>COP Hearing with Treasury Secretary Timothy F. Geithner</i>
9/24/2009	<i>COP Field Hearing in Philadelphia: Foreclosure Mitigation Under the Troubled Asset Relief Program</i>
10/22/2009	<i>COP Hearing with Herbert M. Allison, Jr., Assistant Secretary of the Treasury Secretary for Financial Stability</i>
11/19/2009	<i>Taking Stock: Independent Views on TARP's Effectiveness</i>
12/10/2009	<i>COP Hearing with Treasury Secretary Timothy Geithner</i>
1/27/2010	<i>COP Field Hearing in Atlanta on Commercial Real Estate</i>
2/25/2010	<i>GMAC Financial Services and the Troubled Asset Relief Program</i>
3/4/2010	<i>Citigroup and the Troubled Asset Relief Program</i>
4/27/2010	<i>COP Field Hearing in Phoenix on Small Business Lending</i>
5/26/2010	<i>TARP and Other Government Assistance for AIG</i>
6/22/2010	<i>COP Hearing with Treasury Secretary Timothy Geithner</i>
9/22/2010	<i>Treasury's Use of Contracting Authority Under the TARP</i>
10/21/2010	<i>COP Hearing on the TARP and Executive Compensation Restrictions</i>

Date	Hearing
10/27/2010	<i>COP Hearing on TARP Foreclosure Mitigation Programs</i>
12/16/2010	<i>COP Hearing with Treasury Secretary Timothy Geithner</i>
2/4/2011	<i>COP Hearing on Commercial Real Estate</i>
3/4/2011	<i>COP Hearing on the TARP's Impact on Financial Stability</i>

D. Staff

<i>Naomi Baum, Executive Director</i>	
<i>Tewana Wilkerson, Deputy Executive Director</i>	
<i>Elizabeth MacDonald, General Counsel</i>	<i>Alan Rhinesmith, Senior Policy Advisor</i>
Wilson Abney, Ethics Counsel	Steve Kroll, Deputy Executive Director/ General Counsel
Felicia Battista, Counsel/Senior Financial Analyst	Patrick McGreevy, Professional Staff Member
Adam Berkland, Staff Assistant/Dir. of Correspondence	Eamonn Moran, Counsel
Isaac Boltansky, Research Analyst	Michael Negron, Counsel
Katherine Brandon, Press Assistant	Marcus Newman, Financial Analyst
Elizabeth Brennan, Financial Analyst	Jamie Ostrow, Counsel
Nicole Callan, Scheduler/Research Assistant	Joe Otchin, Legislative Fellow
Ellen Campbell, Research Analyst	Patrick Pangan, Research Assistant
Joe Cwiklinski, Policy Advisor	Matt Perault, Counsel
Beth Davidson, Investigative Counsel	Brian Phillips, Research Analyst and Dir. of Correspondence
Elizabeth Davis, Chief Clerk	Patrick Pinschmidt, Financial Markets Policy Advisor
Neal Desai, Counsel	Caroline Read, Press Assistant
Joan Evans, Chief Clerk	Thomas Seay, Communications Director
Dan Geldon, Counsel	William Shen, Policy Advisor
Marc Geller, Professional Staff Member	Ryan Spear, Legislative Fellow
Shanan Guinn, Communications Director	Marianne Spraggins, Senior Counsel
Sara Hanks, General Counsel	Jonathan Vogan, Fellow
Aslynn Hogue, Counsel	Kevin Wack, Policy Analyst/Senior Editor
Charles Honig, Senior Counsel	Graham Ward, Financial Analyst
Peter Jackson, Communications Director	Caleb Weaver, Senior Advisor
Thaya Knight, Investigative Counsel	
Fanni Koszeg, Counsel	

DETAILEES

Jayne Copley
Jean Paffenback
Pamela Williams

INTERNS

Michael Abelson	Benjamin Levine
Daniel Arking	Eric Levine
Eric Baum	Dan O'Brien
Shirley Dai	Jared Policicchio
Anthony DeLuise, Jr.	Joshua Ruby
Paul Dumaine	Matthew Schoenfeld
Cory Ellenson	Elyse Schneiderman
George Everly III	Steven Syverud
Michael Gallagher	Thomas Smith
Reid Johnson	Nick Smyth
Sean Kelly	Don Snyder
Arthur Kimball-Stanley	Benjamin Steiner
Heather Klein	Alexa Strear
Paul Laliberte-Tipple	Wei Xiang

E. Budget

Section 125(g)(2) of EESA required that Panel expenses be paid equally from the contingent fund of the Senate and an "applicable" fund of the House of Representatives. Such expenses were then to

be reimbursed to the House and Senate by the Treasury Department from funds made available to the Secretary of the Treasury pursuant to the Act. Congressional leadership designated the Senate as the “administrating entity” for the Panel. All contracts entered into by the Panel received written approval from the Senate Committee on Rules and Administration and adhered to all Senate policies and procedures.

Projected Total Panel Expenses through April 3, 2011

Compensation and Benefits	\$8,738,630
Office Space Rental	619,000
Office Equipment and Expenses	358,904
Printing Costs for Hearings and Reports	768,851
Hearings and Travel	199,037
Total	\$10,684,422

**APPENDIX I: LETTER TO SECRETARY TIMOTHY
GEITHNER FROM CHAIRMAN TED KAUFMAN RE: RE-
DESIGN OF WEBSITE, DATED MARCH 7, 2011**

SEN. TED KAUFMAN, CHAIRMAN
RICHARD H. NEWMAN
DAVID SILVERSTEIN
J. MARK SCHWARTZ
KENNETH R. TROTSKY

737 NORTH CAPITOL STREET, NW
ROOM C-220
WASHINGTON, DC 20401

Congress of the United States
CONGRESSIONAL OVERSIGHT PANEL

March 7, 2011

The Honorable Timothy F. Geithner
Secretary of the Treasury
United States Department of the Treasury
Room 3300
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Dear Mr. Secretary:

On behalf of the Congressional Oversight Panel, I am writing to express concern about Treasury's handling of the recent redesign of its main website, Treasury.Gov, as well as its website for the Troubled Asset Relief Program (TARP), FinancialStability.Gov. In particular, I am troubled that the redesign has relocated thousands of documents critical to oversight, rendering it difficult – and in some cases even impossible – for oversight bodies, outside experts, or the public to review Treasury's work.

As you are aware, in our monthly oversight reports on the TARP, the Panel relies heavily on official materials published by Treasury. Our reports commonly cite dozens of documents on Treasury's website, including TARP program guidelines, transaction reports, and press releases. In keeping with common government practice, the Panel cites these documents using their Uniform Resource Locators (URLs) on Treasury's website. We intend for these citations to provide outside and future experts with the information needed to verify or expand upon the Panel's work. The continued availability of cited documents represents a meaningful part of the Panel's legacy and an important resource to future policymakers.

Unfortunately, Treasury's redesign of its website has broken nearly a thousand hyperlinks from the Panel's past oversight reports – as well as countless hyperlinks from other oversight bodies, newspaper websites, and other Internet users. Visitors attempting to follow a hyperlink from a past Panel report in order to view, for example, a TARP contract that disbursed billions of taxpayer dollars, or a summary of Treasury's disbursements under TARP to date, will no longer find this critical information. Instead, visitors are redirected to the front page of Treasury's website, which contains no explanation of the redesign and no guidance on how users can proceed to find their requested document. Regrettably, Treasury provided no advance notice to the Panel of its website redesign or the implications for the TARP's transparency.

It is important to note that the accessibility problems posed by a website redesign are well-recognized within the federal government, and the Office of Management and Budget has proposed "best practices" to ensure that redesigns do not improperly obscure

public information. In particular, the Interagency Committee on Government Information issued a 2004 report entitled "Recommended Policies and Guidelines for Federal Public Websites," which states:

[E]very visitor needs to know about changes to URLs that may affect bookmarks and other links to the website. Since many federal organizations link to each other, it's important to keep URLs current, or provide redirect pages, so content on other federal websites also stays current.... For individual page URL changes, organizations should insert a "redirect" notice that will automatically take visitors to the new URL. When a significant number of page URLs change at one time (for example, as part of a redesign or conversion to an automated content management system), organizations should provide as many ways as possible for visitors to locate the new page locations.

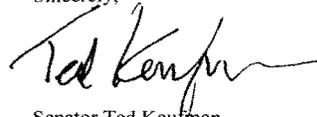
The Panel is troubled that Treasury does not appear to have followed these "best practices" in its recent redesign. Although a small handful of outdated URLs on the Treasury website include a redirect code that points users directly to their requested page, the vast majority of URLs do not; they direct users only to Treasury's front page.

To Treasury's credit, your staff has been accessible and helpful to the Panel when we have requested updated URLs for now-outdated hyperlinks. Unfortunately, our staff conversations have revealed that, in many cases, Treasury itself has no readily available record of where old files have been relocated on the new website. Of even greater concern is the fact that Treasury appears to have removed certain documents from its website entirely during the redesign. For example, when the Panel recently requested the updated URL for a TARP contract with GMAC, Treasury responded that "this was an old file that was removed from the [Financial Stability] website" during the redesign. Although Treasury has offered to provide the Panel with copies of all removed or revised documents for our archival purposes, it is concerning that these documents are not otherwise available to the public.

The Panel urges Treasury to consider updating your website to redirect users who attempt to visit outdated URLs to the same information at its new location. If Treasury determines that it is not technically feasible to provide a redirect notice for all outdated URLs, Treasury should provide visitors to those addresses with a clear explanation of the website's redesign and specific, actionable instructions on how they may find their requested information. Further, the Panel urges Treasury to ensure that all public records that were available on its old website remain available on its new website.

The Panel appreciates that website redesigns are occasionally a necessary and important step in government outreach. Indeed, Treasury deserves credit for creating a new website that is, in general, more accessible and more readily navigable than earlier versions. Even so, Treasury's steps toward the future must not shroud its past. The TARP provided Treasury the authority to spend a staggering \$700 billion in taxpayer funds, and Americans deserve full and ready access to the information necessary to learn from the TARP's experience and to judge the program's legacy.

Sincerely,

A handwritten signature in black ink that reads "Ted Kaufman". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Senator Ted Kaufman
Chairman
Congressional Oversight Panel

Cc: Mr. Vivek Kundra,
U.S. Chief Information Officer,
Office of Management & Budget

Mr. Damon Silvers
Mr. J. Mark McWatters
Mr. Richard Neiman
Dr. Kenneth Troske

**APPENDIX II: LETTER TO CHAIRMAN TED KAUFMAN
FROM ACTING ASSISTANT SECRETARY TIMOTHY
MASSAD RE: REDESIGN OF WEBSITE, DATED MARCH
14, 2011**



ASSISTANT SECRETARY

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

March 14, 2011

Senator Ted Kaufman, Chairman
Congressional Oversight Panel
732 North Capitol Street, NW
Room C-320
Washington, DC 20401

Dear Senator Kaufman:

I am writing in response to your letter of March 7 regarding the redesign of the Department of the Treasury's websites, and in particular, the website for the Troubled Asset Relief Program (TARP), FinancialStability.gov.

Your letter notes that our website redesign project inadvertently broke numerous hyperlinks from the Congressional Oversight Panel's (COP) past oversight reports. We regret the inconvenience to the Panel and to those that rely on its reports.

The redesign of the FinancialStability.gov website was part of a Treasury-wide website modernization project intended to make all Treasury websites more accessible, user-friendly and informative. The website was created to provide the public with information about TARP and ensure that we implement TARP programs in as transparent a manner as possible. Thus, we have posted thousands of documents on FinancialStability.gov, enabling the public to easily access information about the programs. FinancialStability.gov was not, however, created as a records management system and we add and remove content as appropriate. For example, to make the site as clear and useful as possible, we may remove legal documents that have been superseded by more recent contracts or agreements, or we may remove documents that are no longer relevant or applicable to TARP programs.

Nevertheless, we have worked hard to ensure that your staff has all of the new links and documents needed to complete the archiving of COP's records. Soon after COP staff first expressed concerns about the new website, I made my staff available to explain our process for the website changes. To facilitate the identification of old and new hyperlinks, our technical experts sent a master spreadsheet that mapped the majority of these links from the old site to the new site. Thereafter, we worked with COP staff to provide them with each of the new links they requested, and, in the case of any removed documents, we provided PDFs to ensure all documents cited in COP's reports were available. It is our understanding that at this point all problematic links have been addressed.

You point out that we could have uniformly utilized redirect notices as was recommended by the Interagency Committee on Government Information in a report issued in 2004. We have already implemented a number of changes to the site, including a new page explaining site changes, an

updated redirect notification, and expanded language on error pages explaining the redesign and offering ways for people to find the information they are looking for. We will be making additional adjustments in the near future.

We are always open to suggestions on how we can do a better job in using technology to keep the public informed, and we appreciate your input on this matter. Thank you again for your letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Tim Massad", written in a cursive style.

Timothy G. Massad
Acting Assistant Secretary for Financial Stability

Cc: Mr. Damon Silvers
Mr. J. Mark McWatters
Mr. Richard Neiman
Dr. Kenneth Troske