



Emergency Economic Stabilization Act: Preliminary Analysis of Oversight Provisions

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Summary

The Emergency Economic Stabilization Act of 2008 (EESA, Division A of H.R. 1424, P.L. 110-343) permits the Secretary of the Treasury to purchase and insure “troubled assets” to provide stability and prevent disruption in the economy and financial system. The act established two organizations to provide broad oversight for the program—a Financial Stability Oversight Board (FSOB) and a Congressional Oversight Panel (COP). The act also placed audit responsibilities for the program with two individuals—a new Special Inspector General (IG) for the Troubled Asset Relief Program (TARP), and the Comptroller General (CG) of the United States, who heads the Government Accountability Office (GAO).

Several aspects of the FSOB do not appear to be clearly delineated in the act, including where the FSOB is “established” within the federal government, whether it is covered by a variety of general management laws, and how the FSOB is to be funded and staffed. The act is also unclear regarding certain aspects of the Special IG for the TARP, including where the Office of the Special IG is to be “established” or housed, how or when its authorized appropriation is to be provided, and its specific investigative authorities.

The duties of both oversight panels and both audit organizations overlap in several key areas, and some of the reporting requirements also overlap. Although 18 types of EESA reports are required, none of them specifically require disclosure of how the funds are used by the recipients, and only one report is required to be made to the public. The Special IG for the TARP and the initial members of the COP were not named until mid-November 2008, and the Special IG was not confirmed until December 8, 2008—more than two months after EESA was enacted. The nature of the “troubled assets” being purchased have changed since EESA was enacted, perhaps necessitating reassessment of the act’s oversight mechanisms. Finally, it is unclear what effect the various oversight and audit mechanisms will have on the balance of power between Congress and the executive branch. Congress gave itself expedited legislative procedures to disapprove actions by the Secretary, but only after the first \$350 billion has been obligated. If the President supports the actions of the Secretary of the Treasury and vetoes a disapproval resolution, overcoming the veto will require a two-thirds vote in both houses of Congress.

Both GAO and the COP raised concerns about the operation of the TARP in their initial reports, and several Members of Congress have expressed concerns about the Department of the Treasury’s operation of the program—even suggesting that the second \$350 billion in TARP funds should be denied unless the banks can show that the funds provided thus far are being used for lending.

This report will be updated when additional information or perspectives become available regarding the act’s oversight mechanisms.

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One of the purposes of the Emergency Economic Stabilization Act of 2008 (EESA, Division A of H.R. 1424, P.L. 110-343) is 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.”¹ Section 101 of the act (“Purchases of Troubled Assets”) authorizes the Secretary of the Treasury to “establish the Troubled Asset Relief Program (or ‘TARP’) to purchase, and to make and fund commitments to purchase, troubled assets from any financial institution, on such terms and conditions as are determined by the Secretary, and in accordance with this Act and the policies and procedures developed and published by the Secretary.” The term “troubled assets” is defined in Section 3(9) of the act as

(A) residential or commercial mortgages and any securities, obligations, or other instruments that are based on or related to such mortgages, that in each case was originated or issued on or before March 14, 2008, the purchase of which the Secretary determines promotes financial market stability; and (B) any other financial instrument that the Secretary, after consultation with the Chairman of the Board of Governors of the Federal Reserve System, determines the purchase of which is necessary to promote financial market stability, but only upon transmittal of such determination, in writing, to the appropriate committees of Congress.

The act requires the Secretary of the Treasury to implement the program through an Office of Financial Stability within the department’s Office of Domestic Finance. The office is to be headed by an Assistant Secretary appointed by the President with the advice and consent of the Senate, although the law permits the Secretary to appoint an interim Assistant Secretary without Senate confirmation.²

The Secretary is authorized in Section 101(c) to take “such actions as the Secretary deems necessary to carry out the authorities in this Act.” However, Section 101(d) requires the Secretary to publish program guidelines within two business days after the first purchase of troubled assets.³ Those guidelines are required to include mechanisms for purchasing troubled assets, methods of pricing and valuing troubled assets, procedures for selecting asset managers, and criteria for identifying troubled assets for purchase. Section 115 of the act initially permits the Secretary to purchase up to \$250 billion of troubled assets, and up to a total of \$350 billion of assets upon a written certification by the President that the Secretary needs additional authority.⁴ Subsequently, if the President submits a written plan to Congress, and if Congress does not object within 15 calendar days (through a joint resolution of disapproval described in subsection 115(c)), the Secretary may purchase up to \$700 billion in troubled assets.

Section 102 of the act (“Insurance of Troubled Assets”) states that if the Secretary establishes the program authorized in Section 101, then the Secretary “shall establish a program to guarantee troubled assets originated or issued prior to March 14, 2008, including mortgage-backed

¹ For more information on EESA and related issues, see CRS Report RL34730, *The Emergency Economic Stabilization Act and Current Financial Turmoil: Issues and Analysis*, by Baird Webel and Edward V. Murphy.

² On October 6, 2008, the Secretary of the Treasury named Assistant Secretary Neel Kashkari as interim Assistant Secretary for the Office of Financial Stability.

³ On October 28, 2008, the Department of the Treasury transferred the first EESA-related funds to participating institutions. See the remarks of Under Secretary for Domestic Finance Anthony Ryan at <http://www.treasury.gov/press/releases/hp1240.htm>. The department has also published guidelines for the TARP Capital Purchase Program and a list of frequently asked questions. See <http://www.treas.gov/press/releases/hp1222.htm> for a copy of those documents.

⁴ The President has certified to Congress that the additional \$100 billion will be needed. See <http://www.whitehouse.gov/news/releases/2008/10/20081014-1.html> for a copy of the President’s certification.

securities.” Specifically, the Secretary is authorized to guarantee the timely payment of up to 100% of the principal and interest related to the assets.

Oversight and Audit Mechanisms

EESA established two organizations to provide broad oversight for the stability program—a Financial Stability Oversight Board (FSOB) and a Congressional Oversight Panel (COP). The act also placed audit responsibilities for the program with two individuals—a new Special Inspector General (IG) for the TARP, and with the Comptroller General (CG) of the United States, who heads the Government Accountability Office (GAO).⁵ Many of the audit and reporting responsibilities delineated in the act specifically reference the actions required in Sections 101 and 102 of the act to purchase troubled assets and to insure those assets.⁶

Questions have been raised by some observers as to whether these oversight and audit responsibilities are complimentary to one another, or are contradictory.⁷ This report provides a preliminary comparison and analysis of the specific authorities and responsibilities of the FSOB and the COP, and also compares and analyzes the roles and responsibilities of the Special IG and the CG as described in the act.

The Financial Stability Oversight Board and the Congressional Oversight Panel

As described in EESA, the FSOB and the COP are similar in some respects, but different in other respects. Also, the act is unclear with regard to several key aspects of one or both of these entities. The discussion below and in **Table 1** at the end of this report compares the FSOB and the COP on several relevant dimensions.

⁵ GAO’s responsibilities in the act are in addition to its existing responsibilities. For example, 31 U.S.C. §712(1) requires the CG to “investigate all matters related to the receipt, disbursement, and use of public money,” and 31 U.S.C. §717(b) states that the CG shall “evaluate the results of a program or activity the Government carries out under existing law.” For more information on GAO, see CRS Report RL30349, *GAO: Government Accountability Office and General Accounting Office*, by Frederick M. Kaiser.

⁶ The act also requires certain reports from the Office of Management and Budget (OMB) and the Congressional Budget Office (CBO). For example, Section 202(a) requires OMB to report to the President and the Congress within 60 days of the first exercise of authority under Section 101(a) (or by December 31, 2008, whichever comes earlier), and semiannually thereafter on how much the troubled asset program is costing, how that cost estimate was derived, and how the estimate changed from the previous report. CBO is required to assess the OMB reports within 45 days of their submission to the Congress. Also, Section 201 of the act authorizes CBO and the Joint Committee on Taxation to receive “all information used by the Secretary in connection with activities authorized under this Act” to assist Congress with its oversight responsibilities.

⁷ See, for example, Gibson, Dunn & Crutcher LLP, “Financial Markets in Crisis: Section-by-Section Analysis of the Emergency Economic Stabilization Act of 2008,” available at <http://blogs.law.harvard.edu/corpgov/files/2008/10/100208-analysis-economicsabilizationact08.pdf>. The authors note that the oversight entities “overlap considerably,” and that while Congress may want multiple perspectives, “the potential for these oversight entities to trip over each other in the course of their work is great.”

Placement Within the Government

The COP is described in Section 125(a) of the act as an “establishment of the legislative branch.” In contrast, Section 104(a) of the act simply says that the FSOB is “established,” but does not indicate whether the board is part of the executive or legislative branches. All five members of the FSOB are from the executive branch (the Chairman of the Board of Governors of the Federal Reserve System, the Secretary of the Treasury, the Director of the Federal Housing Finance Agency, the Chairman of the Securities and Exchange Commission, and the Secretary of Housing and Urban Development). Therefore, one could reasonably presume that the FSOB is an executive branch entity.

Even if one makes that presumption, however, it is unclear whether the FSOB is intended to be a subunit within the Department of the Treasury or some other agency, or whether the board is intended to be a free-standing, independent entity. The organizational placement of the FSOB may have a number of implications, including whether the board is covered by a variety of statutory management and transparency requirements such as the Federal Records Act, the Federal Advisory Committee Act, the Freedom of Information Act, the Government in the Sunshine Act, and various human resources management and ethics requirements.⁸ Legislative branch entities like the COP are generally not subject to these requirements.

Responsibilities

The listed responsibilities of the FSOB (in Section 104(a) of the act) and the COB (in Sections 125(b) and (e) of the act) are similar both in general and with regard to particular elements. For example, both entities are broadly responsible for reviewing the Secretary’s actions in carrying out the requirements of the act, and both are specifically responsible for examining the effect of those actions on home ownership, financial markets, and costs to the taxpayers. As discussed in more detail later in this report, both are also required to report to Congress on their findings. However, only the FSOB is charged with (1) making recommendations to the Secretary of the Treasury regarding the use of his authorities under the act; and (2) reporting any suspected fraud, misrepresentation, or malfeasance to the Special IG or the Attorney General of the United States. On the other hand, only the COP is specifically (1) permitted to hold hearings, take testimony, receive evidence, and administer oaths and affirmations to witnesses; and (2) required to report on the extent to which the information on transactions has contributed to market transparency. Also, if so authorized by the panel, any individual member or agent of the COP is authorized to take action on behalf of the panel; no such individualization of authority is permitted by the FSOB.

⁸ See, for example, CRS Report RL32592, *General Management Laws and the 9/11 Commission's Proposed Office of National Intelligence Director (NID) and National Counterterrorism Center (NCTC)*, by Clinton T. Brass and Curtis W. Copeland. That report indicated that more general management laws would appear to cover the NID and NCTC if they were independent entities in the executive branch than if they were placed within the Executive Office of the President. If the FSOB is considered part of a federal department or agency or an independent agency, then most of these general management laws would appear to apply. For more information about these management statutes, see CRS Report RL30795, *General Management Laws: A Compendium*, by Clinton T. Brass et al..

Access to Information

Section 125(e)(3) of the act authorizes the COP to obtain whatever information it needs to carry out its responsibilities from any federal department or agency, and the heads of those departments or agencies are required to provide the information requested by the chairperson of the panel. As noted previously, the COP is also permitted to take testimony and administer oaths and affirmations to witnesses. The act provides the FSOB no similar right to information from federal departments or agencies, and there does not appear to be any obligation on the part of those departments or agencies to provide that information to the FSOB. Neither the FSOB nor the COP have subpoena authority, and neither is authorized to request the Attorney General to compel agencies to provide needed information.⁹

Membership

As noted previously, Section 104(b) of the act states that the FSOB is comprised of the heads of five executive branch departments or agencies: the Chairman of the Board of Governors of the Federal Reserve System, the Secretary of the Treasury, the Director of the Federal Housing Finance Agency, the Chairman of the Securities and Exchange Commission, and the Secretary of Housing and Urban Development. Because the Secretary of the Treasury is also charged with implementing the TARP, his role on the FSOB essentially requires him to oversee his own actions. No provision is made for these agency heads to allow alternates to substitute for them.

Section 125(c) of the act is less directive regarding the members of the COP, merely specifying how members are to be appointed (i.e., one each by the Speaker of the House of Representatives, the minority leader of the House, the majority leader of the Senate, and the minority leader of the Senate; and one by the Speaker and the majority leader of the Senate, after consultation with the minority leaders in each house). The act does not require that members of the COP be from Congress or even from the legislative branch, but it clearly contemplates Members of Congress as potential members; Section 125(c)(3) specifies that members of the COP who are Members of Congress or full-time officers or employees of the federal government will receive no additional pay, allowances, or benefits. The act does not require that the members of the COP be appointed by a certain date, although (as discussed below) the COP is required to submit its first “regular report” within 30 days after the first exercise of the Secretary’s authority under Section 101(a) or 102 of the act, and is required to submit a “special report” on regulatory reform by January 20, 2009.¹⁰ On November 14, 2008, Democratic congressional leaders named the first three members of the panel,¹¹ and Republican congressional leaders named the remaining two members on November 19, 2008.¹² However, one of the members named by Republican leaders withdrew

⁹ In contrast, the legislation establishing the Privacy and Civil Liberties Oversight Board (121 Stat. 355) authorizes the Board to request the Attorney General to subpoena information on its behalf.

¹⁰ As noted earlier in this report, the Department of the Treasury transferred the first EESA-related funds to participating institutions on October 28, 2008.

¹¹ Amit R. Paley, “N.Y. Prosecutor Picked to Oversee Bailout,” *Washington Post*, November 15, 2008, p. D1. Democratic congressional leaders reportedly selected Richard H. Neiman, superintendent of banks in New York; Elizabeth Warren, a professor at Harvard Law School; and Damon Silvers, associate general counsel of the AFL-CIO.

¹² Amit R. Paley, “Senators Moving Quickly to Install Bailout Watchdog,” *Washington Post*, November 20, 2008, p. A10. Those named were Senator Judd Gregg and Representative Jeb Hensarling.

from the panel less than two weeks later, citing scheduling difficulties.¹³ On December 17, 2008, a replacement for this member was named.¹⁴

Leadership

Section 104(c) of the act specifies that the chairperson of the FSOB is elected by the members of the board, but the act excludes the Secretary of the Treasury from having a vote in that election. According to the interim Assistant Secretary for the Office of Financial Stability, on October 7, 2008, the members of the board selected the Chairman of the Board of Governors of the Federal Reserve System to be chairman of the FSOB.¹⁵ In contrast, although a chairperson of the COP is clearly contemplated by EESA (e.g., Section 125(c)(7) of the act authorizes the chairperson to call meetings), the legislation does not indicate how that chairperson is to be selected. At the panel's first meeting on November 26, 2008, Elizabeth Warren was reportedly elected chairperson of the COP.¹⁶

Pay for Members

The act is silent regarding pay for members of the FSOB, but presumably they would simply receive their regular salaries as the heads of the five agencies. On the other hand, Section 125(c)(2) of the act states that each member of the COP shall be paid at the daily rate of basic pay for level I of the Executive Schedule (the cabinet secretary level, which is \$191,300 per year in 2008) for each day that the member is performing duties "vested in the Commission." (The act does not indicate what "commission" is referenced here, but the context suggest that the word "panel" should have been used instead of "commission.") As noted previously, members of the COP who are Members of Congress or full-time federal officers or employees are not allowed to receive additional pay, allowances, or benefits.

Meetings/Quorum

The COP is not required to meet at any specific time; Section 125(c)(7) of the act states that its meetings are held at the call of the chairperson or a majority of its members. However, because the COP is required to submit its first "regular report" within 30 days after the first troubled assets are purchased or insured, meetings of the panel are likely before the report is submitted. Section 125(c)(5) specifies that four members of the COP constitute a quorum, although the act states that a lesser number may hold hearings.

¹³ "Gregg Withdraws from Reform Panel; McConnell Expected to Name Successor," *BNA Daily Report for Executives*, December 3, 2008, p. A-33.

¹⁴ "Sununu Named to Bailout Oversight Panel," *Statesman.com*, December 17, 2008.

¹⁵ See interim Assistant Secretary Kashkari's remarks before the Institute of International Bankers, at <http://www.cnn.com/id/27160443>.

¹⁶ Diana B Henriques, "Bailout Monitor Sees Lack of a Coherent Plan," *New York Times*, December 2, 2008, available at <http://www.nytimes.com/2008/12/02/business/02tarp.html>.

Section 104(d) of the act requires the FSOB to meet two weeks after the first exercise of purchase authority of the Secretary of the Treasury, and monthly thereafter. However, the act does not mention what constitutes a quorum for FSOB action. According to the interim Assistant Secretary for the Office of Financial Stability, the FSOB met on October 7—four days after the legislation was enacted and before the exercise of any purchase authority. In addition to selecting the Chairman of the Federal Reserve to be chairman of the FSOB, the members reportedly adopted the board’s bylaws and reviewed the TARP’s initial work streams.¹⁷ The FSOB met again on October 13, 2008, and on October 22, 2008.¹⁸ As of mid-November 2008, the FSOB had reportedly met a total of four times, and the minutes of three of those meetings were posted on the Department of the Treasury’s website.¹⁹

Staffing/Consultants

The act does not mention whether and, if so, how the FSOB is to be staffed or paid, and does not indicate whether it can hire experts or consultants. Nevertheless, the interim Assistant Secretary for the Office of Financial Stability testified on October 23, 2008, that the FSOB had appointed staff to the Board, including an executive director, a general counsel, and a secretary.²⁰

In contrast, Section 125(d) of the act permits the COP to appoint and fix the pay of “any personnel the Commission considers appropriate.” (Again, the context suggests that the word “panel” should have been used instead of “commission.”) The COP is also permitted to procure temporary and intermittent experts and consultants for up to one year, and use employees detailed from any federal department or agency. No limits are specified on the number of employees, consultants, or detailees that the COP may obtain, and no limits are specified regarding their pay.²¹

Reports by the Entities

Section 104(g) of the act requires the FSOB to report to the “appropriate committees” of Congress²² at least quarterly regarding the implementation of its responsibilities, but the act does not specifically indicate when those responsibilities begin. (For example, “quarterly” could mean every three months starting on the date the act was signed into law, or starting on the date that the Secretary of the Treasury begins exercising his authority under the act.) In contrast, Section 125(b)(1) of the act requires the COP to submit a “regular report” of the panel within 30 days

¹⁷ Ibid. See http://www.treasury.gov/initiatives/eesa/docs/Amended_Bylaws.pdf for a copy of the bylaws.

¹⁸ Testimony of Neel Kashkari, interim Assistant Secretary for the Financial Stability Office, U.S. Department of the Treasury, before the Senate Committee on Banking, Housing, and Urban Affairs, October 23, 2008.

¹⁹ See <http://www.treas.gov/initiatives/eesa/minutes.shtml> to view those minutes.

²⁰ Testimony of Neel Kashkari, interim Assistant Secretary for the Financial Stability Office, U.S. Department of the Treasury, before the Senate Committee on Banking, Housing, and Urban Affairs, October 23, 2008.

²¹ In mid-December 2008, the COP hired an Executive Director and a General Counsel.

²² Section 3(1) of the act defines the term “appropriate committees of Congress” as the Committee on Banking, Housing, and Urban Affairs, the Committee on Finance, the Committee on the Budget, and the Committee on Appropriations of the Senate; and the Committee on Financial Services, the Committee on Ways and Means, the Committee on the Budget, and the Committee on Appropriations of the House of Representatives.

after the first exercise of the Secretary's authority under Section 101(a) or 102 of the act, and every 30 days thereafter.²³ The COP's first report was issued on December 10, 2008.²⁴

In addition, the COP is required to submit a one-time "special report" by January 20, 2009, analyzing the current regulatory system and its effectiveness at overseeing the participants in the financial system and protecting consumers. The report is also required to contain recommendations for improvement, including whether other participants in the financial markets should be subject to the regulatory system, the rationale for such a recommendation, and whether there are any gaps in existing consumer protections.²⁵

Reports to the Entities

The act does not require the FSOB to be the recipient of any reports prepared by other entities, but several provisions in the act specify that certain reports are to be sent to the COP. For example, (1) Section 104(g) of the act requires the FSOB to provide to the COP its quarterly reports to Congress; (2) Section 105(d) states that any report to Congress by the Secretary that is required by Section 105 (e.g., "tranche" reports for each \$50 billion of purchases and a "regulatory modernization" report) shall also be provided to the COP; (3) Section 116(d) says that any report or audit required under Section 116 of the act (including Comptroller General reports) shall also be submitted to the COP; (4) Section 117(d) requires the CG's report on "margin authority" to be provided to the COP; (5) Section 121(f)(3) provides that reports by the Special IG for the TARP shall also be submitted to the COP; and (6) Section 129(e) states that the report to certain congressional committees on "exercise of loan authority" shall also be provided to the COP.

Funding

The act does not indicate whether and, if so, how the FSOB is to be funded. In contrast, the act specifies in Section 125(g) that the COP is authorized "such sums as may be necessary for any fiscal year," and specifies that half of the funds are to be derived from the applicable account of the House of Representatives, and half from the contingent fund of the Senate. The act goes on to state in Section 125(h) that an amount equal to the expenses of the COP shall be promptly transferred by the Secretary from time to time upon the presentment of a statement of such expenses by the chairperson of the panel. The funds are to be taken from funds provided to the Secretary under the act and sent to the applicable fund of the House of Representatives and the contingent fund of the Senate.

²³ As noted earlier in this report, the Department of the Treasury transferred the first EESA-related funds to participating institutions on October 28, 2008.

²⁴ See <http://cop.senate.gov/documents/cop-121008-report.pdf> for a copy of this report.

²⁵ S. 3652, introduced by Senator Maria Cantwell on September 29, 2008, would have established an independent, bipartisan commission to conduct a similar review of the U.S. financial system. The bill also would have established a special inspector general for financial markets oversight.

Termination

Section 104(h) of the act requires that the FSOB and its authority terminate 15 days after (1) the date that the last troubled asset acquired under Section 101 has been sold or transferred out of the ownership of the federal government, or (2) the date of expiration of the last insurance contract under Section 102, whichever is later. Section 125(f) of the act states that the COP is to terminate six months after the authorities provided to the Secretary expire, which is described in Section 120 of the act as December 31, 2009, subject to extension. There are no requirements in the act that either the FSOB or the COP preserve any records, or to provide a means by which the public or others can access any records.

The Special Inspector General for the TARP and the Comptroller General's Role in the Act

As was the case with the two general oversight bodies, the act's descriptions of the duties and responsibilities of the Special IG for the TARP and the Comptroller General are similar in some respects, but differ in other ways. Also, certain elements of the Special IG's operations appear to be undefined. The discussion below and in **Table 2** at the end of this report compares the roles of the Special IG and the CG with regard to several relevant dimensions.

Placement Within the Government

Pursuant to the *Bowsher v. Synar* decision of the Supreme Court, it is clear that GAO is a legislative branch agency, and can have no significant executive branch functions.²⁶ However, although Section 121(a) of EESA "established" the Office of the Special IG for the TARP, the act does not indicate where in the government that office is to be housed. Legislation establishing other special inspectors general, while not specifying organizational placement, contains other indications of where the entity was housed. For example, the Special Inspector General for Iraq Reconstruction was established by Section 3001 of P.L. 108-106, which provided that the IG was appointed by the Secretary of Defense (after consultation with the Secretary of State), and reported to the head of the Coalition Provisional Authority.²⁷

The act is also unclear where the Special IG's offices are to be located. Section 116(a)(2)(A) requires the Secretary of the Treasury to provide GAO with appropriate audit space and facilities in the Department of the Treasury, but the act contains no similar requirement for the Special IG. However, Section 121(d)(1) of the act says that, in carrying out the duties delineated in the act in subsection (c), "the Special Inspector General shall have the authorities provided in section 6 of the Inspector General Act of 1978." Section 6 of the Inspector General Act (codified at 5 U.S.C. Appendix) states, in relevant part, that the "head of an establishment shall provide the Office within such establishment with appropriate and adequate office space at central and field locations of such establishment, together with such equipment, office supplies, and

²⁶ *Bowsher v. Synar*, 478 U.S. 714, at 734 (1986).

²⁷ For a detailed comparison of the Special IG for the TARP and other special IGs as well as statutory IGs under the Inspector General Act of 1978, as amended, see CRS Report RS22981, *The Special Inspector General for the Troubled Asset Relief Program (SIG TARP)*, by Vanessa K. Burrows.

communications facilities and services as may be necessary.” Therefore, if the Special IG is determined to be located within the Department of the Treasury, then the Secretary may be required to provide the Special IG with space and facilities.

Responsibilities

Section 116(a)(1) of the act describes the responsibilities of the Comptroller General with regard to the TARP, and Section 121(c)(1) describes the responsibilities of the Special IG. The general responsibilities of both the CG and the IG are similar, although stated somewhat differently. For example, once the TARP is established, the CG is to “commence ongoing oversight of the activities and performance of the TARP,” including the performance of the TARP in meeting the purposes of this Act”. The Special IG is to “conduct, supervise, and coordinate audits and investigations of the purchase, management, and sale of assets by the Secretary of the Treasury under any program established under section 101, and the management of the Secretary of any program established under section 102.”

The two audit organizations’ specific responsibilities are similar, but also differ in some ways. For example, while both the CG and the Special IG are required to identify the troubled assets acquired under the program, only the Special IG is charged with describing why the Secretary deemed it necessary to purchase each asset, and to list (with detailed biographical information) each person or entity hired to manage the troubled assets. The CG, on the other hand, is the only entity specifically required to examine the internal controls of the TARP, to examine the efficiency of TARP operations and contracting procedures, and to review the TARP’s efforts to minimize conflicts of interest.

The act gives two responsibilities to the CG that are not given to the Special IG. Section 116(b)(1) of the act requires the CG to audit the TARP’s financial statements, and Section 117 requires the CG to determine the extent to which leverage and sudden deleveraging of financial institutions was a factor behind the financial crisis, including the roles of the Board of Governors of the Federal Reserve System, the Securities and Exchange Commission, the Secretary of the Treasury, and others.

When Audits Begin

Section 121(b)(1) requires the President to nominate the Special IG “as soon as practicable after the establishment of any program under sections 101 and 102.” According to an interim final rule issued by the Board of Governors of the Federal Reserve System, on October 14, 2008, the Secretary of the Treasury announced a program within the TARP to provide capital to eligible financial institutions.²⁸ Therefore, it appears that a “program” triggering the nomination of the Special IG was established at that point. However, the President did not submit a nomination for the position until November 14, 2008, and the nominee was not confirmed by the Senate until December 8, 2008. Also, Section 121(e) of the act indicates that the Office of the Special IG is to be provided \$50 million from the proceeds of the sale of securities, including Treasury bills and

²⁸ See U.S. Department of the Treasury, “Tarp Capital Purchase Program; Interim Final Rule,” 73 *Federal Register* 62205, October 20, 2008, for a copy of this rule.

savings bonds.²⁹ However, the act does not indicate when or how those funds are to be provided, so it is unclear when the Office of the Special IG will be operational.

The act says that the CG's audit functions are to begin "upon establishment of the troubled asset relief program." According to the interim Assistant Secretary and the acting CG, GAO officials and staff met with Treasury officials on October 9, and they reviewed certain contracts on October 12.³⁰

Access to Information

The act provides both the CG and the Special IG with access to certain information, although those rights differ somewhat.³¹ Section 116(a)(2)(B) states that, consistent with applicable law, the CG has access to any information or "things" belonging to the TARP, and to its officers, employees, or agents. Section 121(e)(4) requires the heads of other agencies to furnish the Special IG with any requested information or assistance that is "practicable" and not in contravention to law. Therefore, the CG appears to have specific access rights to information from the TARP, whereas the Special IG appears to have specific access only to information from other agencies. Also, the act requires that the CG be given "full facilities for verifying transactions with the balances or securities held by depositaries, fiscal agents, and custodians," and is permitted to make and retain copies of any records. No similar rights are specifically afforded the Special IG.

As noted previously, however, Section 121(d)(1) of the act says that, in carrying out the duties delineated in the act in subsection (c), "the Special Inspector General shall have the authorities provided in section 6 of the Inspector General Act of 1978." Section 6 of the Inspector General Act states, in relevant part, that each inspector general is authorized to "have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under this Act." That section goes on to authorize the IGs to require by enforceable subpoena the production of all information, documents, and other evidence needed in the performance of the functions assigned by the act.

Obligation of the TARP to Respond to Audits

Section 116(b)(3) of the act requires the TARP to address deficiencies that the CG identifies, or to certify to the appropriate committees of Congress that no action is needed. The act places no similar requirement on the TARP regarding audit findings by the Special IG.

²⁹ Specifically, Section 121(g) of the act says that "Of the amounts made available to the Secretary of the Treasury under section 118, \$50,000,000 shall be available to the Special Inspector General to carry out this section." Section 118 states that the "Secretary may use the proceeds of the sale of any securities issued under chapter 31 of title 31, United States Code." Chapter 31 of Title 31 ("Public Debt") includes savings bonds and savings certificates (Section 3105), retirement and savings bonds (Section 3106), and other vehicles.

³⁰ See interim Assistant Secretary Kashkari's remarks before the Institute of International Bankers, at <http://www.cnbc.com/id/27160443>.

³¹ GAO has certain data access rights under existing law. For example, 31 U.S.C. §716(a) states that each agency is to "give the Comptroller General information the Comptroller General requires about the duties, powers, activities, organization, and financial transactions of the agency."

Staffing/Contracting

Section 121(e) of the act permits the Special IG to select, appoint, and employ as many officers and employees as he or she deems necessary, but the selection, classification, and pay of those employees is governed by the requirements of current civil service law in Title 5, *United States Code*. That section also permits the Special IG to employ experts and consultants at a rate not to exceed GS-15 of the General Schedule (the top end of which is currently \$149,000 per year in Washington, D.C.), and to enter into contracts for other audits or studies. These authorities are similar to those provided to other statutory inspectors general under the Inspector General Act of 1978. The act contains no similar provisions for the CG, but GAO already has similar abilities under its existing statutory authorities.³²

Reports

Both the CG and the Special IG are required to submit reports regarding their audit activities to the appropriate committees of Congress, but some of the specifics are unclear and appear to be different. For example, Section 116(a)(3) requires the CG to submit GAO's reports at least every 60 days, but does not specifically indicate when the first 60-day period begins. As discussed in more detail later in this report, GAO issued its first report regarding the TARP on December 2, 2008.³³

Section 121(f)(1) requires the Special IG's reports to include a "detailed statement of all purchases, obligations, expenditures, and revenues associated with any program established by the Secretary of the Treasury under sections 101 and 102." In contrast, the CG is simply required to submit reports of "findings under this section." The CG is required to submit GAO's reports to the Special IG, among others; the Special IG is not required to reciprocate, but is required (by Section 121(f)(3) of the act) to submit its reports to the COP. Notably, in contrast to reports from statutory inspectors general, the Special IG's reports are not required to be sent to the Secretary of the Treasury or any other executive branch official.

Funding

Section 116(a)(2)(C) of the act requires the Department of the Treasury to reimburse GAO for the full cost of any oversight activities that are billed by the CG. Section 116(b)(1) requires the department to reimburse GAO for the full cost of the audit of the TARP financial statement—a requirement that is similar to one in the Government Accountability Office Act of 2008 (P.L. 110-323).³⁴

³² For example, 31 U.S.C. §731 permits the Comptroller General to procure the services of up to 20 experts and consultants for up to three years at daily rates of pay for level IV of the Executive Schedule (currently \$149,000 per year).

³³ U.S. Government Accountability Office, *Troubled Asset Relief Program: Additional Actions Needed to Better Ensure Integrity, Accountability, and Transparency*, GAO-09-161, December 2, 2008.

³⁴ Section 6 of that legislation provides that, after October 1, 2009, if GAO "audits any financial statement or related schedule which is prepared under section 3515 by an executive agency," the agency must reimburse GAO for the cost of the audit if GAO audited the statement for FY2007.

In contrast, Section 121(g) of the act requires that \$50 million of the funds from the proceeds of the sale of securities under Section 118 be provided to the Special IG to carry out his or her responsibilities. Section 118 of the act states that the Secretary “may use the proceeds of the sale of any securities issued under chapter 31 of title 31, United States Code” for the authorities granted in the act and the cost of administering those authorities. Chapter 31 of title 31 (“Public Debt”) includes Treasury bills, savings bonds and savings certificates, and other instruments. However, the timing and mechanics of the transfer of funds to the Special IG are unclear (e.g., whether the Special IG gets a one-time payment of \$50 million at the time the office is established, or whether that amount is to be provided over a longer period of time, as determined by the Secretary of the Treasury).

Termination

Section 121(h) of the act specifies that the Office of the Special IG terminates on the later of (1) the date the at the last troubled asset acquired under Section 101 has been sold or transferred, or (2) the date of expiration of the last insurance contract under Section 102.³⁵ Section 116(e) says that the CG’s oversight, audit, and reporting requirements under the act also terminate on those dates. Also, Section 116(a)(2)(A) states that the Secretary of the Treasury is to provide the CG with audit space and facilities until the termination date specified in Section 120 (which is December 31, 2009, subject to extension). There are no requirements in the act that either the CG or the Special IG preserve any records or provide a means by which the public or others can access any records.

Concluding Observations

The Secretary of the Treasury’s initial proposal to purchase troubled assets was very short and contained no oversight provisions. Instead, it stated that, “Decisions by the Secretary pursuant to the authority of this Act are non-reviewable and committed to agency discretion, and may not be reviewed by any court of law or any administrative agency.”³⁶ Several Members of Congress and many others, including both of the major party presidential candidates, called for increased oversight of the program. For example, Senator John McCain said, “We won’t solve a problem caused by poor oversight with a plan that has no oversight.”³⁷

As enacted on October 3, 2008, however, EESA contained an elaborate oversight system, with general oversight responsibilities given to the FSOB and the COP, and with detailed auditing responsibilities assigned to the Comptroller General and a new Special Inspector General for the TARP. Other, albeit more limited, responsibilities were assigned to OMB, CBO, and the Joint Committee on Taxation to help Congress oversee the implementation of the TARP. Together, 11 different entities are required to prepare and submit a total of 18 different types of reports to six

³⁵ In comparison, the posts of Special Inspector General for Iraq Reconstruction and Special Inspector General for Afghanistan Reconstruction are each to end 180 days after its parent entity’s reconstruction funds are less than \$250 million.

³⁶ Andrew Ross Sorkin, “A Bailout Above the Law,” *New York Times*, September 23, 2008, p. C1.

³⁷ Michael Cooper and Patrick Healey, “McCain, More Critical of Bailout Plan, Faults Oversight,” *New York Times*, September 22, 2008, available at <http://www.nytimes.com/2008/09/23/us/politics/23campaign.html>.

different entities, with many of those reports required to be submitted on a recurring basis.³⁸ No single entity receives all of the reports.

Overlapping Responsibilities

The duties and responsibilities of both oversight panels and both audit organizations overlap in several key areas. For example, both the FSOB and the COP are broadly required to review how the Secretary of the Treasury uses the act's authorities. Likewise, the Special IG and the CG have similar general responsibilities (e.g., to "oversee the activities and performance of the TARP" and to audit the "purchase, management, and sale of assets under any Section 101 program"), as well as similar specific responsibilities.³⁹ Even where the entities' responsibilities differ, it is not clear why certain responsibilities were given to one organization instead of another.

Some of the EESA reporting requirements also appear to overlap, even for the same entity. For example, Section 105(a) of the act requires the Secretary of the Treasury to report to the "appropriate committees" within 60 days after the first use of his authority in Sections 101 and 102, and every 30 days afterward, on all "actions taken by the Secretary," including all agreements, transactions, and insurance contracts. Section 105(b) requires the Secretary to report to the same committees on the same transactions within seven days of each \$50 billion in commitments to purchase troubled assets. Section 116 requires the Comptroller General to oversee the activities of the TARP and report on his findings at least every 60 days, which would presumably include TARP-related agreements, transactions, and insurance contracts. Section 121 requires the Special Inspector General to report every quarter on his audits of (among other things) all "troubled assets" purchased or sold under Section 101, and the management of any insurance program under Section 102.

Congress may have wanted these overlaps and divisions of responsibility to occur, providing it with differing perspectives on the same issues. However, in practice, the areas of overlap may prove to be counterproductive, particularly if the bodies are not sharing relevant information and, as a result, are reaching different conclusions based on incomplete or variable data and methods. Also, with duplicative and uncoordinated oversight, the Secretary of the Treasury and other officials responsible for implementing the financial rescue plan may spend the bulk of their time responding to requests for information from multiple entities asking the same questions. One author commented that, once it was clear that some type of oversight was needed in EESA, "consensus seemed to have been reached by including everyone's favorite idea in the bill, with no one thinking hard about how all of them fit together and whether more oversight is necessarily better than less."⁴⁰

³⁸ For a complete listing of the reports required by EESA, see CRS Report RL34740, *Reporting Requirements in the Emergency Economic Stabilization Act of 2008*, by Curtis W. Copeland.

³⁹ For example, the CG is to describe the "characteristics and disposition of acquired assets." The Special IG is to provide a "description of the categories of troubled assets purchased or procured by the Secretary," and a "listing of the troubled assets in each category."

⁴⁰ Alan Morrison, "Plugging Leaks in the Bailout," *Legal Times*, November 10, 2008, p. 46.

Possible Additions to Reporting Requirements

These numerous oversight and audit requirements notwithstanding, it is unclear how effective they will be in ensuring that the underlying purpose of the TARP is being met, or that the program is transparent to the public. None of the 18 types of reports delineated in EESA are specifically required to address one of the central issues that have been raised about the purchases of these troubled assets—how the funds provided by the Secretary of the Treasury are being used by the recipients of those funds. Initially, the Secretary of the Treasury indicated that troubled assets would be purchased to increase lending by the banks.⁴¹ He later said that he decided to purchase stock in financial institutions instead of bad assets because buying those assets would take too long to recapitalize the banks for lending.⁴² However, a number of questions have been raised by Members of Congress and others about whether the banks that received TARP funds were using the money to pay dividends to stockholders, to pay bonuses to corporate executives, or to finance the purchases of smaller banks—not to increase lending.⁴³ Although none of these activities are prohibited uses of the funds, it is notable that none of the reports specifically require the disclosure of how the money is being used. Senator Richard Shelby was quoted as saying that “We don’t know who’s benefitting from this, [or] where the money’s going.”⁴⁴ The Special Inspector General for the TARP reportedly said he believes that he has the statutory authority needed to determine how the banks spent the money,⁴⁵ but he is not specifically required to include that information in any of his reports.

Also, only one of the 18 types of EESA reports is required to be made to the public.⁴⁶ All of the other reports are required to be submitted to Congress, the “appropriate” committees of Congress, or to one of the oversight or auditing bodies. While either the preparers or the recipients of these reports may be able to make them public, they are not required to do so.⁴⁷ Concerns have been raised about a perceived lack of transparency in various aspects of the financial system rescue

⁴¹ For example, in his statement upon the passage of EESA, the Secretary of the Treasury said that the authority provided in the act “gives us the ability to protect and recapitalize our financial system as we work through the stresses in our credit markets.” To view a copy of this statement, see <http://www.treasury.gov/press/releases/hp1175.htm>.

⁴² Aaron Lorenzo and R. Christian Bruce, “Treasury Pulls Back From TARP Purchase of Mortgage-Related Assets, Paulson Says,” *BNA Daily Report for Executives*, November 13, 2008, p. AA-1.

⁴³ See, for example, Mark Landler, “New Terrain for Arbiters of a Bailout,” *New York Times*, November 4, 2008, p. B1, which said “critics from Capitol Hill to Wall Street are lashing out at the program, saying the banks are misusing the capital infusions by hoarding the money rather than lending it, as the Treasury Secretary, Henry M. Paulson Jr., urged in order to unclog the credit markets.... Critics also say that, by not barring banks from paying dividends or hefty bonuses, the Treasury is leading taxpayers to think that their money is being spent frivolously.” Also, see Binyamin Appelbaum, “Banks to Continue Paying Dividends; Bailout Money is for Lending, Critics Say,” *Washington Post*, October 30, 2008, p. A1; and Charlene Carter, “Leading House Democrats Pressure Treasury on Banks’ Use of Federal Funds,” *Congress Now*, October 31, 2008, available at <http://congressnow.gallerywatch.com/ArticleDetail.aspx?articleID=7182>.

⁴⁴ R. Christian Bruce, “Federal Overseer Will Seek Real-Time Data From TARP Asset Mangers and Contractors,” *BNA Daily Report for Executives*, November 20, 2008, p. A-20.

⁴⁵ Terry Kivian, “Special IG Nominee Pledges Enforcement of TARP Rules,” *Congress Daily PM*, November 19, 2008, available at http://www.nationaljournal.com/congressdaily/cdp_20081119_5781.php?related=true&story1=null&story2=null&story3=null.

⁴⁶ Section 116(b) of the act requires TARP to prepare and issue audited financial statements to the appropriate committees of Congress and the public.

⁴⁷ For example, the Department of the Treasury posted the first “tranche” report on its public website even though EESA did not require the report to be provided to the public. To view a copy, see <http://www.treas.gov/initiatives/eesa/docs/Tranche-Reportfinal.pdf>.

program, including the contracts that have been awarded, and the securities being accepted as collateral for loans to the banks.⁴⁸

A Delayed Start for the COP and the Special IG

Although the FSOB and GAO began their oversight and auditing responsibilities quickly, the first members of the COP were not appointed, and the Special IG was not nominated, until November 14, 2008—more than a month after the enactment of EESA.⁴⁹ Then, the Special IG was not confirmed until December 8, 2008 (largely because of a hold that was placed on the nomination by a Senator)—more than two months after EESA was enacted. By that time, a substantial portion of the \$700 billion in TARP funds had already been committed to purchase bank stock and other “troubled assets.”

The COP was required to submit its first “regular report” within 30 days of the Secretary’s first purchase of “troubled assets,” which occurred on October 28, 2008. However, because of the delay in appointments to the COP, the panel did not issue its first report until December 10, 2008—more than two weeks after the deadline.⁵⁰ Also, the COP is required to submit its “special report” by January 20, 2009, “analyzing the regulatory system and its effectiveness at overseeing the participants in the financial system,” and making recommendations for reform.

EESA requires the first report by the Special IG to be submitted within 60 days after confirmation. Because the Special IG was not confirmed until December 8, 2008, this report is not required to be submitted until February 6, 2009. Also, the act states that the Special IG is to be provided \$50 million from the proceeds of the sale of securities to carry out the act’s requirements, but it is unclear when those payments are to be made and in what amounts. At a hearing before the Senate Finance Committee on November 17, 2008, the Special Inspector General nominee said he was unsure whether \$50 million would be enough to fund the office’s operations.⁵¹

Before the confirmation of the Special IG, the inspector general for the Department of the Treasury, Eric M. Thorson, attempted to oversee the implementation of EESA in addition to his regular responsibilities. He reportedly had “a few dozen” people working on the program part time, but said that the new office should have at least 100 full time employees.⁵² On November 13, 2008, the Treasury IG was quoted as saying, “It’s a mess,” and “I don’t think anyone understands right now how we’re going to do proper oversight of this thing.”⁵³

⁴⁸ See, for example, Ben Protess, “Bailout Docs Still Redacted,” *ProPublica*, November 13, 2008, available at <http://www.propublica.org/article/bailout-docs-still-redacted-1113%20/>; and Dean Starkman, “Bloomberg Steps Up; Wire Service Sues Fed for Bailout Transparency,” *Columbia Journalism Review*, November 7, 2008, available at http://www.cjr.org/the_audit/bloomberg_steps_up.php.

⁴⁹ Mike Soraghan, “Bush Picks a Bailout Watchdog,” *The Hill*, November 14, 2008. The nominee is Neil M. Barofsky, of New York. EESA required the President to nominate the Special IG for the TARP “as soon as practicable after the establishment of any program under sections 101 and 102.” The first programs were created on October 14, 2008.

⁵⁰ See <http://cop.senate.gov/documents/cop-121008-report.pdf> for a copy of this report.

⁵¹ R. Christian Bruce and Ralph Lindeman, “Drawdown of Remaining TARP Funds May Be Left for Obama Administration,” *BNA Daily Report for Executives*, p. A-23.

⁵² Amit R. Paley, “Bailout Lacks Oversight Despite Billions Pledged,” *Washington Post*, November 13, 2008, p. A1.

⁵³ *bid.*

Possible Reassessment of Oversight Mechanisms

Some of the oversight and auditing requirements may need to be reassessed given the changed nature of the TARP. When EESA was enacted on October 3, 2008, the type of “troubled assets” that were generally expected to be purchased under the TARP were those fitting the first definition in Section 3(9) of the act—i.e., “residential or commercial mortgages and any securities, obligations, or other instruments that are based on or related to such mortgages.”⁵⁴ The composition of some of the oversight bodies, and the specific oversight and auditing responsibilities given to those entities, appear to have been predicated on this expectation.⁵⁵

However, on October 14, 2008—less than two weeks after EESA was enacted—the Secretary of the Treasury announced that initial funds authorized by the act would be used to purchase preferred shares of stock in certain banks.⁵⁶ Congress had authorized the Secretary to take such action when it defined a “troubled asset” in Section 3(9) of EESA as both mortgage-based financial instruments as well as “any other financial instrument that the Secretary ... determines the purchase of which is necessary to promote financial stability.” Subsequent developments seemed to confirm this shift in direction. On October 25, 2008, the *Washington Post* reported that the Department of the Treasury was “dramatically expanding the scope of its bailout of the financial system with a plan to take ownership stakes in the nation’s insurance companies.”⁵⁷ Treasury officials were also reportedly in discussions about using TARP or other funds to address liquidity problems facing state and local governments,⁵⁸ as well as U.S. automakers.⁵⁹

Then, on November 12, 2008, the Secretary of the Treasury announced that the department no longer planned to buy troubled mortgage-based assets from financial firms, but would instead provide “aid to banks and other firms that issue student, auto and credit card loans in part by jump starting the market that provides financing for these companies.”⁶⁰ Firms that reportedly could be eligible for this new round of capital purchases include insurers and specialty lenders for small

⁵⁴ For example, the legislation was described as having “granted authority to purchase up to \$700 billion in troubled mortgage-backed securities from debt-riddled Wall Street firms, a move designed to free up the credit markets.” Michael Kranish and Jenny Paul, “Resounding Yes to Bailout,” *Boston Globe*, October 4, 2008, p. A1.

⁵⁵ For example, several members of the FSOB appear to have been named to the board because of their relationship to the housing industry (e.g., the Director of the Federal Housing Finance Agency and the Secretary of Housing and Urban Development). Section 116(a)(1) of the act states that the CG is to describe the “characteristics of transactions and commitments entered into, including transaction type, frequency, size, prices paid, and all other relevant terms and conditions, and the timing, duration and terms of any future commitments to purchase assets.” The CG is also required to describe the “characteristics and disposition of acquired assets, including type, acquisition price, current market value, sale prices and terms, and use of proceeds from sales.”

⁵⁶ David Cho, Neil Irwin, and Peter Whoriskey, “US Forces Nine Major Banks to Accept Partial Nationalization,” *Washington Post*, October 14, 2008, p. A-1; and Neil Irwin and David Cho, “Paulson’s Change in Rescue Tactics,” *Washington Post*, October 15, 2008, p. D-1.

⁵⁷ David Cho, Binyamin Appelbaum, and Zachary A. Goldfarb, “Bailout Expands to Insurers,” *Washington Post*, October 25, 2008, p. A1.

⁵⁸ Yin Wilczek, “MSRB in Discussions Concerning Possible Bailout of State, Local Governments,” *BNA Daily Report for Executives*, October 28, 2008, p. A-21.

⁵⁹ Nora Macaluso, “Federal Aid Crucial for Survival of U.S. Automakers, Analysts Say,” *BNA Daily Report for Executives*, October 30, 2008, p. AA-1.

⁶⁰ Peter Whoriskey, David Cho, and Binyamin Appelbaum, “Treasury Redefines Its Rescue Program; Plan to Buy Distressed Assets is Abandoned in Favor of Aid to Loosen Consumer Credit,” *Washington Post*, November 13, 2008, p. A1.

businesses. The Secretary said that the department had decided that buying mortgage-based assets would take too long to recapitalize the financial institutions, and that buying equity in these firms would be a more powerful incentive for them to lend.⁶¹

While the oversight and audit responsibilities of the COP, the FSOB, the CG, and the Special IG may still generally apply to these new TARP-related programs, the makeup and the nature of their specific responsibilities may need to be reconsidered and redefined in light of the type of “troubled assets” being purchased and the other types of programs being considered. For example, given the current focus on purchasing bank stock instead of mortgage-based securities, members of the FSOB could be appointed based on their expertise in the banking industry (e.g., the head of the Federal Deposit Insurance Corporation or the Comptroller of the Currency) in addition to, or instead of, those appointed to the board based on their housing-related expertise.

In addition, to the extent that the Secretary establishes programs based on statutory authorities outside of Sections 101 and 102 of EESA, the audit responsibilities of both the CG and the Special IG may need to be redefined to ensure that they cover all aspects of the program. For example, Section 116(a)(1) defines the CG’s “scope of oversight” as “the activities and performance of the TARP and of any agents and representatives of the TARP (as related to the agent or representative’s activities on behalf of or under the authority of the TARP), including vehicles established by the Secretary under this Act.” Section 3(8) of the act defines the TARP as “the Troubled Asset Relief Program established under section 101.” Similarly, Section 121(c) of the act defines the duties of the Special IG as audits and investigations of the “purchase, management, and sale of assets by the Secretary of the Treasury under any program established by the Secretary under section 101, and the management by the Secretary of any program established under section 102.” Since all of these audit functions are geared to Sections 101 and 102 of the act, it is unclear whether the CG or the Special IG can audit or investigate programs established pursuant to other sections of the act (e.g., the proposed program to guarantee troubled mortgages under Section 109).⁶² However, during Senate hearings on his nomination to be Special IG for the TARP, several Senators reportedly told Neil M. Barofsky that he should assume that he has authority for all aspects of EESA.⁶³ Legislation was introduced late in the 110th Congress that would give the Special IG broad authority regarding actions taken under EESA authority.⁶⁴

⁶¹ Aaron Lorenzo and R. Christian Bruce, “Treasury Pulls Back From TARP Purchase of Mortgage-Related Assets, Paulson Says,” *BNA Daily Report for Executives*, November 13, 2008, p. AA-1.

⁶² On October 23, 2008, the interim Assistant Secretary for the Office of Financial Stability testified before the Senate Committee on Banking, Housing, and Urban Affairs that the department was considering implementing a large-scale program to guarantee troubled mortgages, which is authorized under Section 109 of EESA.

⁶³ Amit R. Paley, “Senators Moving Quickly to Install Bailout Watchdog,” *Washington Post*, November 20, 2008, p. A10. Senators Claire McCaskill and Charles E. Grassley reportedly introduced legislation on November 19, 2008, to make clear that the Special IG has authority over all aspects of EESA, and to allow him to hire staff without following the civil service hiring process.

⁶⁴ See, for example, S. 3716, introduced by Senator McCaskill on November 20, 2008, and H.R. 7333, introduced by Representative Flake, on December 10, 2008.

Certain Issues Are Unclear

The information provided in the body of this report also suggests that certain aspects of these oversight and auditing organizations may need to be clarified. For example, it is currently unclear where the FSOB is located within the federal government, or whether it is covered by a variety of general management and transparency requirements. Also, unlike the COP, the act does not provide the FSOB with a statutory right to information from federal departments or agencies. When the FSOB meets, it is not clear whether all or a majority of members must be present to take action, as the act does not specify what constitutes a quorum. The act does not indicate whether, and if so how, the FSOB is to be funded or staffed, or whether it can employ consultants to help it carry out its mission. As a result, it may be difficult for the board to carry out some of the tasks that it has been assigned (e.g., reporting evidence of fraud or malfeasance)—particularly since several members of the FSOB are likely to change at the end of this Administration. Although the FSOB is required to report “quarterly,” the act does not specify when those quarterly periods begin. The FSOB also does not appear to receive any of the various reports that are provided to the COP (e.g., reports by the Special IG or the CG).

In addition, although the act states that the Office of the Special IG is “established,” it does not indicate where the office will be housed, and (in contrast to the provisions regarding GAO) there is no specific requirement in the act that the Secretary of the Treasury or any other department or agency provide the office with space or facilities. (However, if the Office of the Special IG is considered part of the Department of the Treasury, then the Secretary may be required by the Inspector General Act of 1978 to do so.) Finally, the act indicates that both the Office of the Special IG and GAO’s audit and reporting responsibilities under the act terminate on the date that the last asset is sold or the last insurance contract expires, whichever is later. It is therefore unlikely that reports of the Special IG will reflect all relevant transactions, as some period after those dates will likely be needed to summarize the information and provide a complete historical record. GAO’s final report, however, could address those transactions under the CG’s general authority in 31 U.S.C. §§712 and 717.⁶⁵

Oversight and the Balance of Power

It is unclear what effect the various oversight and audit mechanisms will have on the balance of power between Congress and the executive branch. EESA gave the Secretary of the Treasury broad authority to purchase “troubled assets,” and defined that term to include any financial instrument that the Secretary deems “necessary to promote financial market stability.” Congress gave itself expedited legislative procedures to disapprove actions by the Secretary, but only after the first \$350 billion has been obligated.⁶⁶ Congress can use its regular legislative procedures to

⁶⁵ As noted earlier in this report, 31 U.S.C. 712(1) requires the CG to “investigate all matters related to the receipt, disbursement, and use of public money,” and 31 U.S.C. §717(b) states that the CG shall “evaluate the results of a program or activity the Government carries out under existing law.”

⁶⁶ As noted earlier in this report, Section 115(a)(3) of the act states that if the President sends Congress a written report describing the Secretary of the Treasury’s plan to spend the second \$350 billion, Congress has 15 calendar days to enact a joint resolution of disapproval. For more information about this process, see CRS Report RS22985, “*Fast Track*” *Parliamentary Procedures to Authorize Additional Funds Under the Emergency Economic Stabilization Act*, by Christopher M. Davis. Although no written report has been submitted, legislation has already been introduced in the (continued...)

disapprove actions regarding the first \$350 billion of asset purchases, but a presidential veto of any congressional action (whether through regular or expedited procedures) would require a two-thirds vote of both houses of Congress to prevent the Secretary's actions from taking effect. Also, legislation has been introduced in the 110th Congress to reverse the presumption and require Congress to *approve* any expenditure over \$350 billion,⁶⁷ but the President could veto this type of initiative as well—again requiring a two-thirds majority in both houses of Congress for enactment.

Senate confirmation of agency officials is another means by which Congress can provide oversight of executive branch actions, and that authority will be particularly relevant regarding the nomination of the Assistant Secretary of the Treasury for the Office of Financial Stability. However, the legislation permits the Secretary of the Treasury to appoint an interim Assistant Secretary, and places no limit on how long that appointee may serve. Given the scope of the Assistant Secretary's responsibilities and the need for immediate action, a nomination for the position is unlikely during the remaining days of the 110th Congress. The only other position established by EESA that requires Senate confirmation is the Special Inspector General for the TARP.

GAO's First TARP Report

As noted previously in this report, on December 2, 2008, GAO issued its first TARP report,⁶⁸ and the Acting Comptroller General testified about the report before the House Committee on Financial Services on December 10, 2008.⁶⁹ GAO concluded that the Department of the Treasury had not addressed a number of critical issues, including how it would ensure that the TARP Capital Purchase Program (CPP) was achieving its intended goals, and how it would monitor compliance with limits on executive compensation, dividend payments, and stock repurchases. Among other things, GAO recommended that the department (1) “establish a systematic means of determining and reporting in a timely manner whether financial institutions’ activities are generally consistent with the purposes of the CPP and help ensure an appropriate level of accountability and transparency,” (2) “ensure that institutions participating in CPP comply with key program requirements,” and (3) “develop a comprehensive system of internal control over TARP.”⁷⁰ GAO went on to say that, “Until these issues are resolved, there is heightened risk that the interests of the government and taxpayers may not be adequately protected and that [the Office of Financial Stability] may not achieve its mission in an effective and efficient manner.”⁷¹ Commenting on GAO's report, the Department of the Treasury agreed that it should develop means to determine whether financial institutions are complying with statutory and other program requirements, but expressed concern about whether the actions of individual institutions' use of the funds needed to be monitored. However, in the wake of concerns expressed by several

(...continued)

110th Congress (H.J.Res. 101) to invoke this requirement (i.e., to prevent expenditures above \$350 billion).

⁶⁷ See, for example, S. 3683, S. 3694, S. 3697, and H.R. 7276 in the 110th Congress.

⁶⁸ U.S. Government Accountability Office, *Troubled Asset Relief Program: Additional Actions Needed to Better Ensure Integrity, Accountability, and Transparency*, GAO-09-161, December 2, 2008.

⁶⁹ U.S. Government Accountability Office, *Troubled Asset Relief Program: Additional Actions Needed to Better Ensure Integrity, Accountability, and Transparency*, GAO-09-266T, December 10, 2008.

⁷⁰ Ibid., p. 3.

⁷¹ Ibid., p. 5.

Members of Congress regarding poor oversight, interim Assistant Secretary Kaskhari told the House Financial Services Committee that the department would set up a monitoring system to track how each bank was spending TARP dollars.⁷² After that hearing, the chairman of the committee reportedly said that Congress' willingness to permit the use of the second \$350 billion may hinge on whether banks can show that the funds provided thus far were being used for lending.⁷³

COP's First Report

As noted previously, the COP released its first report on December 10, 2008—two weeks after its first meeting.⁷⁴ The report posed a series of questions, including the following:

- What does the Department of the Treasury think the central causes of the financial crisis are, and what is the department's strategy for addressing those causes?
- What metrics can the department cite to show the effects of the \$250 billion spent thus far?
- What have financial institutions done with the taxpayer money received so far?
- How is Treasury deciding which institutions receive the money?

Elizabeth Warren, the chairwoman of the COP, was quoted as saying that the federal government did not appear to have a coherent strategy for addressing the financial crisis.⁷⁵ However, the Republican-appointed member of the COP did not sign the report, saying he could not do so until "every panel member has the resources and rights necessary to conduct effective oversight" and until "the panel adopts a serious agenda that truly brings transparency and accountability to the process."⁷⁶ The COP held its first field hearing on December 16, 2008, in Nevada.⁷⁷ The Republican-appointed member did not participate.

Table 1. Characteristics of the Financial Stability Oversight Board and the Congressional Oversight Panel in the Emergency Economic Stabilization Act of 2008

	Financial Stability Oversight Board (FSOB) (Section 104)	Congressional Oversight Panel (COP) (Section 125)
Placement Within the	Unclear. Subsection (a) simply says the FSOB is "established".	(a) An "establishment of the legislative branch."

⁷² Dan Friedman and Bill Swindell, "Treasury Official Vows to Beef Up Oversight of Bailout Funds," *Congress Daily*, December 10, 2008, available at <http://www.govexec.com/dailyfed/1208/121008cdpm1.htm>.

⁷³ R. Christian Bruce, "Frank Says Release of Second \$350 Billion May Hinge on Bank Loans Using TARP Funds," *BNA Daily Report for Executives*, December 11, 2008, p. A-27.

⁷⁴ See <http://cop.senate.gov/documents/cop-121008-report.pdf> for a copy of this report.

⁷⁵ Diana B Henriques, "Bailout Monitor Sees Lack of a Coherent Plan," *New York Times*, December 2, 2008, available at <http://www.nytimes.com/2008/12/02/business/02tarp.html>.

⁷⁶ Peter Whoriskey, "Congressional Oversight Panel Questions Bailout's Efficacy," *Washington Post*, December 10, 2008, p. D3.

⁷⁷ For more information on this hearing see <http://www.cop.senate.gov/>.

	Financial Stability Oversight Board (FSOB) (Section 104)	Congressional Oversight Panel (COP) (Section 125)
Federal Government		
Responsibilities	<p>(a) The FSOB is responsible for—</p> <p>(1) reviewing the exercise of authority under a program developed in accordance with this Act, including—</p> <p>—(A) policies implemented by the Secretary and the Office of Financial Stability created under Sections 101 and 102, including the appointment of financial agents, the designation of asset classes to be purchased, and plans for the structure of vehicles used to purchase troubled assets; and</p> <p>—(B) the effect of such actions in assisting American families in preserving home ownership, stabilizing financial markets, and protecting taxpayers;</p> <p>(2) making recommendations, as appropriate, to the Secretary regarding use of the authority under this Act; and</p> <p>(3) reporting any suspected fraud, misrepresentation, or malfeasance to the Special Inspector General for the Troubled Assets Relief Program or the Attorney General of the United States, consistent with Section 535(b) of title 28, United States Code.</p>	<p>(b) The COP shall review the current state of the financial markets and the regulatory system, and submit “regular reports” to Congress on—</p> <p>(1) the use by the Secretary of authority under the act, including the use of contracting authority and the administration of the program;</p> <p>(2) the impact of purchases made under the act on financial markets and financial institutions;</p> <p>(3) the extent to which information made available on transactions has contributed to market transparency; and</p> <p>(4) 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.</p>
Other Authorities and Powers	<p>(e) In addition to the above responsibilities, the FSOB has the authority to ensure that the policies implemented by the Secretary are—</p> <p>(1) in accordance with the purposes of the Act;</p> <p>(2) in the economic interests of the United States; and</p> <p>(3) consistent with protecting taxpayers, in accordance with Section 113(a) (entitled “Minimization of Long-Term Costs and Maximization of Benefits for Taxpayers”)</p>	<p>(e)(1) In carrying out its responsibilities, the COP may hold hearings, “sit and act at times and places,” take testimony, receive evidence, and administer oaths and affirmations to witnesses.</p> <p>(e)(2) Any member or agent of the COP may, if authorized by the panel, take any action which the COP is authorized to take.</p>
Access to Data	No mention.	<p>(e)(3) The COP may secure directly from any department or agency of the U.S. information needed to carry out its responsibilities. Upon request of the chairperson of the COP, the head of any department or agency shall furnish such information.</p>
Membership	<p>(b) The FSOB is comprised of (1) Chairman of the Board of Governors of the Federal Reserve System, (2) the Secretary of the Treasury; (3) the</p>	<p>(c) The COP shall consist of five members, with one member each appointed by (1) the Speaker of the House of Representatives; (2) the minority leader of the House of Representatives; (3) the</p>

	Financial Stability Oversight Board (FSOB) (Section 104)	Congressional Oversight Panel (COP) (Section 125)
	Director of the Federal Housing Finance Agency; (4) the Chairman of the Securities and Exchange Commission, and (5) the Secretary of Housing and Urban Development.	majority leader of the Senate; (4) the minority leader of the Senate; and (5) the Speaker and the majority leader of the Senate, after consultation with the minority leaders of each house.
Leadership	(c) The chairperson of the FSOB shall be elected by the members of the board (other than the Secretary)	(c)(6) A vacancy on the COP shall be filled in the same manner as the original appointment. Although Section (c)(7) authorizes a “chairperson” of the COP to call meetings, the act does not indicate how the chairperson is selected.
Pay for Members	No mention	(c)(2) Each member of the COP shall be paid at the daily rate of basic pay for level I of the Executive Schedule (\$191,300 in 2008) for each day the member is performing duties in the Commission. (3) However, members of the COP who are Members of Congress or full-time federal officers or employees of the U.S. receive no additional pay, allowances, or benefits.
Meetings	(d) The FSOB shall meet two weeks after the first exercise of purchase authority of the Secretary and monthly thereafter.	(c)(7) The COP shall meet at the call of the chairperson or a majority of its members.
Quorum	No mention.	(c)(5) Four members of the COP constitute a quorum, but a lesser number may hold hearings.
Subordinate Bodies	(f) The FSOB may appoint a credit review committee to evaluate the use of the purchase authority provided under the Act and the assets acquired through the use of that authority.	No mention.
Staffing and Consultants	No mention	(d)(1) The COP may appoint and fix the pay of any personnel it deems appropriate. (d)(2) The COP may procure temporary and intermittent services under Section 3109(b) of title 5 (experts and consultants for up to one year). (d)(3) Upon request of the COP, the head of any federal department or agency may detail (on a reimbursable basis) any personnel of that department or agency to the COP.
Reports by the Entity	(g) The FSOB shall report to the appropriate committees of Congress and the COP not less than quarterly regarding its responsibilities under subsection (a).	(b)(1)(B) The “regular reports” of the COP (described in subsection (a) above) shall be submitted within 30 days after the first exercise of the Secretary’s authority under Section 101(a) or 102, and every 30 days thereafter. (b)(2) The COP is also to submit a “special report on regulatory reform” not later than Jan. 20, 2009, analyzing the current regulatory system and its effectiveness at overseeing the participants in the financial system and protecting consumers, with recommendations for improvement (including whether other participants in the

	Financial Stability Oversight Board (FSOB) (Section 104)	Congressional Oversight Panel (COP) (Section 125)
Reports to the Entity	No mention.	<p>financial markets should be subject to the regulatory system, the rationale for such a recommendation, and whether there are any gaps in existing consumer protections).</p> <p>Per Section 104(g) of the act, the FSOB is to provide its quarterly reports to Congress to the COP.</p> <p>Per Section 105(d), any report to Congress by the Secretary that is required by section 105 shall also be provided to the COP.</p> <p>Per Section 116(d), any report or audit required under section 116 of the act (including Comptroller General reports) shall also be submitted to the COP.</p> <p>Per Section 117(d), the Comptroller General's report on "margin authority" is also to be provided to the COP.</p> <p>Per Section 121(f)(3), reports by the Special Inspector General for the TARP shall also be submitted to the COP.</p> <p>Per Section 129(e), the report to certain congressional committees on "exercise of loan authority" shall also be provided to the COP.</p>
Funding	No mention.	<p>(g) There is authorized to be appropriated to the COP such sums as may be necessary for any fiscal year, half of which shall be derived from the applicable account of the House of Representatives, and half from the contingent fund of the Senate.</p> <p>(h) An amount equal to the expenses of the COP shall be promptly transferred by the Secretary from time to time upon the presentment of a statement of such expenses by the chairperson of the panel. The funds are to be taken from funds provided to the Secretary under the act and sent to the applicable fund of the House of Representatives and the contingent fund of the Senate.</p>
Termination	(h) The FSOB and its authority shall terminate 15 days after the later of (1) the date that the last troubled asset acquired under Section 101 has been sold or transferred out of the ownership of the federal government, or (2) the date of expiration of the last insurance contract under Section 102.	The COP shall terminate 6 months after the termination date in Section 120 (Dec. 31, 2009, subject to extension)

Source: Congressional Research Service.

Table 2. Responsibilities of the Comptroller General and the Special Inspector General for the TARP in the Emergency Economic Stabilization Act of 2008

	Comptroller General (CG) (Section 116)	Special Inspector General (IG) (Section 121)
Placement Within the Federal Government	GAO is a legislative branch agency (per <i>Bowsher v. Synar</i> , 478 U.S. 714, at 734 (1986)).	Unclear, although presumably within the Department of the Treasury (since the Secretary is authorized to establish the TARP).
Responsibilities	<p>(a) (1) The CG shall oversee the activities and performance of the TARP and its agents and representatives, including:</p> <p>—(A) the performance of the TARP in meeting the purposes of the Act, particularly foreclosure mitigation, cost reduction, stability of financial markets or banking system, and protection of taxpayers;</p> <p>—(B) the financial condition and internal controls of the TARP and its agents;</p> <p>—(C) the characteristics of transactions and commitments entered into, including type, frequency, size, prices paid, terms/conditions, and terms of future commitments;</p> <p>—(D) the characteristics and disposition of acquired assets, including type, acquisition price, market value, sale prices and terms, and use of proceeds;</p> <p>—(E) the efficiency of TARP operations in using appropriated funds;</p> <p>—(F) the compliance of TARP and its agents with applicable laws and regulations;</p> <p>—(G) TARP's efforts to prevent, identify, and minimize conflicts of interest by its agents;</p> <p>—(H) the efficiency of contracting procedures pursuant to Section 107(b) (minority and women contracting).</p> <p>(b)(2) The CG may audit the programs/activities of the TARP, its agents, and any vehicles established.</p>	<p>(c) (1) The Special IG shall conduct, supervise, and coordinate audits and investigations of the purchase, management, and sale of assets under any Section 101 program, and the management of any program under Section 102, including by collecting and summarizing:</p> <p>—(A) a description of the categories of troubled assets purchased or procured by the Secretary;</p> <p>—(B) a listing of the troubled assets in each category;</p> <p>—(C) an explanation of why the Secretary deemed it necessary to purchase each asset;</p> <p>—(D) a listing of each institution selling those assets;</p> <p>—(E) a listing (with detailed biographical information) of each person or entity hired to manage such troubled assets;</p> <p>—(F) a current estimate of the amount of troubled assets on the books, purchased, and sold, and the profit or loss on each sale; and</p> <p>—(G) a listing of the insurance contracts issued.</p> <p>(c)(3) In addition to the above, the Special IG shall also have the authorities provided to IGs in section 6 of the Inspector General Act of 1978.</p>
Obligation to Respond to Its Audits	(b)(3) The TARP is required to take action to address deficiencies identified by the CG or other auditor engaged by the TARP, or to certify to the appropriate committees of Congress that no action is needed.	No specific provision (although the Inspector General Act requires agencies to furnish requested information or assistance).
Audit Space and Facilities	(a)(2)(A) The Secretary shall provide appropriate audit space and facilities in the Department of the Treasury.	No specific provision (although the Inspector General Act requires agencies to furnish office space and facilities).

	Comptroller General (CG) (Section 116)	Special Inspector General (IG) (Section 121)
Staffing and Contracting	No provision (although GAO will likely use existing staff and contracting authority)	(e) The Special IG may (1) select, appoint, and employ such officers and employees as may be necessary, subject to the provisions of title 5 regarding appointments, classification, and pay; (2) employ experts and consultants at daily rates not to exceed GS-15; and (3) enter into contracts or other arrangements for audits and studies as may be necessary.
Access to Data and Records	(a)(2)(B) To the extent consistent with law, the CG has access to any information, data, reports, papers, or things belonging to or used by the TARP, and to officers, agents, advisors, and employees. The CG shall be given full facilities for verifying transactions, and may make and retain copies of any records.	(e)(4) Upon request of the IG, the head of other agencies shall furnish any requested information or assistance that is practicable and not in contravention of law. If information or assistance is unreasonably refused, the IG shall report to the appropriate committees of Congress without delay.
Appointment, Removal, and Pay of the Auditor	N/A	(b)(1) The Special IG is to be appointed by the President, with the advice and consent of the Senate. (2) The appointment is to be made on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigation. (3) The nomination is to be made as soon as practicable after the establishment of any program under Sections 101 and 102. (4) The IG may be removed by the President, with communication of the reason to Congress. (6) The IG shall be paid the same as other presidentially-appointed IGs.
Reports	<p>(a)(3) The CG shall submit reports of findings to the appropriate committees of Congress and to the Special IG for the TARP at least every 60 days. The CG may also submit special reports as warranted by GAO's findings.</p> <p>(b)(1) The CG is to annually audit the TARP's financial statements.</p> <p>Also, Section 117 requires the CG to determine the extent to which leverage and sudden deleveraging of financial institutions was a factor behind the crisis, including the roles of the Board of Governors, the SEC, the Secretary, and others.</p>	<p>(f)(1) The Special IG shall submit a report to the appropriate committees of Congress summarizing the IG's activities during the relevant period within 60 days after confirmation and each calendar quarter thereafter. Each report shall include a detailed statement of all purchases, obligations, expenditures, and revenues associated with any program under Sections 101 and 102, as well as information under subsection (c)(1).</p> <p>(f)(2) None of the above authorizes the disclosure of information that is prohibited from disclosure by law or executive order, or part of a criminal investigation.</p> <p>(f)(3) The reports shall also be submitted to the COP.</p>
Funding	<p>(a)(2)(C) Treasury shall reimburse GAO for the full cost of any oversight activities as billed by the CG.</p> <p>(b)(1) Treasury is also to reimburse GAO</p>	(g) Of the funds available to the Secretary of the Treasury under Section 118 (from the sale of securities), \$50 million shall be provided to the Special IG until expended.

	Comptroller General (CG) (Section 116)	Special Inspector General (IG) (Section 121)
	for the full cost of the audit of the TARP financial statement. In both cases, the reimbursements are credited to GAO's "salaries and expenses" appropriation account and available until expended.	
Termination	(e) Any oversight, reporting, or audit requirement terminates on the later of (1) the date that the last troubled asset acquired under Section 101 has been sold or transferred or (2) the date of expiration of the last insurance contract under Section 102. (a)(2) Secretary is to provide the CG with space and facilities until the termination date in Section 120 (Dec. 31, 2009, subject to extension).	(h) The Office of the Special IG shall terminate on the later of (1) the date that the last troubled asset acquired under Section 101 has been sold or transferred or (2) the date of expiration of the last insurance contract under Section 102.

Source: Congressional Research Service.

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