OFFICE OF THE SPECIAL INSPECTOR GENERAL
TROUBLED ASSET RELIEF PROGRAM
1500 Pennsylvania Ave., NW, Suite 1064
Washington, D.C. 20220

April 7, 2009

MEMORANUM FOR: BERNARD KNIGHT, Jr., Acting General Counsel

FROM: NEIL M. BAROFSKY, Special Inspector General

SUBJECT: SIGTARP's Position Within Treasury

This responds to your April 2, 2009 e-mail concerning your intention to seek a legal opinion from the Office of Legal Counsel (OLC), Department of Justice, regarding the position of the Office of the Special Inspector General for the Troubled Asset Relief Program (SIGTARP) within the Federal government. Specifically, you advised that you desire OLC's opinion about: (1) whether SIGTARP exists within the Department of the Treasury; (2) whether the Secretary of the Treasury has supervisory authority with respect to SIGTARP; and (3) assuming the answer to the first question is in the negative, whether providing Treasury's attorney-client privileged materials to SIGTARP effectively waives the privilege.

SIGTARP does not object to your plan to seek guidance from OLC; however, as discussed below, SIGTARP believes that the Emergency Economic Stability Act of 2008 (EESA), Pub. Law No. 110-343, provides that SIGTARP is an independent entity within Treasury, that SIGTARP is not subject to the Secretary's supervision, and that attorney-client privilege is not a bar to SIGTARP's access to Treasury's records or information. Further, I respectfully request that your communication to OLC refer to this memorandum and include it as an appendix.

SIGTARP Is An Independent Entity Within Treasury

Turning to your question about SIGTARP's position in the government, as I understand your position: (1) you acknowledge that SIGTARP is within the Executive Branch because I am appointed, and may be removed, by the President, and SIGTARP is not otherwise under Congressional control;[1] but (2) you question SIGTARP's position within the Executive Branch.

[1] We agree with this proposition, but hasten to add that SIGTARP has a quarterly reporting responsibility to Congress. See 12 U.S.C. § 5231(i). However, like with other Inspectors General and their semi-annual reporting responsibilities, see 5 U.S.C. App. 3 § 5, this does not render SIGTARP part of the Legislative Branch, see, e.g., NASA v. Fed. Labor Relations Auth., 527 U.S. 229 (1999).

Section 121 of EESA, as amended,[2] sets forth numerous connections between SIGTARP and Treasury: (1) the SIGTARP name set forth at section 121(a) of EESA is taken directly from the program that Treasury is authorized to create and implement at section 101(a)(1) of EESA; (2) SIGTARP's authority as originally described by section 121(c)(1) of EESA related exclusively to Treasury's authorities under sections 101 and 102 of EESA; (3) SIGTARP is required by section 121(c)(3) of EESA[3] to keep Treasury, as well as Congress, informed concerning fraud and other serious problems, abuses, and deficiencies in the TARP program; (4) section 121(f) of EESA, as amended, appears to contemplate that all SIGTARP audits will be addressed to the Secretary of Treasury, who must implement SIGTARP recommendations or certify to Congress why the recommended action is not necessary;[4] (5) Treasury is SIGTARP's source of funding, see 12 U.S.C. § 5231(j); and (6) Congress codified SIGTARP's authorizing legislation, section 121 of EESA, within chapter 52 of title 12 of the United States Code, as opposed to within the third appendix to title 5 where the IG Act is codified. Further, as you note in your request for an opinion, Treasury and SIGTARP have thus far operated as if SIGTARP is an independent entity within Treasury: (1) Treasury has provided SIGTARP space, equipment, and services, pursuant to section 6(c) of the IG Act; (2) Treasury circulated to SIGTARP for comment a draft Treasury Order 117-01, which plainly stated "[t]here is within the Department of Treasury an Office of Special Inspector General for the Troubled Asset Relief Program;" and (3) SIGTARP circulated to Treasury a delegation of subpoena authority, a regulation, and a systems of records notice, all of which noted that SIGTARP is part of Treasury, and your office has concurred on the first two of these.[5]

SIGTARP Is Not Subject to Secretarial Supervision

Regarding supervision: (1) you note that the Treasury Inspector General and the Special Inspectors General for Iraq and Afghanistan Reconstruction are subject to express Secretarial supervision provisions; and (2) you aver that EESA, by its incorporation of the IG Act "duties and responsibilities," implies that SIGTARP is subject to the Secretary's supervision. We do not share your conclusion.

Initially, your comparison of SIGTARP to the Treasury Inspector General and the Special Inspectors General for Iraq and Afghanistan Reconstruction, is inapposite. While you accurately point out that Congress expressly placed the Treasury Inspector General and the Special Inspectors General for Iraq and Afghanistan Reconstruction under the supervision of the Secretary of Treasury and the Secretaries of State and Defense, respectively, see 5 U.S.C. App. 3 §§ 3(a), 8D, and 11(2); Pub. Law No. 108-106 § 3001(e); Pub. Law No. 110-1229(e), by so

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[2] As you are aware S.383 was enrolled on March 25, 2009. We understand that Treasury has recommended the President sign the bill, and, thus, for purposes of this memorandum we assume that S.383 has been enacted.

[3] Section 121(c)(3) incorporates section 4(a)(5) of the Inspector General Act of 1978 (IG Act), 5 U.S.C. App. 3 § 4(a)(5).

[4] It is SIGTARP's intention to copy Congress on all audit reports.

[5] The systems of records notice has yet to be circulated to your office.

doing Congress demonstrated its ability to assign supervisory authorities to Inspectors General, Special or otherwise, when it intends to do so. Indeed, in the case of the Treasury Inspector General, in section 8D of the IG Act, Congress gave the Secretary the extraordinary power to stop audits and investigations;[6] in the case of the Special Inspectors General for Iraq and Afghanistan Reconstruction, Congress granted dual supervisory authority to the Secretaries of State and Defense. Id. Given that Congress knows how to assign supervisory duties, the omission of this language in EESA signifies its clear intention to preserve SIGTARP's independence and not subject us to the Secretary's ability to shut down an audit or investigation.[7] Indeed, the legislative architect of section 121 of EESA, Senator Max Baucus, so stated in his statement in support of EESA's enactment, "I designed the office of this inspector general to be truly Independent," and not report to the Secretary. See Congressional Record, p. S10218 (Oct. 1, 2008).

Next, the "duties and responsibilities" under the IG Act, which EESA specifically impose upon SIGTARP, do not include sections 3(a) or 8D,[8] Congress did not create SIGTARP within the IG Act; it placed us within chapter 52 of title 12 of the United States Code. Moreover, section 121 of EESA did not incorporate the entirety of the IG Act but rather only incorporated specifically referenced provisions: 3(b), 3(e), 4(b) and 6.[9] To be sure, section 121(c)(3) of EESA provides, "the Inspector General shall also have the duties and responsibilities of inspectors general under the Inspector General Act of 1978", but this does not suggest incorporation of section 8D. Section 8D does not relate to "inspectors general," it – like sections 8, 8A, 8B, 8C, 8E, 8F, 8I, and 8K of the IG Act – relates to a single Inspector General: the Treasury Inspector General. See 5 U.S.C. App. 3 § 8D; see also 5 U.S.C. App. 3 §§ 8, 8A, 8B, 8C, 8E, 8F, 8I, and 8K. Nor does it suggest incorporation of section 3(a). Section 3(a) provides for the appointment of Inspectors General; establishes the supervision of Inspectors General; and limits the supervisory power with respect to individual audits and investigations. The first of these issues is controlled directly by section 121(b) of EESA, and the inter-related latter two (i.e., if there is no supervision, then there is no need for limitations on supervision) do not involve SIGTARP duties or responsibilities. Supervision by a third party, and limitations on that

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[6] See 5 U.S.C. App. 3 § 8D(a). EESA does not include constraints similar to those imposed upon the Treasury Inspector General, whose activities can be limited by a Secretarial determination that his activity may involve "deliberations and decisions on policy matters, including documented information used as a basis for making policy decisions" that the Secretary would prefer remain confidential. Id.

[7] Indeed, if Congress wanted the Secretary to supervise the internal oversight of the TARP program, then Congress did not need to create SIGTARP. The Treasury Inspector General, which had plenary audit and investigative authority with respect to Treasury's programs, already existed, and Congress could have simply increased funding for that Office.

[8] Likewise, they do not include section 5 of the IG Act. Nonetheless, as a matter of policy, SIGTARP has decided to adopt the reporting topics of section 5(a), and include them in appendices to our quarterly reports for the second and fourth quarters.

[9] The maxim of statutory construction, *inclusio unius est exclusio alterius*, holds that if a statute or rule expressly includes, recites or enumerates matters, then matters that are not so included, recited or enumerated are excluded. See, e.g., Campo v. Allstate Ins. Co., 2009 U.S. App. LEXIS 5460 (5th Cir. Mar. 17, 2009).

supervision, simply do not constitute "duties and responsibilities" of SIGTARP. More importantly, in the context of the IG Act, "duties and responsibilities" of Inspectors General are expressly established at section 4(a), not 3(a) or 8D. Section 4 of the IG Act is entitled, "Duties and responsibilities; report of criminal violations to Attorney General," and section 4(a) begins, "it shall be the duty and responsibility of each Inspector General . . . ." Additionally, the legislative history underlying the IG Act, fully supports the proposition that "duties and responsibilities" of Inspectors General are located at section 4(a), not 3(a) or 8D. See H.R. Rep. No 95-584 pp. 11-13; and Sen. Report No. 95-1071 p. 27 ("Section 4 sets forth the duties and responsibilities of the Inspector and Auditor General"). A more expansive construction of EESA to include incorporation of sections 3(a) and 8D is simply not warranted in light of the express language and the obvious legislative intent described above.

Attorney-Client Privilege Is Not A Bar To SIGTARP's Access To Treasury Information

With respect to your concern about attorney-client privilege, the existence of an applicable privilege does not relieve Treasury from its responsibility under EESA, as amended, and the IG Act to cooperate with SIGTARP and produce records and information deemed necessary to the accomplishment of SIGTARP's mission. Section 121(c)(4)(A) of EESA, as amended, authorizes SIGTARP "to conduct, supervise, and coordinate an audit or investigation of any action taken under [EESA] as the Special Inspector General determines appropriate." Further, pursuant to sections 6(a)(1) and 6(a)(3) of the IG Act, which are expressly incorporated into EESA by section 121(c)(3), SIGTARP is guaranteed "access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to" Treasury and is authorized "to request such information or assistance as may be necessary" to satisfy our responsibilities. Moreover, in the latter regard, Treasury – "insofar as is practicable and not in contravention of any existing law" – is required to cooperate with SIGTARP, see 12 U.S.C. § 5231(e)(4)(A), and, in the event that it fails to do so, SIGTARP is required immediately to report to Congress, see 12 U.S.C. § 5231(e)(4)(B). Neither EESA nor the IG Act include an exception for privileged materials. Thus, it seems fairly certain that SIGTARP statutorily has unfettered access to Treasury's privileged as well as non-privileged documents and information.

Additionally, it may be reasonably argued that SIGTARP's compelled access via EESA and the IG Act renders Treasury's compliance with SIGTARP's access demands "involuntary." As you know, waivers of the attorney-client privilege are not effective if they are "involuntary." See Equity Analytics, LLC v. Lundin, 248 F.R.D. 331, 334 (D.D.C. 2008); In re Parmalat Securities Litigation, 2006 LEXIS 88629 (S.D.N.Y. 2006); Duttle v. Bander & Kass, 127 F.R.D. 46, 56 n. 5 (S.D.N.Y. 1989) (citing S.E.C. v. Forma, 117 F.R.D. 516, 523 (S.D.N.Y. 1987) Teachers Ins. And Annuity Assoc. of Am. v. Shamrock Broadcasting Co., 521 F.Supp. 638, 641-42 (S.D.N.Y. 1981).

Thank you for consulting with us concerning your intention to seek OLC guidance. Please contact me or my Chief Counsel, Bryan Saddler, if you have any questions regarding this memorandum.